

Commercial Law Newsletter

Messages from the Chairs



[Committee on Commercial Finance](#)

Lynn Soukup, Chair, Pillsbury Winthrop Shaw Pittman LLP

What's Goin' On?

Last year at about this time we were planning the ComFin Fall meeting and decided that a "what to do in a credit crunch" program would make us look like Chicken Little. Flash-forward to 2008, where many of the programs at the August Annual

Meeting and the upcoming ComFin Fall Meeting could well be described as "When Wall Street Bites Main Street."

The plans for the ComFin Fall meeting on November 12 in San Francisco are complete and registration is underway...with hotel deadline of October 24 and pre-registration deadline of October 31 coming soon.

[More...](#)



[Committee on Uniform Commercial Code](#)

Stephen L. Sepinuck, Chair, Gonzaga University School of Law

The UCC Committee is continually striving to provide its members on a timely basis with important information about developments in commercial law and commercial practice. Anyone with a suggestion for a project the Committee should undertake or with an idea about how the Committee can better fulfill its mission should contact me.

Legislative Update

Just when we thought it was safe to go back in the water...After more than a decade of revisions to almost every Article of the UCC, it seemed like the pace of legislative change was slowing. Alas, two new endeavors are under way.

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JOIN THE COMMERCIAL FINANCE
COMMITTEE ONLINE!
[FREE FOR ALL BUSINESS LAW MEMBERS](#)
JOIN THE UNIFORM COMMERCIAL CODE
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Featured Articles

[Proposed Guiding Principles for Considering UCC Amendments](#)

Submitted by Edith Warkentine, Vasco H. Morais, and Harry C. Sigman, on behalf of the Uniform Commercial Code Committee of the Business Law Section of the State Bar of California

Recently, the Uniform Commercial Code Committee of the Business Law Section of the State Bar of California (the "Cal UCC Committee") conducted an analysis of proposed amendments and non-uniform state variations to Article 9 of the Uniform Commercial Code ("UCC" or the "Code"). In the course of analyzing and considering these proposed amendments and non-uniform state variations to Article 9, the Cal UCC Committee believed it constructive to develop suitable and consistent criteria to be used when evaluating the appropriateness of any proposed amendments or non-uniform state variations to the UCC.

[More...](#)

[Redaction and the Impact on UCC Due Diligence](#)

Paul Hodnefield, Associate General Counsel, Corporation Service Company

In many ways, the availability of public record information on the Internet has made the due diligence process much easier for UCC searchers. Nearly all state-level filing offices now provide electronic access to UCC index data and images of filed records (collectively "UCC records"). This has been a tremendous improvement over the largely paper-based UCC system that existed prior to the 2001 adoption of Revised Article 9.

[More...](#)

[BAP Opinion in *Clear Channel* Likely to Chill Credit Bids](#)

Evan Jones and Emily Culler, O'Melveny & Myers LLP

Bankruptcy Code Section 363(f) allows debtors to maximize the value of their estates by selling their assets free and clear of all liens, claims and interests. The free and clear sale and the finality of bankruptcy court orders attract buyers that would otherwise hesitate to participate in bankruptcy auctions. A recent decision of the Bankruptcy Appellate Panel of the Ninth Circuit may significantly decrease buyers' willingness to rely on bankruptcy court orders.

[More...](#)

[Eurodollar Disaster Clause - LIBOR and Base Rate Loans](#)

Bridget K. Marsh, Assistant General Counsel, The Loan Syndications and Trading Association

Over the past two weeks, the LSTA has received a number of queries from members about a provision in a credit agreement which permits lenders to convert LIBOR loans to base rate loans. In response, the LSTA hosted an educational call on October 7th

to discuss this provision, which is referred to as the "Eurodollar Disaster" clause. Rick Gray, Partner of Milbank Tweed Hadley & McCloy, led the discussion with more than 730 members participating.

[More...](#)

[Delaware Update – 2008 Legislation Amending Certain Corporations and Alternative Entity Laws](#)

Norman M. Powell, Young Conaway Stargatt & Taylor, LLP

In its legislative session ended June 30, 2008, the Delaware General Assembly enacted amendments to the General Corporation Law of the State of Delaware, the Delaware Limited Liability Company Act, and the Delaware Revised Uniform Limited Partnership Act. The amendments to the DGCL took effect when signed by Governor Minner on June 26, 2008. The amendments to the DLLC Act and the DLP Act took effect on August 1, 2008.

[More...](#)

Committee on Commercial Finance: Subcommittee and Task Force Reports

- [Subcommittee on Aircraft Financing](#)
- [Subcommittee on Creditors' Rights](#)
- [Subcommittee on Cross-Border and Trade Financing](#)
- [Subcommittee on Intellectual Property Financing](#)
- [Subcommittee on Lender Liability](#)
- [Subcommittee on Loan Documentation](#)
- [Subcommittee on Loan Workouts](#)
- [Subcommittee on Real Estate Financing](#)
- [Subcommittee on Syndications and Lender Relations](#)
- [Model Intercreditor Agreement Task Force](#)
- [Task Force on Syndications Chapter for ABL Treatise](#)

Committee on Uniform Commercial Code: Subcommittee and Task Force Reports

- [Subcommittee on Article 2A – Leasing](#)
- [Subcommittee on General Scope and Provisions](#)
- [Subcommittee on Letters of Credit](#)
- [Subcommittee on Payments](#)

Joint Subcommittee and Task Force Reports

- [Subcommittees on Secured Lending \(ComFin\) and Secured Transactions \(UCC\)](#)
- [Joint Task Force on Filing Office Operations and Search Logic](#)

Fall 2008 Commercial Law Newsletter – ComFin Chair’s Column

WHAT’S GOIN’ ON?

Last year at about this time we were planning the ComFin Fall meeting and decided that a “what to do in a credit crunch” program would make us look like Chicken Little. Flash-forward to 2008, where many of the programs at the August Annual Meeting and the ComFin Fall Meeting could well be described as “When Wall Street Bites Main Street.”

The plans for the ComFin Fall meeting on November 12 in San Francisco are complete and registration is underway..... with hotel deadline of October 24 and pre-registration deadline of October 31 coming soon.

COMFIN FALL MEETING NOV. 12 / MICA TASK FORCE MEETING NOV. 13 (SAN FRANCISCO)

The ComFin Fall Meeting will be held Wednesday, November 12, 2008, at the San Francisco Marriott from 11:00 a.m. to 4:00 p.m. local time. We’ll present three timely CLE programs:

- Enforcement of Security Interests in LLC and Partnership Interests and Intellectual Property
- Commitment Letters in Turbulent Credit Markets – Solutia, Clear Channel and Beyond
- Nightmare on Main Street – What Keeps Lenders Up at Night?

There will also be a networking lunch. Registration and hotel information and additional details about the programs can be found [here](#). Advance registration closes on October 31 (you will be able to register on-site the day of the meeting) and the hotel reservation deadline for a discounted rate is October 24.

The MICA Task Force will hold an all-day drafting session on the bankruptcy provisions of the draft Model Intercreditor Agreement on Thursday, November 13, in San Francisco in conjunction with the ComFin Fall Meeting. Details are available [here](#). There are no registration fees (and even a free lunch) and the drafting session provides lots of information you can use.

Please invite your colleagues and others who would be interested to join us in San Francisco.

OTHER EVENTS OF INTEREST

There are a number of upcoming events of interest to ComFin members, including:

| | |
|----------------|---|
| November 6-7 | Bob Zadek’s Commercial Loan Documents: What They Mean and How They Are Used Program (Chicago and Las Vegas) |
| November 17-18 | |

| | |
|-------------|---|
| November 13 | MICA Taskforce Meeting (San Francisco) |
| November 17 | ACFA Update on Fraudulent Conveyance Law Program (New York) |

A detailed calendar with additional information is available under “Mark Your Calendars” in this newsletter.

2008 SPRING AND ANNUAL MEETING MATERIALS POSTED TO COMFIN WEBSITE

The “**Materials**” section of the ComFin Website (<http://www.abanet.org/dch/committee.cfm?com=CL190000>) provides links to access the materials from ComFin programs and subcommittee and taskforce meetings held at the 2008 Spring and Annual Meetings. We’ll also post the Fall meeting materials following that meeting.

A podcast of the Creditors’ Rights Subcommittee meeting from the Annual Meeting is available [here](#) and can be downloaded at <http://tinyurl.com/53laek>.

UCC ARTICLE 9 REVISIONS

The Joint Review Committee for UCC Article 9 met on October 3-5, 2008 to discuss possible revisions to current Article 9. A summary of issues being considered is available [here](#) and we have reports from the initial meeting posted [on the ComFin website](#).

CURRENT PROJECTS

ComFin has a number of active projects and we welcome your involvement (from active participant to interested reader) – click on the project name for more information and to join the task force:

- [Survey of Commercial Laws Task Force](#). Preparing state-specific summaries of laws applicable to commercial finance transactions.
- [Commercial Finance Terms Task Force](#). Compiling a dictionary of terms used in commercial finance transactions.
- [Deposit Account Control Agreements Task Force](#). Preparing model deposit account control agreements and practical commentary on their development and legal issues.
- [Filing Office Operations and Search Logic Task Force](#). Monitoring UCC filing and searching issues and meeting with state administrators and UCC Article 9 revision committee on possible improvements.
- [Model Intercreditor Agreement Task Force](#). Preparing a model intercreditor agreement and commentary.

- [Syndications Chapter for ABL Treatise Task Force](#). Preparing a chapter on syndicated lending for the Ruda ABL treatise.
- [ADR in Commercial Finance Transactions](#). Preparing model arbitration rules for use in commercial finance disputes.

2009 MEETINGS

Planning is already underway for the Business Law Section Spring Meeting (April 16-18, 2009 in Vancouver) and 2009 Global Law Forum (June 10-12, 2009 in Hong Kong). Get those passport renewals taken care of!

COMFIN COMMITTEE NEWS

The current description of all of the ComFin subcommittees and task forces is available [here](#) and the current leadership directory is available [here](#) – please join the groups that interest you and let us know if you have suggestions for programs, projects or publications.

I'd like to thank all the chairs and vice chairs of ComFin's subcommittees and task forces and the ComFin vice chairs and planning subcommittee, who volunteer their time and expertise to ComFin. In particular I'd like to thank Randall Wright (Agricultural and Agri-business Financing), Carolyn Richter and Rhonda Nelson (Creditor's Rights), Roberta Griffin Torian (Deposit Account Control Agreements), Jeremy Friedberg and Stu Ames (Loan Documentation), Charles Donovan (Maritime Financing), Tony Callobre and Michele White Suarez (Syndications and Lender Relations), Sherman Helenese (Meetings), Mike Maglio (Website and Technology) and Ross Romero (Business Law Section Ambassador), whose terms ended this summer, for all their contributions.

SO IT GOES

I'm sure there will be much more of interest to report on and discuss in future email updates, newsletters and meetings – stay tuned!

Lynn

ComFin Committee Chair

lynn.soukup@pillsburylaw.com

CHAIR'S COLUMN

October 2008



The UCC Committee is continually striving to provide its members on a timely basis with important information about developments in commercial law and commercial practice. Anyone with a suggestion for a project the Committee should undertake or with an idea about how the Committee can better fulfill its mission should contact me.

Legislative Update

Just when we thought it was safe to go back in the water. . . . After more than a decade of revisions to almost every Article of the UCC, it seemed like the pace of legislative change was slowing. Alas, two new endeavors are under way.

Secured Transactions

The Uniform Law Commission (formerly known as NCCUSL) and the ALI have established the Joint Review Committee for Article 9 of the Uniform Commercial Code (the “Committee”). The Committee is charged with dealing with the approximately 40 issues identified in the June 2008 report of the Article 9 Review Committee (the “Study Committee”). A copy of the Study Committee’s report is available on the UCC Committee’s [web page](#).

The Committee held its first meeting on October 3-5, 2008 in Chicago. It reached tentative decisions on a number of issues, including how to respond to the highly criticized decisions in *Highland Capital Management v. Schneider*, 866 N.E.2d 1020 (N.Y. 2007), and *In re Commercial Money Center*, 350 B.R. 465 (9th Cir. BAP 2006). A detailed report on the Committee’s deliberations and tentative decisions is available on the UCC Committee’s [web page](#).

Payments

The Uniform Law Commission has established a Study Committee on Regulation of Financial Institutions and Payment Systems. The Study Committee’s charge is to

1. Monitor developments at the federal level, particularly of the Federal Reserve Board, Treasury Department, and relevant committees;
2. Communicate to those and other interested entities the ULC’s expertise related to payment systems and the regulation of financial institutions;
3. Present the advantages of maintaining a balance of federal and state regulation in these areas; and
4. Make any recommendations it deems appropriate to the Scope and Program Committee concerning the advisability of establishing a ULC or joint ULC/ALI drafting project in these areas.

The fourth of these instructions is the principal one. In short, the Study Committee is to consider whether to establish a drafting project to unify the law governing different payment mechanisms. The Study Committee is chaired by Professor Fred H. Miller and its reporter is Professor Linda J. Rusch. Its members are Boris Auerbach, John P. Burton, William H. Henning, Gene N. Lebrun, Richard A. Lord, Clinton R. Losego, Neal Ossen, Anita Ramasastry, Carlyle C. Ring, Jr., Sandra S. Stern, and Robert J. Tennessen. The official Observers include Stephanie A. Heller, on behalf of the Federal Reserve Bank of New York, and Amelia H. Boss, on behalf of the ALI.

In connection with this development, the UCC Committee and the Banking Law Committee have established a new Joint Task Force on the Unification of Payments Law to investigate and report on whether there are sufficient operational problems (*e.g.*, uncertainty, cost) with the current state of the law, to support an effort to revise payments law to treat different payments mechanisms under the same or similar legal rules. The Joint Task Force's report is due February 1, 2010. The UCC Committee's co-chair of the Task Force has yet to be appointed. Karen Nash-Goetz will serve as the Banking Law Committee's co-chair of the Task Force.

Noteworthy Events at the Upcoming Spring Meeting

The Spring Meeting of the Business Law Section will be held April 16-18, 2009 in Vancouver, BC. General information about the meeting can be obtained on the Section's [web page](#).

The UCC Committee has some wonderful events planned. The ever popular *Stump the Chumps* will be making a comeback on Friday, April 17, 2009 at 1:30–2:30. It will be preceded by a presentation of the UCC Committee's Award for Exceptional Service. In addition, the UCC Committee will be presenting three CLE programs. The tentative titles and dates are:

Non-uniformity: Is It the Spice of Life or a Recipe for Disaster?,
Thursday, April 16, 2009, 2:30pm–4:30pm;

How Well Do You Know Your Neighbor? What's New and What's Different about Canadian Secured Transactions, Friday, April 17, 2009, 2:30pm–4:30pm;

What Every Commercial Lawyer Needs to Know About the Restatement (Third) of Restitution and Unjust Enrichment, Saturday, April 18, 2009,
1:00pm–3:00pm

A more complete – but tentative – schedule of the activities of the UCC Committee and the Commercial Finance Committee appears at the end of this column.

Leaders Needed

The UCC Committee has four vacant leadership positions. Each position has a three-year term and is described below. If you are interested or wish to recommend someone who might be interested, please contact me.

- ◆ **Co-chair or Vice-chair of the Subcommittee on General Provisions & Relations to Other Law.** The leadership of this subcommittee: (i) plans and arranges for substantive discussion, presentations by guest speakers, and distribution of materials at subcommittee meetings; (ii) suggests topics and provides organizers for Committee programs and forums at the annual and spring meetings; and (iii) either writes or finds someone to write substantive articles for the Commercial Law Newsletter. The terms of the current chair of this subcommittee, Professor Kristen Adams, expires in August, 2009. So, any new co-chair or vice-chair should be prepared to assume primary responsibility for the subcommittee at that time.
- ◆ **Vice-chair of the Subcommittee on International Commercial Law.** The leadership of this subcommittee: (i) plans and arranges for substantive discussion, presentations by guest speakers, and distribution of materials at subcommittee meetings; (ii) suggests topics and provides organizers for Committee programs and forums at the annual and spring meetings; and (iii) either writes or finds someone to write substantive articles for the Commercial Law Newsletter.
- ◆ **Liaison to the Diversity Committee.** This person serves as a conduit for communication between the UCC Committee and the Diversity Committee and submits a written report on his or her activities to the Committee chair twice each year (shortly before the Committee's report to the Section Council is due). The liaison is also expected to contact each person planning a CLE program or forum on behalf of the Committee to assist in finding presenters who will help bring a diverse perspective.
- ◆ **Regional Coordinator for the Northeast Region.** This person serves as a liaison between the UCC Committee of the ABA Business Law Section and state bar associations within the region (consisting of Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont). This is done primarily through each state bar association's UCC Committee, if it has one. The Regional Coordinator's tasks are to: (i) ensure that the members of the bar within their respective regions are aware of the programming, resources, and publications provided by the UCC Committee and have input into the policies and projects of the UCC Committee; (ii) assist state and local bars reprise UCC Committee programming at the local level; and (iii) identify for those organizing CLE programs for the UCC Committee attorneys from the area where the programs will be offered who would be effective presenters.

Stephen L. Sepinuck
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ssepinuck@lawschool.gonzaga.edu

BUSINESS LAW SECTION SPRING MEETING
APRIL 16-18, 2009
Vancouver, BC
(tentative schedule)

| Thursday, April 16 | | | |
|--------------------|---|--|--|
| Time | Com Fin | | UCC |
| 9:00-9:30am | | | |
| 9:30-10:00am | Joint Subcom. Mtg.: Int'l Com. Law (UCC) & Cross-Border Secured Trans. (ComFin) | | Joint Subcommittee Meeting: Leasing (UCC) and Lease Financings (DBF) |
| 10:00-10:30am | | | |
| 10:30-11:00am | Program: Syndicated Loan Markets in the U.S. and Canada | | Subcommittee Meeting: Sales |
| 11:00-11:30am | | | |
| 11:30-12:00pm | | | |
| 12:00-12:30pm | | | |
| 12:30-1:00pm | | | |
| 1:00-1:30pm | Subcommittee Meeting: Creditors' Rights | Subcommittee Meeting: Loan Documentation | Subcommittee Meeting: Letters of Credit |
| 1:30-2:00pm | | | Subcommittee Meeting: General Provisions |
| 2:00-2:30pm | | | |
| 2:30-3:00pm | Subcommittee Meeting: aircraft Financing (starts at 2:00) | | Program: <i>Non-uniformity: Is It the Spice of Life or a Recipe for Disaster?</i> |
| 3:00-3:30pm | | | |
| 3:30-4:00pm | | | |
| 4:00-4:30pm | | | |
| 4:30-5:00pm | | | |
| 5:00-5:30pm | Subcommittee Meeting: Lender Liability | | |
| 5:30-6:00pm | | | |
| 6:00-6:30pm | | | |
| 6:30-7:00pm | | | |
| 7:00-7:30pm | UCC/Com Fin Joint Dinner | | |
| 7:30-8:00pm | | | |
| 8:00-8:30pm | | | |

Friday, April 17

| Time | Com Fin | | UCC |
|---------------|---|---|--|
| 8:00-8:30am | | Subcommittee Meeting: Agricultural and Agri-Business Financing | Subcommittee Meeting: Investment Securities |
| 8:30-9:00am | | | |
| 9:00-9:30am | Subcommittee Meeting: Aircraft Financing | Program: Cross Border Insolvency | |
| 9:30-10:00am | | | |
| 10:00-10:30am | | | |
| 10:30-11:00am | | | |
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| 12:30-1:00pm | | | |
| 1:00-1:30pm | | | |
| 1:30-2:00pm | | | |
| 2:00-2:30pm | | | Committee Meeting: <i>Stump the Chumps & Presentation of UCC Award of Exceptional Service</i> |
| 2:30-3:00pm | | | |
| 3:00-3:30pm | Subcommittee Meeting: Real Estate Financing | | Committee Forum: <i>How Well Do You Know Your Neighbor? What's New and What's Different about Canadian Secured Transactions</i> |
| 3:30-4:00pm | | | |
| 4:00-4:30pm | | | |
| 4:30-5:00pm | Subcommittee Meeting: IP Financing | Task Force Meeting: Syndications Chapter | Leadership Meeting |
| 5:00-5:30pm | | | |
| 5:30-6:00pm | | | |
| 6:00-6:30pm | | | |
| 6:30-7:00pm | | | |
| 7:00-7:30pm | | | |
| 7:30-8:00pm | | | |
| 8:00-8:30pm | | | |
| 8:30-9:00pm | | | |

Section Dinner

Saturday, April 18

| Time | Com Fin | UCC | |
|---------------|--|-----|---|
| 8:30-9:00am | Joint Subcommittee Meeting: Secured Lending (Com Fin) & Secured Transactions (UCC) | | |
| 9:00-9:30am | | | |
| 9:30-10:00am | | | |
| 10:00-10:30am | Joint Task Force Meeting on Commercial Finance Terms | | |
| 10:30-11:00am | Program: <i>Commercial Law Developments</i> (UCC co-sponsoring) | | |
| 11:00-11:30am | | | |
| 11:30-12:00pm | | | |
| 12:00-12:30pm | | | |
| 12:30-1:00pm | | | Program <i>What Every Commercial Lawyer Needs to Know About the Restatement (Third) of Restitution and Unjust Enrichment</i> |
| 1:00-1:30pm | | | |
| 1:30-2:00pm | | | |
| 2:00-2:30pm | | | |
| 2:30-3:00pm | | | |
| 3:00-3:30pm | Joint Task Force Meeting on Filing Office Operations & Search Logic | | |
| 3:30-4:00pm | | | |
| 4:00-4:30pm | | | |
| 4:30-5:00pm | Leadership Meeting | | |
| 5:00-5:30pm | | | |

Mark Your Calendars

- **November 6-7, 2008 – Commercial Loan Documents: What They Mean and How They Are Used – Chicago, IL**
Former ComFin Committee Chair Bob Zadek will present a hands-on, in-depth commercial loan documentation conference, updated to reflect current and anticipated legal developments. The program will be held at the Doubletree Hotel in Chicago. Registration and other information is available [here](#).
- **November 12, 2008 – ComFin Fall Meeting – San Francisco, CA**
The ComFin Fall Meeting will be held November 12, 2008 at the San Francisco Marriott from 11:00 a.m. to 4:00 p.m. local time, in conjunction with the CFA Annual Convention. As in prior years, ComFin will present three timely CLE programs:
 - (1) Enforcement of Security Interests in LLC and Partnership Interests and Intellectual Property
 - (2) Commitment Letters in Turbulent Credit Markets – Solutia, Clear Channel and Beyond
 - (3) Nightmare on Main Street – What Keeps Lenders Up at Night?

Registration information and additional details about the program can be found [here](#). Advance registration closes on October 31 (you will be able to register on-site the day of the meeting) and the hotel reservation deadline to obtain a discounted rate is October 20, 2008.

- **November 13, 2008 – Model Intercreditor Agreement Task Force Meeting – San Francisco, CA**
The [MICA Task Force](#) will hold an all-day drafting session on the bankruptcy provisions of the Model Intercreditor Agreement on Thursday November 13 in San Francisco in connection with the ABA/CFA meetings. Bingham McCutchen LLP has graciously agreed to host the meeting at their San Francisco office (Board Room, 28th Floor, Three Embarcadero Center). Lunch will be provided. The meeting will begin at 8:30 a.m. local time and will end at 4:00 p.m. Please email Gary D. Chamblee, the Task Force Chair (gchamblee@wcsr.com), to participate.
- **November 12-14, 2008 – CFA Convention – San Francisco, CA**
The Commercial Finance Association 64th Annual Convention will be held November 12-14, 2008 in San Francisco. Additional information is available [here](#).

- **November 17, 2008 – Update on Fraudulent Conveyance Law Program – New York, NY**
The Association of Commercial Finance Attorneys will present a program “*Update on Fraudulent Conveyance Law*” on Monday, November 17, at the 101 Club, 101 Park Avenue, New York, NY. A networking cocktail party begins at 4:45 p.m. local time, followed by the CLE presentation from 5:45 to 7:00 p.m. Non-ACFA members’ cost for NY CLE credit for the program is \$50.00. More information is available [here](#).
- **November 17-18, 2008 – Commercial Loan Documents: What They Mean and How They are Used – Las Vegas, NV**
Former ComFin Committee Chair Bob Zadek will present a hands-on, in-depth commercial loan documentation conference, updated to reflect current and anticipated legal developments. The program will be held at the Paris Hotel in Las Vegas. Registration and other information is available [here](#).
- **November 21-22, 2008 – Business Law Section Fall Meeting – Washington, D.C.**
Registration and other information is available [here](#).

Commercial Finance Committee Joins Synergy Group

The Commercial Finance Committee, acting on behalf of the Section of Business Law, has joined the “Synergy Group,” a collection of various professional groups in the finance and real estate disciplines. Other members include the ABA Real Property, Trust and Estate Law Section; the American College of Commercial Finance Lawyers; the American College of Mortgage Attorneys; the American College of Real Estate Lawyers; the Commercial Real Estate Women Network and the International Council of Shopping Centers Law Conference. The group’s objectives include sharing observations and insights about real estate and real estate professionals, minimizing conflicts among respective meeting dates and discussing (and often collaborating) on public and professional projects that are of concern and interest to the group’s members. We will report on Synergy Group activities in future newsletters.

PROPOSED GUIDING PRINCIPLES FOR CONSIDERING UCC AMENDMENTS

*Submitted by
Edith Warkentine,
Vasco H. Morais, and
Harry C. Sigman,
on behalf of the
Uniform Commercial Code Committee of the
Business Law Section of the State Bar of California¹*

Recently, the Uniform Commercial Code Committee of the Business Law Section of the State Bar of California (the “Cal UCC Committee”) conducted an analysis of proposed amendments and non-uniform state variations to Article 9 of the Uniform Commercial Code (“UCC” or the “Code”).² In the course of analyzing and considering these proposed amendments and non-uniform state variations to Article 9, the Cal UCC Committee believed it constructive to develop suitable and consistent criteria to be used when evaluating the appropriateness of any proposed amendments or non-uniform state variations to the UCC.³

As a result of this effort, the Cal UCC Committee has developed the following Guiding Principles which it believes may prove helpful as a guideline for the review and analysis of any past or future proposed amendments or non-uniform state variations to the UCC.⁴ The Cal UCC Committee proposes that the Guiding Principles outlined below be utilized in conjunction with the well-established public participatory process carried out by the co-sponsors of the UCC: the National Conference of Commissioners on Uniform State Laws and the American Law Institute—supported by the American Bar Association, the various state bar UCC committees around the country, and other interested organizations. Only through a full vetting by the UCC sponsor organizations, is the process of review of a perceived problem and/or proposed amendment to the UCC most likely to reach carefully crafted and well-articulated solutions to actual real-world (as opposed to merely academic) problems with the existing UCC. Such vetted solutions are correspondingly more likely to be consistent with UCC policies, and are more likely to enjoy widespread support, which will, in turn, best ensure the likelihood of a uniform and simultaneous nationwide adoption.

A. Guiding Principles and Criteria Generally Applicable to Analysis of Proposed Amendments to the UCC

¹ This article was prepared by the Cal UCC Committee in the spring of 2008, at a time when several states were considering enactment of non-uniform amendments to Article 9. The co-sponsors of the UCC have now established a Drafting Committee to consider amendments to Article 9, making even stronger the case made herein for deferring consideration by individual states of non-uniform amendments.

² Unless the context indicates otherwise, all references to “Article 9” are to the Official Text of Article 9 of the Uniform Commercial Code promulgated by The American Law Institute (“ALI”) and The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 1999.

³ See the Cal UCC Committee website at: http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=11387.

⁴ Please note that the positions set forth in this article are those of the Cal UCC Committee only. The positions stated herein have not been adopted by the California State Bar Business Law Section or its overall membership, or by the California State Bar’s Board of Governors or its overall membership and are not to be construed as the position of the State Bar of California. Membership on the Cal UCC Committee and in the California State Bar Business Law Section is voluntary and funding for their activities, including all legislative activities, is obtained entirely from voluntary sources. Reprinted with permission of the State Bar of California.

The analysis of any proposed amendments to the UCC should be guided by the overarching principles (the "Guiding Principles") of:

- (A) preserving the uniformity of the UCC, and
- (B) maintaining the coherence of the UCC and consistency with the underlying purposes and policies of the UCC.

Consequently, proposed amendments to the UCC should be analyzed based on the following specific criteria to determine whether the proposed amendments are (1) necessary, (2) appropriate, (3) comprehensive, and (4) uniform.

1. Necessary

The first of these criteria, *necessity*, requires that there be a defect in the current text of the UCC that causes a problem in practice that can be solved by a change in the text. For example, where text has been subject to conflicting interpretations that have generated significant legal disputes or legitimate uncertainty causing significant cost or distortion of transactions, or have led to a result that is contrary to the underlying policies or purposes of the UCC, a change may be necessary. Well-meaning attempts to "improve" on or "tinker" with the language of the UCC ("we can say it better"), where no serious need for a change has been demonstrated, or where there is no clear evidence that a real, rather than an imagined, problem exists under the current UCC text, should be resisted; attempts to make such changes raise the risk of unintended consequences and needlessly imperil uniformity due to the possibility that they will not be universally adopted. Even when it is arguable that the UCC might be improved by a particular amendment, an amendment is generally not advisable if the UCC, in its current form, will achieve the correct result. Changes should not be made to address problems that are the result not of a defect in the current text but of a mistake on the part of a person that failed to comply with the current text, unless the evidence suggests that a significant number of similar mistakes are being made, or are likely to be made, that can be attributed to ambiguous or confusing text.

2. Appropriate

The second criterion, *appropriateness*, requires that the proposed UCC amendment be directly targeted at correcting the problematic provisions in the UCC text. This requires precise identification of the problem and extensive and careful analysis of all of the options available to address the defect in the UCC text, and selection of the best solution among these options. The proposed amendment should be complete and not incremental, and the costs, benefits, and burdens of the proposed amendment to all parties affected should be identified and taken into account. Furthermore, the language of the proposed amendment should be carefully tailored to address the identified defect and avoid unintended collateral effects. Finally, the proposed amendment should be in harmony with and fully integrated within the current UCC text.

3. Comprehensive

The third criterion is *comprehensiveness*. As it is not feasible to engage in frequent legislative efforts on a nationwide level and frequent change may well result in instability, proposed amendments to the UCC should, absent emergency, be gathered into a single comprehensive legislative package rather than being introduced individually or in small bundles to each of the individual state legislative bodies. Thus,

it must always be considered whether a particular UCC amendment, even if meritorious, can be combined with other proposed amendments in a comprehensive legislative package to be presented simultaneously to all states. A comprehensive approach to UCC amendments makes it more likely that such amendments will be fully integrated with each other and with the remainder of the UCC text and will be consistent with the purposes and policies underlying the UCC. ***Only in exceptional cases, when evidence of serious and imminent actual or potential harm creates an urgent need for immediate action, should the need for a particular amendment outweigh the importance of acting with due deliberation to propose a comprehensive package of amendments.***

4. Uniform

A comprehensive package of proposed UCC amendments is more likely to draw the attention, study and input of a far wider constituency, enhancing both the likelihood of quality and the greater likelihood of acceptance, i.e., simultaneous and uniform enactment, producing satisfaction of the fourth criterion, *uniformity*. A lack of uniformity among the versions of the UCC adopted by the various states leads to increased transaction costs, the potential for costly errors and unintended consequences, defeating the purpose of a uniform body of law. Although uniformity can never be guaranteed, a proposed UCC amendment not aimed at solving a unique local problem should not be enacted by a state unless there is evidence that it enjoys sufficient widespread support to make likely nationwide enactment. An endeavor to seek approval of a particular amendment on an ad-hoc state-by-state basis, without a substantial organizational effort on a national level, would be ill-advised and would likely jeopardize the essential uniformity of the UCC.

B. Summary

The best possible text of proposed amendments to the UCC, meeting the foregoing criteria of *necessity, appropriateness, comprehensiveness, and uniformity*, will have the best chance of nationwide uniform enactment. Satisfaction of these four criteria is most likely to be achieved through a vetting of the proposed amendments by the UCC co-sponsors, with input from the ABA, state and local bar groups and any other interested groups and persons. Consequently, the Cal UCC Committee strongly believes that any amendments to the UCC should in almost all cases be fully analyzed first by the Code's co-sponsors, and that ***individual state non-uniform amendments or variations to the UCC are generally undesirable as being inconsistent with one of the principal objectives of the UCC, i.e., uniformity.***

The Cal UCC Committee notes that the UCC co-sponsors, ALI and NCCUSL, have recently created a Review Committee to consider and make a recommendation concerning whether there are problems under existing Article 9 that can and should now be dealt with by legislative amendment and, if so, to identify them. The Cal UCC Committee understands that a summary of the initial findings of the Review Committee will be made available shortly, and, if deemed appropriate, a Drafting Committee will be established.

The Cal UCC Committee intends to employ the Guiding Principles in its consideration of any proposed amendments or variations to the UCC. The Cal UCC Committee would welcome comments on the foregoing Guiding Principles. Please direct any such comments to the Co-Chairs of the Cal UCC Committee subcommittee on Article 9 Amendments, Vasco H. Morais at vmorais@atel.com and Edith Warkentine at ewarkentine@wsulaw.edu.

REDACTION AND THE IMPACT ON UCC DUE DILIGENCE

By Paul Hodnefield, Associate General Counsel, Corporation Service Company

In many ways, the availability of public record information on the Internet has made the due diligence process much easier for UCC searchers. Nearly all state-level filing offices now provide electronic access to UCC index data and images of filed records (collectively “UCC records”). This has been a tremendous improvement over the largely paper-based UCC system that existed prior to the 2001 adoption of Revised Article 9.

However, easily accessible information about debtors contained in online UCC records has raised concerns about privacy and identity theft. Privacy advocates, the media and concerned citizens have put pressure on filing offices to prevent disclosure of sensitive information contained in their records. In response, many filing offices have found it necessary to implement redaction programs that remove sensitive information from UCC records.

Redaction programs threaten, at least for a period of time, to undo some of the benefits resulting from online access to UCC records. Redaction programs divert filing office personnel resources and impose additional costs. The result is often a slower turnaround for the entire UCC search and filing process.

This article provides background on why redaction has become an issue for filing offices, how redaction works and its impact on due diligence. It also offers suggestions to help UCC filers and searchers navigate redaction issues and avoid contributing to the underlying problems.

UCC Records and Personally Identifiable Information

UCC records generally have simple content requirements. A financing statement is sufficient under UCC Section 9-502(a) if it provides just the name of the debtor, name of the secured party and an indication of the collateral. The party addresses and, if the debtor is an entity, organizational information may also be required to avoid rejection by the filing office under Section 9-516(b).

Trouble arises when UCC filers submit records that go beyond the statutory content requirements and provide personally identifiable information for an individual debtor. According to a report by the National Association of Secretaries of State, “personally identifiable information” is “any information relating to an identifiable individual who is the subject of the information. The concern is that personally identifiable information could be used by criminals to access a person’s financial resources. One piece of personally identifiable information in particular has drawn the attention of UCC filing offices. That is an individual debtor’s Social Security Number (“SSN”).

Prior to 2001, several states required UCC records to include the SSN of an individual debtor. When the safe harbor forms in Section 9-521 were developed for Revised Article

9, the designers accommodated those states by including a field specifically for the debtors SSN or federal tax identification number. However, by the time Revised Article 9 took effect all but two states dropped the SSN requirement. Only North Dakota and South Dakota continue to require SSNs by statute.

The safe harbor UCC forms retained the SSN field. UCC filers often provide an SSN in that field, but may place it in other areas of the form or electronic record as well. Collateral statements, attachments and even debtor name fields may contain embedded SSNs. In general, filing officers have no authority to reject a record simply because it contains an SSN. The result is that records with SSNs can be found throughout the UCC index in every state.

It is the SSNs embedded in UCC records that create serious legal and public relations problems for filing offices. The constant media reports of identity theft horror stories have the public understandably concerned. These concerns directly impact the filing offices.

There are plenty of examples where filing offices have been the subject of unwanted publicity surrounding the public disclosure of SSNs. In 2006, the Ohio Secretary of State was sued by an individual who found his SSN in an online UCC image. On July 21, 2007 The Dallas Morning News reported that Hall of Fame quarterback Troy Aikman's SSN was available from UCC records on the Texas Secretary of State's web site. One privacy advocate made an attempt to force filing offices to remove online access to records that could disclose SSNs by posting public records with the SSNs of well-known people on her web site, including that of former U.S. Secretary of State Colin Powell.

The Redaction Solution

The elected officials that oversee UCC filing offices are justifiably worried about the public's perception of how they protect personally identifiable information. In their effort to protect debtors and avoid the potential for litigation and bad publicity, many filing offices have initiated redaction programs.

According to the International Association of Commercial Administrators ("IACA"), an organization whose membership includes the state-level UCC filing officers, "redaction" means "the act of striking out or otherwise removing from the public record or public view any sensitive, private or confidential information not required by law and which is exempt by law from disclosure in a manner that does not distort the meaning of the record."

There are multiple methods of redacting SSNs from UCC records. At a basic level, filing office staff can simply use a magic marker to block out the SSN on written forms. However, most states already have millions of UCC images on file that might contain SSNs. The filing offices generally lack the resources necessary to manually review and redact each image. To deal with the large number of existing records, filing offices have invested in computer redaction software.

Computerized redaction systems vary in capabilities. A basic system may insert a black box over a designated area on each image. More sophisticated systems scan the entire image in more detail and block out number patterns that appear to be SSNs. The software can usually be set to different levels of sensitivity, depending on the filing office preferences.

Redaction systems have some limitations. Filers can effectively cloak an SSN from recognition by redaction software. UCC records contain SSNs embedded in reference numbers, inserted in debtor name fields or within the collateral. An SSN can appear just about anywhere on the form. Attached exhibits sometimes contain SSNs that can easily slip through the system.

Even the best redaction programs will miss some SSNs. The Colorado Secretary of State's office, for example, conducted a major redaction program in 2007. When that project was completed, some SSNs remained visible in the records. The filing office ran the redaction process for a second time. Even two passes didn't entirely solve the problem. In September 2008, a privacy advocate was still able to find an SSN in the records. In response, the filing office began a third round of redaction.

Another limitation of redaction software is that it can remove necessary information. Although rare, there are examples in some states where redaction programs have blocked out serial numbers in the collateral field, reference numbers and even parts of debtor names. Because of the redaction software limitations, the best programs involve a computer scan to identify potential SSNs, followed by human review.

Impact on UCC Due Diligence

Perhaps the most noticeable effect of filing office redaction initiatives is that the UCC search process takes more time. To prevent disclosure of SSNs during redaction projects, filing offices often remove online UCC images from public view. Instead of instantly downloading images online, a UCC searcher must order copies from the filing office. The filing office can then manually review each image and redact personally identifiable information before releasing the copies.

Manual review slows the turnaround time for search orders. The Colorado Secretary of State, for example, recently blocked online access to UCC records while it carries out a redaction project. During this time, the filing office warned searchers to expect delays of up to five business days for delivery of UCC copy orders.

Redaction initiatives can also increase the cost of due diligence. A filing office may need to review and redact several million records. The cost of the software and personnel necessary to conduct an effective redaction program can be very expensive.

Even after completing a redaction project the filing office frequently must deal with ongoing costs. Filing office staff must continue to review and redact incoming UCC

records. Moreover, just in case courts later need access to the original records, filing offices must incur the cost to maintain a duplicate database of unredacted images. Eventually, the filing offices have to pass these costs on in the form of increased filing fees, expedite fees or copy costs.

Conclusion

Searchers do need to be prepared for longer turnaround times whenever a state engages in a redaction program. The good news is that the delays are only temporary. However, completing the redaction effort can take anywhere from weeks to months.

Lenders and legal professionals can help filing offices avoid the need for more drastic responses to concerns over privacy and identity theft. Filers should never provide any unnecessary personally identifiable information on a UCC record, especially the SSN. Remember, only North and South Dakota require an individual debtor's SSN. The rest of the state and county filing offices do not want any SSNs on submitted records.

BAP OPINION IN *CLEAR CHANNEL* LIKELY TO CHILL CREDIT BIDS

by

Evan Jones and Emily Culler*

Bankruptcy Code Section 363(f) allows debtors to maximize the value of their estates by selling their assets free and clear of all liens, claims and interests. The free and clear sale and the finality of bankruptcy court orders attract buyers that would otherwise hesitate to participate in bankruptcy auctions. A recent decision of the Bankruptcy Appellate Panel of the Ninth Circuit may significantly decrease buyers' willingness to rely on bankruptcy court orders.

Section 363(f) sets forth several grounds under which a "free and clear" order may be entered, including consent of the competing interest holder and that the sale is for "more than the value of the lien." Earlier opinions differed on whether this was to be read to require a sale above the value determined by the court for the collateral, or more than the entire debt that was asserted. *See, e.g., Richardson v. Pitt County (In re Stroud Wholesale, Inc.)*, 47 B.R. 999, 1002 (E.D.N.C. 1985), *aff'd mem.*, 983 F.2d 1057 (4th Cir. 1986) (free and clear sale not allowed unless the sale proceeds will fully compensate the all secured lienholders); *Scherer v. Fed. Nat'l Mortgage Ass'n (In re Terrace Chalet Apartments, Ltd.)*, 159 B.R. 821 (N.D. Ill. 1993) (same); *In re Perroncello*, 170 B.R. 189 (Bankr. D. Mass. 1994) (same); *In re Feinstein Family P'ship*, 247 B.R. 502 (Bankr. M.D. Fla. 2000) (same); *In re Canonigo*, 276 B.R. 257 (Bankr. N.D. Cal. 2002) (same); *Criimi Mae Servs. Ltd. P'ship v. WDH Howell, LLC (In re WDH Howell, LLC)*, 298 B.R. 527 (D.N.J. 2003) (same); *In re Healthco Int'l, Inc.*, 174 B.R. 174 (Bankr. D. Mass.

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1994) (same); *But see, e.g., In re Beker Indus. Corp.*, 63 B.R. 474, 476-77 (Bankr. S.D.N.Y. 1986) (allowing a sale free and clear of “out of the money” liens); *In re Terrace Gardens Park P’ship*, 96 B.R. 707 (Bankr. W.D. Tex. 1989) (same); *In re Oneida Lake Dev., Inc.*, 114 B.R. 352 (Bankr. N.D.N.Y. 1990) (same); *In re WPRV-TV, Inc.*, 143 B.R. 315, 320 (D.P.R. 1991) (same); *Milford Group, Inc. v. Concrete Step Units, Inc. (In re Milford Group, Inc.)*, 150 B.R. 904, 906 (Bankr. M.D. Pa. 1992) (same); *In re Collins*, 180 B.R. 447, 450-01 (Bankr. E.D. Va. 1995) (same). Writing for the three-panel BAP, Judge Markell held that the provision required a sale price above the amount of debt absent consent. *Clear Channel Outdoor, Inc. v. Nancy Knupfer*, 391 B.R. 25 (B.A.P. 9th Cir. 2008). More disturbing, the panel held that a buyer who relied in good faith on the sale order had very limited protection and could have a junior lien re-imposed on the property in the buyer’s hands.

In the *Clear Channel* case, the debtor owned and was in the process of developing several parcels of real estate when it filed for bankruptcy. DB Burbank, LLC held a first priority lien on substantially all of the assets of the debtor. Although DB did not seek relief from the stay, the court observed that because the case was a single asset real estate case, the bankruptcy court would have most likely granted DB relief from the stay to foreclose on the property. Instead, the Chapter 11 trustee negotiated with DB to arrange an auction of the assets with DB credit bidding and serving as the stalking horse bidder at the sale. There were no qualified overbids at the auction. The bankruptcy court approved the sale to DB free and clear of all liens and interests pursuant to Section 363(f) and found that DB was a good faith purchaser who could rely on the finality of the sale pursuant to Section 363(m).

Because the sale was based on a credit bid, no sale proceeds were available to compensate for the junior lien on the property held by Clear Channel Outdoor, Inc. Clear

Channel appealed the sale order and the BAP reversed the free and clear order and remanded to the bankruptcy court for reconsideration. The Chapter 11 trustee and DB argued that the appeal was moot. Addressing the threshold questions of mootness, the BAP held that although the sale was complete, the appeal was not moot because the court could fashion some relief by either reversing the entire sale or reversing the free and clear aspects of the sale and reinstating the liens. The BAP recognized that equitable mootness barred the reversal of the sale but held that neither constitutional, equitable, nor statutory mootness barred a reinstatement of the junior lien. While Bankruptcy Code Section 363(m) provides that a sale to a good faith purchaser may not be reversed on appeal and the bankruptcy court found that DB was a good faith purchaser, the BAP narrowly construed this provision to apply only to the overall sale but not to the specific terms of the sale. In other words, while Section 363(m) prohibits reversal of a sale to a good faith purchaser on appeal, it does not prevent reversal of the free and clear terms of that sale. This ruling is the most disturbing of the opinion, and severely narrows the scope of Section 363(m). Under the Court's interpretation, as long as the property remains with the buyer an appellate court can apparently alter representations, warranties and perhaps even pricing. This narrow ruling is in marked contrast to well developed case law on the parallel provision in Section 364(e) governing debtor in possession financing, which holds that Section 364(e) protects all portions of the financing "deal." *Clear Channel*, 391 B.R. at 36 (distinguishing the language of Section 364(e) from Section 363(m)); *see, also, Weinstein, Eisen & Weiss, LLP v. Gill (In re Cooper Commons, LLP)*, 424 F.3d 963, 968 (9th Cir. 2005), *citing In re Adams Apple, Inc.*, 829 F.2d 1484 (9th Cir. 1987) (holding that Section 364(e) "broadly protects any requirement or obligation that was part of a post-petition creditor's agreement to finance").

Finding that the appeal was not moot, the BAP then reversed the provisions of the sale order that allowed the transfer free of the junior interest. Bankruptcy Code Section 363(f) allows a transfer of property free and clear of liens, claims and interests if the sale meets one of five elements of that section. Examining each of these elements, the BAP held that (1) applicable non-bankruptcy law does not permit the sale of property free and clear of the junior lien; (2) the junior lienholder did not consent to the free and clear sale; (3) the sale price was not greater than the aggregate value of all liens; (4) the junior lien was not in bona fide dispute; and (5) the junior lienholder could not be compelled in any proceeding to accept money satisfaction of its interest. The BAP's initial finding that California real property law does not permit a sale free and clear of a junior lien is inconsistent with state foreclosure law. Citing *Nguyen v. Calhoun*, 105 Cal. App. 4th 428, 437 (Cal. App. 6th Dist. 2003) for the general proposition that real property is transferable subject to a deed of trust, the BAP ignored the well-established law holding that when a senior lienholder forecloses upon the secured property, the sale extinguishes junior liens unless the purchase price is high enough to pay off all liens. *See, e.g., Jones v. Sacramento Sav. & Loan Assoc.*, 248 Cal. App. 2d 522 (Cal. App. 3d Dist. 1967); *Fpci Re-Hab 01 v. E & G Invs.*, 207 Cal. App. 3d 1018, 1023 (Cal. App. 2d Dist. 1989); *S. Bay Bldg. v. Riviera Lend-Lease*, 72 Cal. App. 4th 1111, 1121 (Cal. App. 2d Dist. 1999).

The bulk of the opinion relates to Section 363(f)(3) where the BAP takes a literal approach to the statutory language. Section 363(f)(3) allows the free and clear sale if the interest is a lien and the sale price is greater than the aggregate value of all liens on the property. Instead of interpreting the "aggregate value of all liens" to mean the economic value of the security interest, which would be zero for a junior lienholder if the property is worth less than the senior

lien, the BAP interprets the phrase to mean the aggregate amount of all claims held by creditors who hold a lien or security interest in the property being sold. *Id.* at 32 - 33.

Finally, the BAP suggests that the junior lienholder could not be compelled in a legal or equitable proceeding to accept money satisfaction of its interest pursuant to Section 363(f)(5). The BAP rejected the view that the ability to confirm a “cramdown” plan that paid the interest satisfied this provision. Instead, the BAP held that the focus of the provision is whether there is a non-bankruptcy proceeding in which the lienholder could be compelled to take less than the value of the claim secured by the interest. Because the parties did not identify a proceeding under non-bankruptcy law and the bankruptcy court did not make a finding, the BAP held that Section 363(f)(5) was not met. This appears to involve a failure to point the court to a California judicial foreclosure in which a junior lienholder can indeed be compelled to accept a monetary judgment less than its lien. *See, e.g.*, California Civil Code § 2924k (describing distribution of non-judicial foreclosure sale proceeds).

The BAP’s narrow interpretation of Sections 363(f) and 363(m) is problematic. Prior to the *Clear Channel* opinion, these Bankruptcy Code provisions attracted buyers to auctions and encouraged senior lienholders not to seek relief from the stay to foreclose. Creditors and other buyers agreed to participate in bankruptcy auctions because the buyer could rely on the order stating the property is free and clear of liens, claims and interests. While the BAP stated that DB knew or should have known that Section 363(f) lien-stripping might not work, prior to this opinion, buyers in bankruptcy sales routinely relied on the finality of Section 363(f) orders when they received a Section 363(m) good faith finding. If the BAP decision is followed, buyers no longer have such security in bankruptcy sales. As such, the opinion is likely to have a chilling affect on bankruptcy sales.

Eurodollar Disaster Clause – LIBOR and Base Rate Loans

by

Bridget K. Marsh*

Over the past two weeks, the LSTA has received a number of queries from members about a provision in a credit agreement which permits lenders to convert LIBOR loans to base rate loans. In response, the LSTA hosted an educational call on October 7th to discuss this provision, which is referred to as the “Eurodollar Disaster” clause. Rick Gray, Partner of Milbank Tweed Hadley & McCloy, led the discussion with more than 730 members participating.

Rick Gray provided historical background to the clause and highlighted general yield protection provisions found in credit agreements, before analyzing the clause and giving examples of when markets have focused on it in past downturns. During the Q&A that followed, he touched on another emerging issue, that of borrowers selecting base rate loans on their own because of the current disconnect between the Eurodollar rate and the base rate of most banks. Set forth below is a summary of the issues Rick Gray reviewed on the call. Rick Gray will be producing a more detailed memo on this subject in the near future. In addition, a brief description of the provision can also be found in the LSTA’s *Handbook of Loan Syndications & Trading* and a more detailed description is included in the LSTA’s *Credit Agreement Handbook* by Richard Wight, Warren Cooke and Rick Gray, which will be published in December.

Background

The Eurodollar provision, which gives lenders the right to suspend lending off Eurodollar rates, is typically found in section 2 of a credit agreement. An example of such provision is as follows:

If prior to the commencement of any Interest Period for a LIBOR Borrowing:

(a) the Administrative Agent determines (which determination shall be conclusive absent manifest error) that adequate and reasonable means do not exist for ascertaining LIBOR for such Interest Period; or

(b) the Administrative Agent is advised by the Required Lenders that LIBOR for such Interest Period will not adequately and fairly reflect the cost to the Lenders of making or maintaining the Loans for such Interest Period;

then the Administrative Agent shall give notice thereof to the Borrower and the Lenders as promptly as practicable thereafter and, until the

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Administrative Agent notifies the Borrower and the Lenders that the circumstances giving rise to such notice no longer exist, (i) any request to convert any Borrowing to, or continue any Borrowing as, a LIBOR Borrowing shall be ineffective and (ii) any requested LIBOR Borrowing shall be made as an ABR Borrowing.

The clause protects lenders against certain types of events or “disasters” in the LIBOR market which result in lenders not being able to obtain quotes adequately reflecting their cost of making the loan. Quotes not reflecting the lenders’ true cost could arise if there were “tiering” in the market – a practice where banks are tiered based upon their credit quality (with depositors demanding a better rate for placing funds with certain banks). Those lenders at the top tier might be able to obtain very good rates in comparison with those on the bottom tier. It might also occur if the quotes submitted to the relevant pricing services do not accurately reflect true market conditions.

Either the agent or the lenders can trigger the conversion to base rate. In clause (a) above, the administrative agent – not the lenders – determines whether rates are unavailable in the market in the amounts and for the relevant maturities needed. Alternatively, in clause (b), the Required Lenders can determine that the quoted LIBO rates do not cover their cost of making the loans and they, in turn, advise the administrative agent of those increased costs.

Required Lenders is a defined term in a credit agreement and is typically a simple majority or two thirds majority. Sometimes agreements set a lower threshold. In the London market, less than a majority of lenders, or even a single lender, might be able to trigger the clause (of course, requiring that a majority of lenders must make the determination to invoke the clause gives greater protection to the borrower).

If the clause is invoked, and the credit agreement provides for both base rate and LIBOR pricing, then any loans priced according to LIBOR will be calculated according to US base rate. If the agreement does not include the right automatically to convert to base rate, it will require the administrative agent to negotiate an alternative interest rate with the lenders. Agreement on such substitute basis for pricing the loans must typically be reached within 30-45 days. In the event they cannot agree on such rate, the borrower will be required to prepay the loan or cover each individual syndicate member’s lending costs.

When has this provision been invoked

In the early 90s, many Japanese banks suffered higher funding costs than banks from other countries. However, rather than invoking this clause, efforts were often made to include Japanese banks among the reference banks used to determine LIBOR in order to have a rate that was more fair to the overall syndicate. (At that time, it was more common to determine LIBOR by averaging the quotes of Reference Banks, in contrast to today’s practice of using screen quotes.)

During the Asian financial crisis of the late 1990s, when the Asian banks paid a premium on their deposits, their cost of funding increased accordingly. At that time, although there was

discussion about parties invoking this clause, it seems that no one actually triggered a conversion, in many cases probably because the number of affected banks did not reach the Required Lenders threshold.

In today's market, more banks are being affected by the crisis than past downturns, so it might be easier for lenders to meet the threshold required to invoke the clause. Prior to the call, it seems that this clause has only been invoked in a club deal in the Americas with only European bank lenders, and newspaper reports speak of another recent case in Asia.

How to deal with today's situation

There are several different ways to tackle the issue. First, ensure accurate quotes. When rumors circulated earlier in the year about how inaccurate LIBOR was, the BBA was asked to address the issue and has considered expanding the panel of banks used to determine LIBOR and is looking to ensure that LIBOR is accurately quoted. Other ways that lenders are considering addressing the issue is by incorporating certain other provisions in their credit agreements, for example, including a LIBOR floor, increasing or supplementing the applicable margin, providing for the interest rate to be the higher of LIBOR and another market rate basis, or shortening the interest period.

Base Rate Loans Selected by Borrowers

Ironically, in the current environment, with LIBOR rates almost matching base rates, it may be less expensive for many borrowers to select base rate loans rather than borrow off Eurodollar rates. Most credit agreements do not contemplate the possibility that the base rate would not adequately cover their cost of funding and do not offer lenders the option to opt out of base rate loans. This outcome is exacerbated by the fact that the interest margin for base rate loans is generally about 100 basis points less than the interest margin for LIBOR loans. Lenders will need to consider incorporating provisions in their credit agreements that better address the current relationship between LIBOR and the base rate and provide for the option to select the higher of the two (or an alternative rate which more closely reflects their actual cost of funding).

DELAWARE UPDATE – 2008 LEGISLATION AMENDING CERTAIN CORPORATIONS AND ALTERNATIVE ENTITY LAWS

by

Norman M. Powell, Esquire*

In its legislative session ended June 30, 2008, the Delaware General Assembly enacted amendments to the General Corporation Law of the State of Delaware, 8 Del. C. § 101 et seq. (the “DGCL”), the Delaware Limited Liability Company Act, 6 Del. C. § 18-101 et seq. (the “DLLC Act”), and the Delaware Revised Uniform Limited Partnership Act, 6 Del. C. § 17-101 et seq. (the “DLP Act”). The amendments to the DGCL took effect when signed by Governor Minner on June 26, 2008. The amendments to the DLLC Act and the DLP Act took effect on August 1, 2008.

The amendments to the DGCL are modest, and relate to stockholder lists. Likewise, the amendments to each of the DLLC Act and the DLP Act are modest. Both were amended to clarify that “person” includes trusts of all kinds and to clarify who may execute certificates of conversion or domestication. The DLLC Act was also amended to provide greater consistency in the use of the term “manager.” The DLP Act was also amended to clarify that certain formation formalities may be attended to by a single person, notwithstanding that a limited partnership must consist of two or more persons, and to confirm that a limited partner’s participation in certain specified activities do not constitute participation in control of the limited partnership’s business.

This article summarizes these amendments to the DGCL (Senate Bill No. 244, 76 Del. Laws 252), the DLLC Act (House Bill No. 429, 76 Del. Laws 387), and the DLP Act (House Bill No. 427, 76 Del. Laws 386).

Amendments to the DGCL.

The DGCL was amended by Senate Bill No. 244, 76 Del. Laws 252, effective June 26, 2008. The amendments are three. First, Section 219(a) was amended by deleting the word “inspected” to clarify that no distinction is intended between the words “inspected” and “examined” in connection with the examination of lists of stockholders entitled to vote. Second, Section 219(b) was essentially restated, eliminating the concept of “willful neglect,” allocating and specifying the burden of proof where an application is made to compel examination of a list of stockholders, and explicitly granting the Court of Chancery authority to fashion such relief as it may deem appropriate.

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Amendments Common to the DLLC Act and the DLP Act.

The definition of “person” in both the DLLC Act and the DLP Act has been amended to confirm the intended broad scope of the term “trust” as used in such definition. In Section 18-101(12) of the former and Section 17-101(14) of the latter, the term “trust” is now followed by the parenthetical “(including a common law trust, business trust, statutory trust, voting trust or any other form of trust).” Both Acts have been amended to clarify the persons who may execute certificates of conversion or domestication. Under Section 18-204(a) of the DLLC Act and Section 17-204(a)(1) of the DLP Act, such action may be taken by any person authorized to execute the certificate on behalf of the other entity or non-United States entity. Conforming changes were made to Sections 18-204, 18-212, and 18-214 of the DLLC Act, and to Sections 17-204, 17-215, and 17-217 of the DLP Act.

Amendments to the DLLC Act.

Sections 18-110 (Contested matters relating to managers; contested votes) and 18-111 (Interpretation and enforcement of limited liability company agreement) were both amended by insertion of the following new text:

“As used in this section, the term ‘manager’ refers (i) to a person who is a manager as defined in § 18-101(10) of this Title, and (ii) to a person, whether or not a member of a limited liability company, who, although not a manager as defined in § 18-101(10) of this Title, participates materially in the management of the limited liability company; provided however, that the power to elect or otherwise select or to participate in the election or selection of a person to be a manager as defined in § 18-101(10) of this Title shall not, by itself, constitute participation in the management of the limited liability company.”

With this amendment, the term “manager” has the same meaning for purposes of these two sections as it has had in Section 18-109 (Service of process on managers and liquidating trustees).

Amendments to the DLP Act.

Section 17-303(b)(8) of the DLP Act was amended to augment the list of specific actions (or inactions) that may be taken (or omitted) by a limited partner without causing such limited partner to be “participat[ing] in the control of the business” and thereby incur potential liability from which he would otherwise be insulated by reason of Section 17-303(a). New subsection n. provides as follows:

“n. The nomination, appointment, election or other manner of selection or removal of an independent contractor for, or an agent or employee of, the limited partnership or a general partner, or an officer, director or stockholder of a corporate general partner, or a partner of a partnership which is a general partner, or a trustee, administrator, executor, custodian or other fiduciary or beneficiary of an estate or trust which is a general partner, or a trustee, officer, advisor,

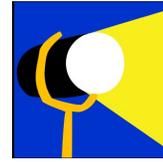
stockholder or beneficiary of a business trust or a statutory trust which is a general partner, or a member or manager of a limited liability company which is a general partner, or a member of a governing body of, or a fiduciary for, any person, whether domestic or foreign, which is a general partner; or”

No Amendments to Statutory Trust Act, General Partnership Act, or Uniform Commercial Code.

There were no 2008 amendments to the Delaware Statutory Trust Act, 12 Del. C. § 3801 et seq., the Delaware Revised Uniform Partnership Act, 6 Del. C. § 15-101 et seq., or the Uniform Commercial Code as adopted in Delaware, 6 Del. C. § 1-101 et seq.

SPOTLIGHT

October 2008



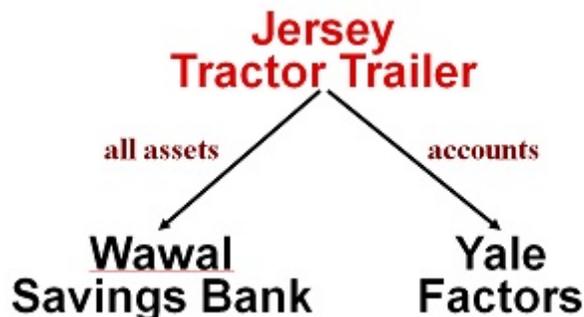
The purpose of this column is to identify some of the most disconcerting judicial decisions interpreting the Uniform Commercial Code or related commercial laws. The purpose of the column is not to be mean. It is not to get judges recalled, law clerks fired, or litigators disciplined for incompetence. Instead, it is to shine a spotlight on analytical errors, and thereby provide practitioners and judges with reason to disregard the opinion.

In re Jersey Tractor Trailer Training, Inc., **2008 WL 2783342 (D.N.J. 2008)**

As reported in the December, 2007 edition of this column, few cases from last year contained as many serious analytical errors as the bankruptcy court's decision in this case. Well, the case is now back. On appeal, the district court repeated all of the bankruptcy court's mistakes, and exacerbated one of them.

The case is essentially a priority battle between two secured parties. It began in 2002, when Wawal Savings Bank granted the debtor, Jersey Tractor Trailer Training, Inc., a \$315,000 line of credit secured by an interest in substantially all of the debtor's assets. Wawal perfected its interest by filing a proper financing statement and the security agreement allowed the debtor to collect its own accounts and use the proceeds in its business.

The following year, to alleviate severe cash flow problems, the debtor sought to sell some of its accounts to Yale Factors. In its credit check of the debtor, Yale conducted a UCC search against "Jersey Tractor Trailer Training," an incomplete version of the debtor's name that omitted the corporate identifier. The search failed to disclose Wawal's filing. Relying on its apparent priority, Yale then purchased some of the debtor's accounts and filed its own financing statement.



In late 2005, as the debtor's finances deteriorated, Wawal and Yale each learned of the debtor's relationship with the other. Wawal asserted its priority in the debtor's accounts and the debtor informed Yale that it would not renew its factoring contract. Nevertheless, Yale continued to collect the debtor's accounts and even went so far as to obtain an ex parte restraining order that prohibited the debtor from collecting. The debtor filed for bankruptcy protection and Wawal brought

an adversary proceeding to determine the priority of its interest in the debtor's remaining accounts as well as in amounts that Yale had already collected.

Wawal should win this case. It has the senior security interest. It should win as to the remaining accounts under § 9-322(a)(1) as the first to file or perfect. And, indeed, that is what the court so ruled. Wawal should also win – at least presumptively – as to collections by Yale. That is because of the difference between a disposition of tangible collateral and a collection of receivables. When a junior secured party disposes of collateral, any senior security interest remains unaffected and the buyer takes subject to it. *See* § 9-617. Because of that, the senior secured party has no claim to the proceeds of the junior's disposition. *See* § 9-615(a). However, when a junior secured party collects on accounts, the account debtor's obligation is discharged, with the result that the senior's collateral is gone. To compensate for this, the comments to Article 9 make clear that the junior secured party must account to the senior for the amounts collected, unless the junior qualifies for priority as a holder in due course, good faith purchaser of an instrument, or noncollusive transferee of money. *See* §§ 9-330 comment 7, 9-331 comment 5, 9-607 comment 5.

Unfortunately, the court's analysis is misguided on several key points. First, the court addressed whether Yale took priority in the *accounts* as a holder in due course. This is, of course, an absolute impossibility. A person can be a holder in due course of a *negotiable instrument*, *see* § 3-302, but there is no such thing as a holder in due course of *accounts*. Nevertheless, the court's whole analysis is premised on the assumption – made without discussion or citation to any supporting authority – that the debtor's invoices to its customers were negotiable instruments. This is absurd. A negotiable instrument is either a promise to pay or an order to pay issued by the person making the promise or order (that is, by the drawer or maker of the instrument), not a writing issued by the person claiming a right to be paid. §§ 3-104(a), 3-105(a). A creditor's invoice thus cannot possibly be a negotiable instrument; it is the wrong kind of document and is issued by the wrong party.

Second, in evaluating whether Yale was a holder in due course, the court focused on the requirement of good faith. This is the most disturbing aspect of the decision. The obligation of good faith requires “honesty in fact and observance of reasonable commercial standards of fair dealing.” The latter half of this standard – reasonable commercial standards of fair dealing – is not a requirement that the holder act in a commercially reasonable manner, *cf.* §§ 9-607(c), 9-610(b) (requiring that collections on collateral and dispositions of collateral be conducted in a commercially reasonable manner), it is a requirement of fair dealing. As such, it is a requirement that normally applies only to people in contract with each other. *See* § 1-304 (“every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement”); P.E.B. Commentary No. 10 (February 10, 1994). However, there is language in comment 5 to § 9-331 that indicates otherwise, and expressly suggests that a junior secured party may have a duty to search to determine if a senior lender has contractually prohibited the debtor from granting a junior security interest in accounts.

The bankruptcy court picked up on this comment and took it a step further. It concluded that Yale had failed to act in good faith because Yale had conducted an improper search. Although the

record failed to explain why the search firm had missed the filing, and thus it was unclear whether the error was Yale's or its search firm's, the court ruled that did not matter. It noted that a search revealing no significant secured debt at a time the debtor faced severe liquidity problems "should have raised red flags" and required further inquiry. It described Yale's loan officer as "inexperience[d]" and Yale's conduct as "reckless."

On appeal, the district court agreed with the bankruptcy court. However, it went significantly further. It ruled that "Yale had a duty to search both the debtor's correct corporate name, as well as roots of that name." This is a terrifying prospect and one that is simply inconsistent with one of the major revisions to Article 9. Under old Article 9, a filing was effective if it contained a minor error that was not seriously misleading. Because of this rule, searchers had to search broadly, to ensure they uncovered all previous filings with minor errors. Revised Article 9 modified this rule with respect to the debtor's name. In part because searches are no longer conducted from a paper index (where minor errors may not hinder the searcher from discovering a filing), but instead by computer, revised Article 9 provides that an erroneous filing is ineffective unless a search under the debtor's correct name would reveal it. § 9-506(b), (c). The point of this is to make it easier on the searcher: the searcher need search only under the correct name, not likely variations or misspellings. The district court's decision in this case runs counter that policy. By limiting the circumstances in which a lender can qualify as a holder in due course, it impels prospective lenders to conduct a massive search, something that the revisions to Article 9 attempted to obviate.

There is also a more fundamental problem with the court's analysis. Comment 5 to § 9-331 does indeed suggest that HDC status may require a search of the UCC records. However, there is a big difference between willful blindness – sticking your head in the sand to avoid notice of a conflicting claim – which suggests a lack of fair dealing, and negligence, which does not. Because the good faith requirement of reasonable commercial standards of fair dealing is fundamentally about fairness, not negligence, it should deal with the former, not the latter.

Phar-Mor, Inc. v. McKesson Corp.,
534 F.3d 502 (6th Cir. 2008)

The issue in this case was whether a vendor's reclamation claim was entitled to priority as an administrative expense once the goods subject to reclamation were sold and the proceeds were used to pay a secured creditor. The facts can be summarized as follows. McKesson had sold goods to the debtor prepetition and after the petition filed a timely demand to reclaim the goods under § 546(c) of the Bankruptcy Code. At the debtor's request, the Bankruptcy Court denied reclamation but gave McKesson an administrative expense priority. However, at all relevant times, all of the debtor's assets served as collateral for secured loans. Before the petition, the debtor owed substantial sums to its secured creditors. After the petition, the Bankruptcy Court approved DIP financing under which the DIP lenders acquired a security interest in all of the debtor's assets.

After the secured parties were paid off, the remaining assets were allocated first to the administrative expense claimants, such as McKesson. The debtor objected, claiming that McKesson

actually had no reclamation rights, and therefore was not entitled to administrative expense treatment. The Bankruptcy Court overruled the objection and the debtor appealed.

The Sixth Circuit began its analysis by noting that the question was whether McKesson had a right to reclaim those goods. If so, then the bankruptcy court, having denied reclamation, was obligated to grant McKesson an administrative-expense priority in the amount of the goods (as it did). If not, then the court was not so obliged and McKesson's claim for the value of those goods could be properly regarded as merely a general unsecured claim.

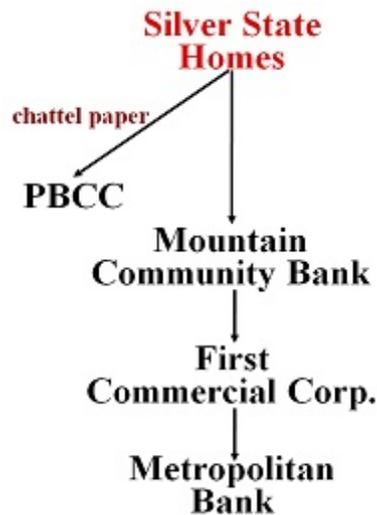
The court then proceeded to analyze McKesson's reclamation rights under § 2-702 of the UCC. It quoted the applicable state's version of § 2-702(3), which provides that "[t]he seller's right to reclaim . . . is subject to the rights of a buyer in ordinary course or other good faith purchaser." The court then properly noted that secured creditors qualify as purchasers. *See* § 1-201(b)(29), (30). Nevertheless, the court concluded that this provision – despite its seemingly clear language – did not restrict McKesson's *right* to reclaim, merely its *ability* to reclaim. It then cited a previous Sixth Circuit decision from 1968 that was troubled by a perceived inequity in allowing the rights of a secured creditor to defeat the rights of a reclaiming seller and which refused to enforce the limitation on reclamation in § 2-702(3). Based on this, the court concluded that McKesson was entitled to priority.

The court may have reached the correct result. After all, it was the debtor who had requested administrative expense priority. Thus, perhaps the matter could have perhaps been resolved on grounds of waiver or *res judicata*. Alternatively, the court might have concluded that once the secured creditors were fully paid, as they had been, the limitation in § 2-702(3) was no longer relevant. Unfortunately, the court instead simply refused to read § 2-702(3) to do what it clearly purports to do: restrict the seller's reclamation rights. In the process, it has created doubt and confusion as to whether a secured party really does take priority over an unpaid seller.

Metropolitan Bank & Trust Co. v. Pacific Business Capital Corp.,
2008 WL 2277510 (D. Nev. 2008)

In this case, the court had to resolve a priority dispute between a creditor secured in chattel paper and a purchaser of that chattel paper. The facts can be summarized as follows. The debtor, Silver State Homes, originated chattel paper by selling mobile homes. Its principal lender was PBCC, which had a security interest in the debtor's chattel paper. That security interest was perfected by filing and the security agreement prohibited the debtor from selling the paper without PBCC's consent.

The debtor later sold 160 mobile home notes (chattel paper) to Mountain Community Bank. A representative of PBCC attended the closing and authorized the sale of 32 of the notes free and clear of PBCC's interest. The representative was unaware that the debtor was simultaneously selling an additional 128 notes to Mountain Community Bank. Mountain Community later sold these 128 notes to First Commercial Corp., which in turn resold them to Metropolitan Bank.



The issue came down to whether Metropolitan Bank took free of PBCC's security interest under former § 9-308(a), the predecessor to § 9-330(b). That requires that the purchaser give new value and take possession of the chattel paper in the ordinary course of the purchaser's business and without knowledge that the specific paper is subject to the security interest.¹ The court first commented that the security agreement did not define "ordinary course of business." It then concluded that the sales were not in the ordinary course of the debtor's business because selling the same paper to multiple parties is not in the ordinary course of business.

This analysis of course misses the point entirely. Unlike Article 9's protection for buyers of goods in the ordinary course of business, which inquires whether the sale is in the ordinary course of the *seller's* business, *see* §§ 1-201(b)(9), 9-320(a), the protection for purchasers of chattel paper applies when the transfer is in the ordinary course of the *purchaser's* business. Thus, the court was not focused on the proper inquiry. Beyond that, the provisions of the security agreement – which would be of dubious relevance to the meaning of the statutory phrase "ordinary course of business" even if that phrase did apply to the debtor's business, can have no possible relevance to whether the purchaser – who is a stranger to that agreement – is acting in the ordinary conduct of its own affairs. Frankly, it should not be difficult to ascertain whether a transaction is in the ordinary course of business, *cf.* James J. White & Robert S. Summers, *Uniform Commercial Code*, Sec. 33-8 (5th. ed., 2002) ("[o]nly rarely will it be difficult to tell whether the seller was 'in the business of selling goods of that kind.'"), and the court in this case seems to have been trying to solve a problem where none existed.

Nevertheless, the court may have reached the correct result because it noted that there was no evidence that Mountain Community Bank was unaware of PBCC's security interest.

¹ Current law is a bit more lenient. Section 9-330(b) allows the purchaser to take free even if the purchaser is aware that the paper is encumbered as long as the purchaser does not know that the purchase violates the rights of the secured party.

In re Western Iowa Limestone, Inc.,
538 F.3d 858 (8th Cir. 2008)

This case involved the conduct of three fertilizer and chemical dealers who purchased agricultural lime from Western Iowa Limestone, Inc., but left the lime with Western per the terms of the parties' bill of sale, pending the dealers' resale of the lime to their own customers. Western maintained all of its lime, including that which had been sold to the dealers, in a single undifferentiated pile on its premises.

When Western filed for bankruptcy, some lime that had been sold to the dealers remained on its premises. United Bank of Iowa, having a security interest in all of Western's assets, sold the lime as part of Western's inventory. At that time, the dealers filed a joint objection to the planned distribution of the sale proceeds, claiming priority over the bank as buyers in the ordinary course of business as to the purchased, undelivered lime.

Even though the dealers lacked physical possession of the lime, the bankruptcy court held that they had constructive possession, which the bankruptcy court held was sufficient to satisfy the "possession" requirement of § 1-201(b)(9) and give the dealers priority under § 9-320(a). The Bankruptcy Appellate Panel reversed, ruling that the dealers did not have constructive possession. The Panel declined to address whether constructive possession would have sufficed had it been proven. The Eighth Circuit reversed the BAP and affirmed the bankruptcy court on both points, reasoning that, because Iowa courts had construed "possession" to include "constructive possession" in other UCC contexts, there was no reason to do otherwise here.

In so holding, the Eighth Circuit expanded the definition of § 1-201(b)(9) in a way that is not supported by the text of the UCC, the commentary, or the literature in this area. In fact, looking at the Code's treatment of possession elsewhere, there is reason to believe that only actual possession should suffice here. In the 1999 revisions to § 2-716(3), for example, consumers (but not other purchasers) are given a special property in goods upon identification to the contract. As White & Summers note, the new language would allow a consumer buyer to claim that he or she is a buyer in ordinary course of business even without possession. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, § 33-8 (5th. ed., 2002). The dealers in this case were not consumer purchasers, of course, and it is reasonable to assume that this special provision for consumers would not have been necessary if the word "possession" was automatically intended to include "constructive possession" of the kind that is claimed in this case.

Furthermore, even if constructive possession were acceptable, the facts of this case do not support constructive possession. Instead, constructive possession normally contemplates delivery of the goods to a third party or other exercise of dominion and control on the part of the purchaser. In this case, where the goods remained with the seller in a single, undifferentiated mass, finding constructive possession seems clearly wrong.

Arnold, Matheny & Egan, P.A. v. First American Holdings, Inc.,
982 So. 2d 629 (Fla. 2008)

This case concerns First American Holdings, Inc.'s attempt to collect on a \$26,000 judgment against Preclude, Inc. As part of its collection efforts, First American sought to garnish funds that Preclude had received from Greenleaf Products, Inc. in a settlement. Because these funds had been deposited in the trust account of Arnold, Matheny & Egan, P.A. ("AME"), Preclude's attorneys, First American sought to garnish those funds from AME. AME twice denied that it was in possession of any Preclude funds, and this lawsuit ensued. Although the court reached the correct result, its decision contains some misleading and oversimplified statements about negotiability and stop payment.

The sequence of the facts are important. First American served its first writ of garnishment on AME before the settlement funds were received, and AME answered by indicating it did not currently have any funds belonging to Preclude. Two days later, AME received the settlement funds, deposited them into its trust account, and issued two checks drawn on those funds – one check was made payable to AME's operating account in payment of attorney's fees and costs, and the other was made payable to Preclude for the balance of the settlement funds. Four days later, First American served a second writ of garnishment on AME. Again, AME denied it was in possession of any funds that belonged to Preclude. However, AME's check to Preclude was not presented for payment until three days after the second writ of garnishment was served. Thus, at the time of the second writ, the Preclude funds were still in AME's trust account. First American brought suit, seeking to hold AME responsible for the funds eventually used to honor the check to Preclude.

The court held that, as a matter of garnishment law, AME was required to stop payment on the check, because the funds remained in its account at the time of the second writ of garnishment and it had the ability to stop payment had it chosen to do so. This seems correct. In so holding, however, the court made several imprecise statements. First, the court stated that "[i]t is not until presentment that the issuance of a check constitutes full and absolute payment." In truth, presentment is not the crucial moment in time for "full and absolute payment"; instead, *acceptance* and *final payment* are. See §§ 3-409, 4-215. Presentment is merely the holder's demand for acceptance and payment; the drawee bank is not committed to make final payment until it accepts the check. See § 3-501. This distinction is important because the right of stop payment ends, not at presentment, but when the bank accepts the check or takes certain other action on the check. See §§ 4-303, 4-403.

In the final portion of its opinion, the court rejected AME's contentions that attorney trust account funds should be exempt from garnishment and that checks written on attorney trust accounts should be analogized to cashier's checks or certified checks. This too seems correct. However, reaching its conclusion, the court made two statements that are not entirely correct. First, the court cited a 1989 Florida Supreme Court case for the proposition that "neither the bank nor a purchaser of a cashier's check from the bank has a right to 'stop payment' on a cashier's check." While this statement is correct insofar as the remitter is concerned, and is *usually* true insofar as the issuing bank is concerned, it is oversimplified. Instead, there are a few instances in which an issuing bank

may escape liability for refusing to pay a cashier's check or other check it has already accepted. *See* §§ 3-411, 4-403.

The court also attempted to distinguish checks drawn on an attorney trust account from certified and cashier's checks by noting that the latter "are immediately negotiable." This language incorrectly implies that the former are somehow non-negotiable. The distinguishing feature of certified and cashier's checks is that they are "accepted at issuance," not that they are "immediately negotiable." Whether an instrument is "negotiable" depends entirely on whether the instrument satisfies the requirements described in § 3-104. Whether the funds on which the instrument is drawn are subject to garnishment, or whether a bank has already committed to pay the check via acceptance, are entirely separate matters.

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Subcommittee on Aircraft Financing

Michael K. Vernier, Chair, Peter B. Barlow, Vice Chair

The Aircraft Financing Subcommittee sessions in New York featured Michael McMillen, one of the world's foremost experts on Islamic finance, who discussed aircraft financing and Shari'ah compliant structures. Kerry Long, the FAA Chief Counsel, joined us again to provide his unique, and colorful, perspectives on the FAA and the airline industry. We also had an FAA briefing on the technology that is expected to constitute the future of air traffic control in the US air transportation system. Robert (Bo) Strauss provided an update on recent bankruptcy cases relevant to competing claims in leveraged lease structures, as well as cross-default provisions. Edward Gross discussed evolving market practices and strategies for enforcing lenders' rights in fractional share programs. Mark Lessard from Pillsbury Winthrop discussed issues in the developing area of aircraft pre-delivery payment financings.

Our agenda also featured several speakers addressing issues relating to the Cape Town convention. Jim Tussing and Bill Piels provided an update on Cape Town International Registry issues. Erin Van Laanen from McAfee Taft discussed FAA and Cape Town filing and registration issues, and Phillip Durham from Holland & Knight discussed issues relating to Cape Town registration of lease assignments.

Once again, our Subcommittee dinner was a rousing success, with a delightful evening at the Bryant Park Grill. We encourage all members and friends of the Subcommittee to "save the date" for our 2009 Spring meeting in Vancouver!

Subcommittee on Creditors' Rights

Shannon Lowry Nagle, Chair, and Elizabeth M. Bohn, Vice Chair

The Creditors' Rights Subcommittee met jointly with Bankruptcy Litigation at the ABA Annual Meeting on August 9, 2009, in New York. Glenn Siegel and Iva Uroic from Dechert LLP shared their article recently published in Bloomberg Law Reports on new developments in Delaware law on breach of fiduciary duty by officers and directors and damage claims for deepening insolvency. The program focused on the current status of Delaware law following the decision of Judge Mary Walrath in *In re Brown Schools (Miller v. McCown De Leeuw & Co.)*, wherein the court refused to dismiss a Chapter 7 trustee's breach of fiduciary duty claims against the former directors of a debtor corporation in which some of the damages claimed were for the "deepening insolvency" of the debtor allegedly caused by the defendants' breaches of their duties of loyalty to the corporation and its creditors. This decision distinguished *Trenwick Am. Litig. Trust v. Billett*, 2007 Del. LEXIS 357 (Del. 2007), where the Delaware Supreme Court held that Delaware does not recognize a cause of action for deepening insolvency. The discussion during the meeting focused not only on the *Brown Schools* decision, but a more recent decision, *Bridgeport Holdings*, and provided an overview of the current standards under Delaware law for breach of fiduciary duty. If you would like to listen to the podcast of our Subcommittee's meeting, it is available [here](#).

Subcommittee on Cross-Border and Trade Financing

Daryl E. Clark, Chair, Jonathan M. Cooper, Vice Chair

Our subcommittee is currently considering topics for presentation at the upcoming Spring Meeting in Vancouver in April 2009 and for the ABA's Global Business conference next June in Hong Kong. Please do not hesitate to contact me at daryl.clark@blakes.com should you wish to provide input in regard to topics for these conferences.

Subcommittee on Intellectual Property Financing

Matthew W. Kavanaugh, Chair, John E. Murdock, III, Vice Chair

The Intellectual Property Financing Subcommittee held a meeting at the ABA Business Law Section's Annual Meeting in New York City. Christopher G. Dorman of Phillips Lytle LLP gave a presentation on "Issues in the Financing of Intellectual Property Subject to Licenses." Materials will be posted to the Subcommittee's [webpage](#). The Subcommittee will hold a meeting at the ABA Spring Meeting in Vancouver with the date and subject matter to be announced.

Subcommittee on Lender Liability

Jeffrey W. Kelley, Chair, Mathew S. Rotenberg, Vice Chair

Our subcommittee is co-sponsoring the program titled “Nightmare on Main Street – What Keeps Lenders Up at Night?” at the ComFin Fall Meeting. We are beginning to make plans for our subcommittee meeting at the Spring Meeting. If you are aware of any recent developments in the lender liability area or are interested in making a presentation at our subcommittee meeting, please contact Jeff Kelley (jeffrey.kelley@troutmansanders.com) or Mat Rotenberg (rotenberg@blankrome.com).

Subcommittee on Loan Documentation

Bobbi Accord, Chair, Scott Lessne and Cheryl Stacey, Vice Chairs

The Loan Documentation Subcommittee will present a program at the Spring meeting that will focus on documentation issues in financing in-transit inventory. The topic continues to be of increasing importance to lenders due to the willingness of off-shore manufacturers to sell to U.S. companies on an open account basis rather than through letters of credit and the desire of borrowers to include such inventory in the collateral pool against which advances may be made by lenders. The program will cover, among other documentation, eligible in-transit inventory provisions for loan agreements and custom brokers' agreements and will discuss the handling of documents of title by various parties in the inventory chain.

Subcommittee on Loan Workouts

Steven B. Soll, Chair, Cathy L. Reece, Vice Chair

The Loan Workout Subcommittee of the Commercial Finance Committee, in conjunction with the Lender Liability Subcommittee, will jointly present a panel at the Fall Meeting in San Francisco, California entitled: ***Nightmare on Main Street – What Keeps Lenders Up at Night?*** The panel will be moderated by Steven B. Soll, a Member of the Firm of Otterbourg, Steindler, Houston & Rosen, P.C. The panelists will consist of Cathy L. Reece, Esq., a Member of the Firm of Fennemore Craig, P.C., Harvey I. Forman, Esq., Partner, Blank Rome LLP, and Mr. Howard Bailey, GE Commercial Finance. The panel will address a number of legal issues relating to lender liability and bankruptcy that impact lenders. The issues to be addressed by the panel include matters pertaining to (i) traditional lender liability theories – breach of commitment, fraud and inducement, misrepresentation, lack of good faith and damage theories, and recent trends or decisions relating thereto, (ii) intercreditor issues relating to, among other matters, DIP financing/cash collateral, asset sales and voting rights, (iii) recharacterization or subordination of indebtedness, (iv) cram down of secured debt under a plan of reorganization (value, modification of terms), and (v) disallowance of prepayment premiums. The panel will distribute written materials in advance of the meeting. The panel anticipates a robust interactive discussion with attendees on the various topics.

Subcommittee on Real Estate Financing

Kathleen J. Hopkins, Chair, Edgel C. Lester, Jr., Vice Chair

Most of us have received a fortune cookie that predicted “may you live in interesting times.” That prediction certainly came true for many of us practicing commercial real estate lending law in the past several weeks.

In this issue of the newsletter, we usually make a tentative commitment to a topic for our Spring meeting. This year, however, it would be quite presumptuous for anyone to try and forecast what will be the hot topics for discussion by April. For now, we are going to leave the topic broad – Real Estate Financing in Interesting Times. If the real estate world calms down, our primary focus will be opinion letters in real estate financings; otherwise, we will conduct a structured discussion on hot or interesting state specific topics, with the meeting attendees speaking up as our “panelists.” For the latter, we will be soliciting possible topics in January, 2009. If you have any ideas, please do send them to us at: khopkins@rp-lawgroup.com and elester@carltonfields.com.

Subcommittee on Syndications and Lender Relations

Gary D. Chamblee and Richard K. Brown, Co-Chairs, Christine Gould Hamm, Vice Chair

The Syndications and Lender Relations Subcommittee met at the Annual Meeting in New York City in August and introduced the new Co-Chairs of the Subcommittee - Gary Chamblee of Womble Carlyle Sandridge & Rice, PLLC and Richard Brown of Winston & Strawn, LLP. Christine Gould Hamm of Husch Blackwell Sanders LLP has been appointed Vice Chair of the Subcommittee. We would like to thank the past Chair of the Subcommittee, Anthony Callobre of Bingham McCutchen LLP, for his leadership over the past years. We are planning to roll out a subcommittee listserve and will forward information on the listserve soon. In addition, we are planning the third annual update on the syndicated loan market for the Spring Meeting in Vancouver. The Model Intercreditor Agreement Task Force continues to make progress on a form of intercreditor agreement. See the MICA Task Force report in this newsletter. The Syndications Chapter for ABL Treatise Task Force is working through the publication agreement with the publisher and hopes to begin drafting sessions soon. See the Syndications Chapter Task Force report in this newsletter. If you would like to get involved in the Subcommittee or either of the Task Forces, please let us know. If you are not yet a member of the Subcommittee, visit the [Subcommittee website](#) and join today!

Task Force on Model Intercreditor Agreement

Gary D. Chamblee, Chair, Alyson B.G. Allen, R. Christian Brose, Richard K. Brown, Robert L. Cunningham, Jr., Jane Summers, and Randall Klein, Vice Chairs

The Model Intercreditor Task Force (MICA) will hold an all-day drafting session on the bankruptcy provisions of the Model Intercreditor Agreement on Thursday November 13th in San Francisco in connection with the ABA/CFA meetings. Bingham McCutchen LLP has graciously agreed to host the meeting at their San Francisco office (Board Room, 28th Floor, Three Embarcadero Center). Lunch will be provided. The meeting will begin at 8:30 a.m. local time and will end at 4:00 p.m. Please email Gary D. Chamblee (gchamblee@wcsr.com) to participate.

Task Force on Syndications Chapter for ABL Treatise

Christine Gould Hamm and Scott Lessne, Co-Chairs

Scott Lessne (slessne@capitalsourcebank.com) and Christine Gould Hamm (christine.hamm@huschblackwell.com) are the new Co-Chairs of the Syndications Chapter for ABL Treatise Task Force. We would like to thank Michelle White Suarez for all of her hard work in putting together the outline of the syndications chapter for Howard Ruda's Asset Based Financing treatise. We are currently working with the publisher on a publication agreement. As soon as we have the details of the publication agreement worked out, we will post the chapter outline to the task force website and set up conference calls to facilitate drafting sessions. If you are interested in assisting us with this project, please visit the task force [website](#) and join the task force or send an e-mail to Scott or Christine.

[Subcommittee on Article 2A – Leasing](#)

Teresa Davidson, Chair

LEAF FUNDING, INC. v. CUSTOM HIGHLINE, L.L.C.
Mitigation Evidence Relevant to Liquidated Damages Claim

The court in this case concludes that summary judgment for damages is not appropriate in a breach of contract claim regarding a lease under Article 2A where the lease had a liquidated damages clause but the formula did not include the “usual” offset for proceeds upon disposition.

In *Leaf Funding, Inc. v. Custom Highline, L.L.C., et al.*, Slip Copy, 2008 WL 4305316 (D. Kan. September 18, 2008), Custom Highline, L.L.C. (“Lessee”) leased equipment from Leaf Funding, Inc. (as assignee of Five Point Capital, Inc.) (“Leaf”) for a period of 60 months with monthly payments. Custom Highline Wholesale, L.L.C. (“Custom Wholesale”) and two individuals, Zarif Haque (“Haque”) and David Rueschoff (“Rueschoff”) guaranteed the lease. Less than a year into the lease Lessee defaulted and Leaf filed a claim against Lessee and the guarantors for \$103,990.48 plus interest at 18% per annum, plus reasonable collection costs and attorney fees and possession of the equipment. Of the four defendants, only Rueschoff answered the complaint. The court granted a default judgement against the three non-answering defendants as to liability, but because Rueschoff and the three were admittedly jointly and severally liable, default judgment could not be granted on the amount of damages against the three until the matter was adjudicated against Rueschoff. So, the court turned to Leaf’s motion for summary judgment against Rueschoff for breach of contract.

Rueschoff did not dispute that the elements of breach of contract existed -(1) existence of a contract between the parties; (2) sufficient consideration to support the contract (3) plaintiff’s performance, (4) defendants’ breach of the contract and (5) damages to plaintiff caused by the breach.

Rueschoff, however, asserted that because Leaf did not mitigate its damages, Rueschoff had the right to raise a defense of failure to mitigate and “discover what, if anything, Leaf Funding has done to mitigate its rent damages.” Thus, in this motion for summary judgment, the issue for the court became, as a matter of law, is evidence of mitigation relevant to the issue of damages in this lease context?

Leaf argued that just by virtue of the lease in question being a true lease and not a security agreement, there was no requirement under the California Commercial Code to mitigate if the contract did not provide for it. The Court rejected this argument finding no support for it. Similarly, the Court rejected Leaf’s argument that since the lease agreement was silent on the issue of mitigation, there was no duty to mitigate. It recognized that Article 2A of the California Commercial Code permitted formula-based liquidated damages upon breach but also noted that the formula used in the subject lease agreement lacked the “usual” offset for net proceeds of disposition, citing Comments to Section 2A-504.

The Court then turned to the doctrine of mitigation under California common law which in part holds,

“[a] plaintiff who suffers damages as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided. A plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion....” [citations omitted]

In a commercial context, the doctrine has been used more sparingly, but even in the commercial context, the Court noted, a duty has been imputed on the injured party to minimize its damages. Provided with no clear authority holding that mitigation is irrelevant in the lease context and finding no basis to deviate from the general principals of contract law, the Court found that “the non-breaching party’s duty to mitigate is the rule not the exception.” “[E]vidence of mitigation, or lack thereof, is relevant to the issue of damages in this case.”

Leaf went on to argue that if there was a duty to mitigate, it had sought and been granted replevin and that once repossession occurred, it intended to sell the equipment in a commercially reasonable manner. In response, Rueschoff asserted that Leaf had not demanded return of the equipment nor had Leaf come to the location to retrieve the equipment. With these assertions before it, the Court further found that “there are triable issues of fact as to the duty, extent, and effect of mitigation” precluding summary judgment on the issue of damages. Though summary judgment was granted as to liability, Leaf would have to prove its damages.

The caution to lessors in this case appears to be that though a liquidated damages formula is permitted by Article 2A, it may not stand on its own if such formula fails to take into account mitigation of damages.

Ruthanne Hammett
Vice-Chair
Subcommittee on Article 2A - Leasing

ABA Business Law Section
Uniform Commercial Code Committee
[General Scope and Provisions Subcommittee](#)

Kristen David Adams, Chairperson

“What Good Faith Cannot Do”

At the Spring 2008 Business Law Section Annual Meeting in Dallas, the General Scope and Provisions Subcommittee presented a program on the topic of good faith, entitled, “Are We Giving Good Faith a Bad Name?” The program included a brief selected bibliography of cases and articles discussing the topic of good faith. As a follow-up to that program, I thought it might be useful to present some of the cases on good faith that have been decided since the Spring meeting. This time, rather than focusing on the attributes of good faith, as the Spring program and bibliography did, I have focused on what good faith *cannot* do. Some of the propositions presented below are likely to be exceedingly familiar, while others may be less well known. Regardless of whether the cases discussed below present familiar concepts or new ones, it is my hope that it will be useful for readers to have a short list of recently decided cases, gathered in one place, discussing some of the limits on the UCC’s concept of good faith.

1. Bad Faith is Not Its Own Cause of Action.

The UCC’s definition of good faith does not give rise to an independent cause of action under the Code, but instead requires another, supporting cause of action. *Lechoslaw v. Bank of America, N.A.*, ___ F. Supp. 2d ___, 2008 WL 4145778 (D. Mass. 2008). Stated another way, a cause of action for breach of the implied obligation of good faith and fair dealing cannot be used as a substitute for a non-viable claim for breach of contract. *Bellco Drug Corp. v. Global Supply Force, Inc.*, 2008 WL 2901595 (E.D. Pa. 2008); *Novelis Corp. v. Anheuser-Busch, Inc.*, 559 F. Supp. 2d 877 (N.D. Ohio 2008). Along the same lines, failure to act in good faith does not give rise to an independent cause of action in tort. *Adams v. Martinsville Dupont Credit Union*, ___ F. Supp. 2d ___, 2008 WL 4009040 (D.D.C. 2008); *TIG Ins. Co. v. Alfa Laval, Inc.*, 2008 WL 639894 (E.D. Va. 2008).

2. Article One’s Duty of Good Faith Does Not Apply Outside the UCC.

As recent examples, courts have held that the Article One duty of good faith does not apply to construction services, *Jay Cashman, Inc. v. Portland Pipe Line Corp.*, 559 F. Supp. 2d 85, 2008 WL 2447463 (D.Me. 2008), at-will employment, *Block Corp. v. Nunez*, 2008 WL 1884012 (N.D. Miss. 2008), or employment pursuant to a contract, *Erickson v. Brown*, 747 N.W. 2d 34, 2008 WL 755304 (N.D. 2008).

3. Good Faith Does Not Rewrite the Express Terms of a Contract.

Several courts this year have refused to consider extrinsic evidence, presented to vary the express terms of a contract, that was predicated upon Article One’s obligation of good faith. *See, e.g., Peach State Roofing, Inc. v. 2224 South Trail Corp.*, ___ So. 2d ___, 2008 WL 2150947 (Fla. App. 2008); *Novelis Corp. v. Anheuser-Busch, Inc.*, 559

F. Supp. 2d 877 (N.D. Ohio 2008); *Pierce v. QVC, Inc.*, 555 F. Supp. 2d 499, 2008 WL 1990449 (E.D. Pa. 2008). The *Novelis* decision includes some particularly good language on this point:

The implied duty of good faith and fair dealing in commercial contracts that [UCC Article 1] imposes controls the manner in which contracting parties carry out the obligations they have undertaken in a contract; it does not, however, give a court the power to impose additional obligations on one contracting party because a court concludes it is unfair to have the other shoulder a market risk that the former expressly bargained to avoid and the other expressly agreed to assume.

Id. at 85.

4. Good Faith Does Not Require a Party to Decline to Play its Best Hand.

This is related to the point made above, but I believe it merits special emphasis. In *Austrian Airlines Oesterreichische Luftverkehrs AG v. UT Finance Corp.*, 567 F. Supp. 2d 579 (S.D.N.Y. 2008), the court allowed a buyer to exercise its contractual right to walk away from the deal after a non-conforming tender, rather than permitting the seller to cure. The court rejected the seller's argument that the buyer was acting in bad faith by taking advantage of the fact that the market price for the goods had fallen significantly. In rejecting this argument, the court found that there was no reason not to give the buyer the benefit of its bargain, especially because both parties were "highly sophisticated and well advised commercial entities."

5. Good Faith Does Not Require a Certain Duty of Care.

As the court held in *J. Walter Thompson, U.S.A., Inc., v. First Bank Americano*, 518 F.3d 128, 2008 WL 564967 (2d. Cir. 2008), the UCC's duty of good faith does not impose a standard of care, but instead a standard of fair dealing. Notably, and as discussed in this newsletter's Spotlight column, the court in *In re Jersey Tractor Trailer Training, Inc.*, 2008 WL 2783342 (D.N.J. 2008), errs on this point.

6. Good Faith Does Not Apply to Parties With No Contractual Relationship

In *Kahn v. Volkswagen of America*, 2008 WL 590469 (Conn. Super. Ct. 2008), the court refused to allow a purchaser of a Volkswagen automobile to assert a claim against the car's manufacturer based on an alleged breach of Article 1's duty of good faith, because it found that there was no contract between the purchaser and manufacturer to which such a duty could attach.

If you should run across additional cases (or articles) discussing the contours of good faith, including what it can and cannot do, please send them my way at adams@law.stetson.edu. My plan is to continue to update the good faith bibliography that was begun earlier this year, and to make it available to anyone who might be interested.

ABA UCC/ComFin Newsletter

Letter of Credit Subcommittee

September 2008

The focus of this article is on recent cases dealing with forum and procedural issues.

1. Forum and Procedural Issues. (a) In *Setzer v. Natixis Real Estate Capital, Inc.*, 537 F.Supp.2d 876 (E.D.Ky. 2008) the applicant sued the issuer and the beneficiary claiming fraud by the beneficiary and seeking to enjoin the issuer from paying on the letter of credit and the beneficiary from drawing on the letter of credit. The beneficiary moved to dismiss on the grounds that the underlying contract had a forum selection clause which required that each party submit to the exclusive jurisdiction of the courts in the State of New York for any legal action or proceeding resulting from the underlying transaction. The court concluded that there was no fraud in the inducement of the underlying contract and that the fraud alleged as grounds for enjoining payment or any draw on the letter of credit did not taint the validity of the underlying contract (or the forum selection clause therein). Accordingly, the court granted the beneficiary's motion to dismiss without prejudice.

The court was silent as to the impact on the issuer. Presumably the issuer was also dismissed from the action. Otherwise the lawsuit would continue in Kentucky as to the applicant's request for a preliminary injunction against the issuer, while the applicant would have had to sue the beneficiary separately in New York. It is also unclear whether the issuer (Fifth Third Bank) was subject to jurisdiction in New York. Clearly the issuer was not a party to the underlying transaction and the forum selection clause.

This case is reminiscent of the facts in three related cases in which three different courts came to different conclusions as to whether the forum selection clause in the underlying contract precluded the court from enjoining the payment under various letters of credit issued to support the obligations in the underlying contract. See *Hendricks v. Bank of America, N.A.*, 408 F.3d 1127 (9th Cir. 2005) (affirming injunction against an issuer despite forum selection clause in underlying contract choosing a different forum); *American Patriot Insurance Agency, Inc. v. Mutual Risk Management, Ltd.*, 364 F.3d 884 (7th Cir. 2004) (affirming dismissal of the injunction action against a second issuer) *aff'g* 248 F.Supp.2d 779, 781 (N.D.Ill. 2003); *Hendricks v. Comerica Bank*, 122 Fed.Appx. 820 (6th Cir. 2004) (vacating injunction issued by trial court). In case of a fraud on the beneficiary, an applicant does not want to be delayed in getting a preliminary injunction based on procedural issues dealing with forum selection clauses. Hence, an applicant needs to consider the impact of a forum selection problem in both the drafting of the underlying contract and in the choice of the issuer.

(b) One can also forum shop as between federal and state court. In that context, the three-party arrangement which constitutes the basic letter of credit scenario also raises issues as to who is a required party in litigation and on what side the issuer is placed.

In *Holiday Isle, LLC v. Clarion Mortgage Capital, Inc.*, 2008 U.S. Dist. LEXIS 30561 (S.D. Ala.2008), the beneficiary under a letter of credit sued Clarion, the alleged issuer, for dishonoring a presentation under the letter of credit. The beneficiary was a citizen of the state of

Alabama, and Clarion was a Colorado corporation. The original complaint was filed in Alabama state court, and Clarion removed the action to federal court on the basis of diversity. Clarion took the position that it was not in fact the issuer of the letter of credit. Based upon this assertion and other facts that came to light after the filing of the initial complaint, the beneficiary sought to amend the complaint to add additional parties who purportedly had misled the beneficiary into believing that the letter of credit was issued by Clarion. One of the additional defendants was an Alabama citizen, and the addition of that potential defendant to the case would destroy diversity jurisdiction. The court granted beneficiary's motion to remand the case to Alabama state court.

In *Graddick, et al. v. BankTrust, et al.*, 2008 U.S. Dist. LEXIS 26826 (S.D. Ala. 2008), the applicant on a letter credit sought a temporary restraining order against the issuer to prevent payment under the letter of credit. Both the applicant and the issuer were citizens of Alabama. The complaint alleged that subject matter jurisdiction in federal court rested on diversity of citizenship on the basis that the "true Defendants are residents of Florida and Tennessee", the "true Defendants" being the escrow agent (the beneficiary), a real estate developer and its principal. Although those persons were not named as defendants in the complaint, they were the only entities from which the applicant sought relief. The court dismissed the complaint on the basis of lack of diversity between the applicant and the issuer.

In *Titan Aviation, LLC v. Key Equipment Finance, Inc.*, 2006 WL 3040923 (N.D. Tex. 2006), Titan, a Texas LLC, the applicant under a letter of credit, sued the issuer and the beneficiary to enjoin payment. The complaint was initially filed in Texas state court, and was removed to federal district court based on the citizenship of the beneficiary, who contended that the issue of Texas citizenship of the issuer could be ignored because the issuer was a nominal defendant who had been improperly joined. The court concluded that the issuer was not a necessary party and that complete relief could be accorded to Titan even if the issuer was not a party to the suit. An injunction preventing the beneficiary from drawing or accepting the proceeds of the LC would provide Titan complete relief. On that basis the court refused to remand the case to state court.

Subcommittee on Payments

Chair: Sarah Howard Jenkins, Charles C. Baum Distinguished Professor
University of Arkansas at Little Rock, William H. Bowen School of Law

Vice Chair: Greg Cavanagh, Assistant Vice President and Counsel
Federal Reserve Bank of New York

2008 Annual Meeting Sarah Howard Jenkins, Chair

At the 2008 annual meeting, the Subcommittee on Payments jointly sponsored a panel presentation entitled *Modernizing Payments Law: Prepaid Debit, Stored Value and Other Forms of Electronic Money* with the Electronic Payments and Financial Services Subcommittee of the Cyberspace Law Committee. The panel presentation was coordinated by Sarah Jane Hughes and Stephen T. Middlebrook, co-chairs of the Electronic Payments and Financial Services Subcommittee. Panelists expressed concerns on numerous issues including: inconsistent regulation of some payment providers and the absence of guidance and regulation of others; existing conflicts between federal and state regulations; consumer confusion; and the need to address prepaid debit, stored value, and other forms of electronic money in any harmonizing of payments law. As a point of comparison, Thaer Sabri, Chief Executive of Electronic Money Association (London, UK), addressed the European Union's experience in regulating electronic money from 2000 with the Electronic Money Directive which created a carve out for non-bank issuers of prepaid or stored value products to the EU's current efforts in implementing the Payment Services Directive. The Payment Services Directive, described as a comprehensive set of rules applicable to all payment services whether credit, money transfer, or prepaid, must be implemented by all Member States by November 2009.

Recent Authority UCC Article 3 – Comparative Negligence By Stephen C. Veltri

Comparative negligence provisions appear in a number of the loss allocation rules set forth in articles 3 and 4 of the Uniform Commercial Code. These provisions generally allow a person liable for the loss resulting from check fraud to apportion that loss with others whose negligence "substantially contributed" to the success of the fraudulent scheme. Recently, a closely divided Indiana Supreme Court read one of these comparative negligence provisions quite narrowly.

In *Auto-Owners Insurance Company v. Bank One*, 879 N.E.2d 1086 (Ind. 2008), an insurance adjuster opened an account at Bank One in the name of "Auto-Owners, Kenneth B. Wulf." The adjuster, Wulf, then began to steal checks made payable to his employer, Auto-Owners Insurance Company. He indorsed the checks with a rubber stamp that read "Auto-

Owners Insurance For Deposit Only” and deposited them for collection in the Bank One account. The checks were all paid and, in this fashion, Wulf was able to steal over \$500,000 from his employer.

Generally, section 3-405 of the Code fixes the loss for this kind of employee theft on the employer. The section validates any fraudulent indorsement made by an employee who has been given responsibility to handle his employer’s checks. As a result the checks are properly payable. The banks collecting and paying the check are thus absolved from liability and the employer bears any loss the employer cannot recoup from the embezzler. Section 3-405, however, has a comparative negligence provision that reads “If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.”

Auto-Owners Insurance Company contended these provisions allowed it to shift a portion of the loss resulting from Wulf’s thefts to Bank One. The company established that Bank One never requested any documentation from Wulf showing he had the authority to open and use the account. In a 3-2 decision, however, the Indiana Supreme Court held that only negligence connected with the “taking” and “paying” of a check was relevant under section 3-405, not negligence associated with the opening of the account used to collect the check. The court noted section 3-405 was meant to make employers responsible for monitoring their employees and the court believed that purpose would be frustrated by shifting any portion of a loss occasioned by an employee’s fraudulent indorsement to any bank absent evidence that bank was negligent in “taking” or “paying” a check.

Alternatively, the court held that any negligence by Bank One in opening the account was by itself too remote from the check fraud to be said to have “substantially contributed” to the loss. Relying on precedent cited in the official comments, the court asked whether Bank One’s negligence in opening the account was a “substantial factor” in causing Auto-Owner’s loss. The court held it was not. It noted the account was opened some eight years before the thefts were detected. Consequently, the court felt Auto-One’s failure to supervise its employees was the only substantial factor contributing to the loss; any negligence on the part of the bank was not. Accordingly, the court affirmed a summary judgment in favor of Bank One.

Parties looking to mitigate losses suffered due to check fraud frequently seek to apportion the loss with depository banks under the Code’s comparative negligence provisions. The Indiana Supreme Court’s decision should offer these banks some comfort not only with its parsing of the statute to isolate the acts associated with the opening of an account from check collection, but also with its narrowing of the legal standard for causation.

Subcommittees on Secured Lending (ComFin) and Secured Transactions (UCC)

Katherine Simpson Allen, Chair (ComFin), Pauline M. Stevens, Chair (UCC), Wansun Song, Vice Chair (ComFin), Thomas E. Plank, Vice Chair (UCC)

The Joint Meeting of the Commercial Finance Committee Secured Lending Subcommittee and the UCC Committee Secured Transaction Subcommittee was held at the ABA Annual Meeting in New York on August 9th. At that meeting, Edwin Smith and Steven Weise discussed the work of the Joint Review Committee for Article 9 and some concepts around which amendments to Article 9 may be appropriate, including issues created by non-uniform state amendments. Anyone interested in following the progress of this work may find an update at http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=21.

Joint Task Force on Filing Office Operations and Search Logic

James D. Prendergast and Paul Hodnefield, Co-Chairs

The Filing Office Operations and Search Logic Task Force continues to address significant issues facing the Article 9 Drafting Committee. The Task Force held a “debate” between Sue Collins and Steve Weise on debtor name issues at the recent meeting of the Section in New York. Since the meeting, through Task Force monthly telephone conference and meetings of subcommittees, especially subcommittees on Forms and Debtor Name, the Task Force is hoping to be a useful contributor to the Joint Review Committee. Our next conference call is scheduled for November 17th at 11:00 a.m. EDT. We strongly encourage all members of the Joint Task Force to participate in these once a month, one hour conference calls. Each member’s participation helps create a diverse platform of analysis, which is crucial to the success of the Task Force. We are always seeking new Task Force members, so please go on the ABA website and join today!

Useful Links and Websites

Carol Nulty Doody, UCC Committee Editor

Please find below a list of electronic links that are not ABA-affiliated sites, but are resources our members find useful:

1. The UCCLAW-L listserv, which is sponsored by West Group, publisher of the "UCC Reporting Service." To subscribe to the UCCLAW-L listserv, go to <http://lists.washlaw.edu/mailman/listinfo/ucclaw-l>;
2. U. Penn's archive of NCCUSL final acts and drafts can be accessed at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm>;
3. Pace University's database of CISG decisions can be accessed at <http://cisgw3.law.pace.edu>; and
4. Gonzaga University's new Commercial Law Center has a variety of links to useful sites and can be accessed at <http://www.law.gonzaga.edu/About-Gonzaga-Law/Commercial-Law-Center/default.asp>.

In addition, the Commercial Finance Committee's Task Force on Surveys of State Commercial Laws [website](#) links to surveys of the law of all 50 states (except Connecticut), DC and Puerto Rico.

With your help, our list of electronic resources will continue to grow. Please feel free to forward other electronic resources you would like to see included in future editions of the Commercial Law Newsletter, by sending them to either [Christine Gould Hamm](#), the Commercial Finance Editor, or [Carol Nulty Doody](#), the Uniform Commercial Code Editor.

UNIFORM STATE LAWS SCORECARD

Survey of Adoptions of Revised Official Text of the UCC¹

As of September 12, 2008

| STATES | Article 1 (2001) | Article 2A ² (1987) (1990) | Articles 3&4 ³ (2002) | Article 6 (1989) | Article 7 (2003) |
|----------------------|---------------------|---|-------------------------------------|---------------------|---------------------|
| Alabama | Enacted '04 | Enacted '92 | Not Enacted | Repeal '96 | Enacted '04 |
| Alaska | Not Enacted | Enacted '93 | Not Enacted | Repeal '93 | Not Enacted |
| Arizona | Enacted '06 | Enacted '92 | Not Enacted | Repeal '04 | Enacted '06 |
| Arkansas | Enacted '05 | Enacted '93 | Enacted '05 | Repeal '91 | Enacted '07 |
| California | Enacted '06 | Enacted '91 | Not Enacted | Revise '90 | Enacted '06 |
| Colorado | Enacted '06 | Enacted '91 | Not Enacted | Repeal '91 | Enacted '06 |
| Connecticut | Enacted '05 | Enacted '02 | Not Enacted | Repeal '93 | Enacted '04 |
| Delaware | Enacted '04 | Enacted '92 | Not Enacted | Repeal '96 | Enacted '04 |
| District of Columbia | Not Enacted | Enacted '92 | Not Enacted | Revise '97 | Not Enacted |
| Florida | Enacted '07 | Enacted '90 | Not Enacted | Repeal '93 | Not Enacted |
| Georgia | Not Enacted | Enacted '93 | Not Enacted | Not Enacted | Not Enacted |
| Hawaii | Enacted '04 | Enacted '91 | Not Enacted | Repeal '98 | Enacted '04 |
| Idaho | Enacted '04 | Enacted '93 | Not Enacted | Repeal '93 | Enacted '04 |
| Illinois | Enacted '08 | Enacted '91 | Not Enacted | Repeal '91 | Enacted '08 |
| Indiana | Enacted '07 | Enacted '91 | Not Enacted | Repeal '07 | Enacted '07 |
| Iowa | Enacted '07 | Enacted '94 | Not Enacted | Repeal '94 | Enacted '07 |
| Kansas | Enacted '07 | Enacted '91 | Not Enacted | Repeal '92 | Enacted '07 |
| Kentucky | Enacted '06 | Enacted '90 | Enacted '06 | Repeal '92 | Not Enacted |
| Louisiana | Enacted '06 | Not Enacted | Not Enacted | Repeal '91 | Not Enacted |
| Maine | Not Enacted | Enacted '92 | Not Enacted | Repeal '92 | Not Enacted |
| Maryland | Not Enacted | Enacted '94 | Not Enacted | Not Enacted | Enacted '04 |
| Massachusetts | Not Enacted | Enacted '96 | Not Enacted | Repeal '96 | Not Enacted |
| Michigan | Not Enacted | Enacted '92 | Not Enacted | Repeal '98 | Not Enacted |
| Minnesota | Enacted '04 | Enacted '91 | Enacted '03 | Repeal '91 | Enacted '04 |
| Mississippi | Not Enacted | Enacted '94 | Not Enacted | Repeal '94 | Enacted '06 |
| Missouri | Not Enacted | Enacted '92 | Not Enacted | Repeal '04 | Not Enacted |
| Montana | Enacted '05 | Enacted '91 | Not Enacted | Repeal '91 | Enacted '05 |
| Nebraska | Enacted '05 | Enacted '91 | Not Enacted | Repeal '91 | Enacted '05 |
| Nevada | Enacted '05 | Enacted '91 | Enacted '05 | Repeal '91 | Enacted '05 |
| New Hampshire | Enacted '06 | Enacted '93 | Not Enacted | Repeal '93 | Enacted '06 |
| New Jersey | Not Enacted | Enacted '94 | Not Enacted | Repeal '94 | Not Enacted |
| New Mexico | Enacted '05 | Enacted '92 | Not Enacted | Repeal '92 | Enacted '05 |

| STATES | Article 1 (2001) | Article 2A ² (1987) (1990) | Articles 3&4 ³ (2002) | Article 6 (1989) | Article 7 (2003) |
|----------------|---------------------|---|-------------------------------------|---------------------|---------------------|
| New York | Not Enacted | Enacted '94 | Not Enacted | Repeal '01 | Not Enacted |
| North Carolina | Enacted '06 | Enacted '93 | Not Enacted | Repeal '04 | Enacted '06 |
| North Dakota | Enacted '07 | Enacted '91 | Not Enacted | Repeal '93 | Enacted '05 |
| Ohio | Not Enacted | Enacted '92 | Not Enacted | Repeal '96 | Not Enacted |
| Oklahoma | Enacted '05 | Enacted '91 | Enacted '08 | Repeal '97 | Enacted '05 |
| Oregon | Not Enacted | Enacted '89 | Not Enacted | Repeal '91 | Not Enacted |
| Pennsylvania | Enacted '08 | Enacted '92 | Not Enacted | Repeal '92 | Enacted '08 |
| Rhode Island | Enacted '07 | Enacted '91 | Not Enacted | Repeal '01 | Enacted '06 |
| South Carolina | Not Enacted | Enacted '01 | Enacted '08 | Repeal '01 | Not Enacted |
| South Dakota | Enacted '08 | Enacted '89 | Not Enacted | Repeal '93 | Not Enacted |
| Tennessee | Enacted '08 | Enacted '93 | Not Enacted | Repeal '98 | Enacted '08 |
| Texas | Enacted '03 | Enacted '93 | Enacted '05 | Repeal '93 | Enacted '05 |
| Utah | Enacted '07 | Enacted '93 | Not Enacted | Repeal '96 | Enacted '06 |
| Vermont | Enacted '08 | Enacted '94 | Not Enacted | Repeal '94 | Not Enacted |
| Virginia | Enacted '03 | Enacted '91 | Not Enacted | Revise '97 | Enacted '04 |
| Washington | Not Enacted | Enacted '93 | Not Enacted | Repeal '93 | Not Enacted |
| West Virginia | Enacted '06 | Enacted '96 | Not Enacted | Repeal '92 | Enacted '06 |
| Wisconsin | Not Enacted | Enacted '92 | Not Enacted | Not Enacted | Not Enacted |
| Wyoming | Not Enacted | Enacted '91 | Not Enacted | Repeal '91 | Not Enacted |

Please note that the Enactment Date does not necessarily reflect the effective date. Please refer to the applicable statute for the relevant effective date.

Our thanks to the National Conference of Commissioners on Uniform State Laws ("NCCUSL") for their help in compiling the information above. These revisions are based on information provided by NCCUSL as of September 12, 2008.

1. In addition to enactments noted below, all states and the District of Columbia have adopted (i) the 1995 Official Text of Article 5 of the UCC, (ii) the 1994 Official Text of Article 8 of the UCC and (iii) the 1998 Official Text of Article 9 of the UCC.
2. All states have adopted the 1990 version of Article 2A with the exception of Louisiana and South Dakota. Louisiana has not enacted Article 2A and South Dakota still has the 1987 version of Article 2A. A 2003 version of Article 2A has been introduced in Kansas and Oklahoma, but has not yet been enacted in any state.
3. New York is the only state that still has the 1951 version of Articles 3 and 4.



COMMERCIAL FINANCE COMMITTEE

Section of Business Law
American Bar Association

LEADERSHIP ROSTER

SEPTEMBER 2008

COMMERCIAL FINANCE COMMITTEE LEADERSHIP ROSTER

ComFin Committee

| Position | Contact Information | Term Expires¹ |
|---------------------------------|--|---------------------------------|
| Chair | Lynn A. Soukup Pillsbury Winthrop Shaw Pittman LLP 2300 N Street, NW Washington, DC 20037-1122 Direct: 202.663.8494 Fax: 202.663.8007 E-mail: lynn.soukup@pillsburylaw.com | 2010 |
| Vice Chair | James C. Schulwolf Shipman & Goodwin LLP One Constitution Plaza Hartford, CT 06103-1919 Direct: 860.251.5949 Fax: 860.251.5311 Main Fax: 860.251.5099 E-mail: jschulwolf@goodwin.com | 2010 |
| Vice Chair ² | Neal J. Kling Sher Garner Cahill Richter Klein & Hilbert, L.L.C. 909 Poydras Street, Suite 2800 New Orleans, LA 70112 Direct: 504.299.2112 Fax: 504.299.2312 Main Fax: 504.299.2300 E-mail: nkling@shergarner.com | 2010 |
| Business Law Section Advisor | Professor Steven L. Schwarcz Stanley A. Star Professor of Law & Business Duke University School of Law Founding/Co-Academic Director, Global Capital Markets Center Duke Law School, Box 90360 Corner Science & Towerview Durham, NC 27708-0360 Direct: 919.613.7060 Fax: 919.613.7231 E-mail: schwarcz@law.duke.edu | 2009 |

¹ Terms expire following Annual Meeting in the indicated year.

² Will also serve as co-liaison to the Diversity Committee.

Subcommittees and Taskforces

Agricultural and Agri-Business Financing

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Chair | R. Lawrence Harris Melchert Hubert Sjodin, PLLP Main Street Exchange Building 121 Main Street West, Suite 200 Waconia, MN 55387 Tel: 952.442.7700 Fax: 952.442.6166 E-mail: rlharris@mhslaw.com | 2011 |
| Vice Chair | Drew K. Theophilus Baird Holm LLP 1500 Woodmen Tower 1700 Farnam Street Omaha, Nebraska 68102-2068 Direct: 402.636.8291 Fax: 402.344.0588 E-mail: dtheophilus@bairdholm.com | 2011 |

Aircraft Financing

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Chair | Michael K. Vernier Associate General Counsel Standard & Poor's Ratings Services 55 Water Street, 35 th Floor New York, NY 10041 Direct: 212.438.6629 Fax: 212.438.6632 E-mail: michael_vernier@sandp.com | 2009 |
| Vice Chair | Peter B. Barlow General Counsel Skybus Airlines, Inc. 4324 East 5 th Avenue Columbus, Ohio 43219 Mobile: 404-272-3952 E-mail: pete.barlow@skybus.com | 2009 |

Colloquium on ADR in Commercial Finance Disputes(Taskforce)

| Position | Contact Information | Term Expires |
|-----------------|--|---------------------|
| Chair | Thomas J. Welsh Brown & Welsh, P.C. 530 Preston Avenue, 2nd Floor Meriden, CT 06450 Direct: 203.235-1651 Fax: 203.235.9600 Email: TJWelsh@BrownWelsh.com | N/A |
| | <i>Colloquium Chair</i> Michael S. Greco K&L Gates One Lincoln Street Boston, Massachusetts 02111 Direct: 617.261.3232 Fax: 617.261.3175 Email: michael.greco@klgates.com | N/A |

Commercial Finance Terms (Joint Taskforce with UCC Committee)

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Co-Chair | Carl Bjerre Professor of Law University of Oregon School Law 1515 Agate Street Eugene, OR 97403 (541) 346-3981 cbjerre@law.uoregon.edu | N/A |
| Co-Chair | Meredith Jackson Irell & Manella LLP 1800 Avenue of the Stars Suite 900 Los Angeles, CA 90067-4276 (310) 203-7953 Fax: (310) 556-5393 MJackson@irell.com | N/A |

Creditors' Rights

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Chair | Shannon Lowry Nagle O'Melveny & Myers LLP Times Square Tower 7 Times Square New York, NY 10036 Tel: 212.408.2452 Fax: 212.326.2061 Email: snagle@omm.com | 2011 |
| Vice Chair | Elizabeth M. Bohn Jordan Burt LLP 777 Brickell Avenue Suite 500 Miami, FL 33131 Tel: 305.347.6879 Fax: 305.372.9928 Email: EB@jordenusa.com | 2011 |

Cross Border and Trade Financing

| Position | Contact Information | Term Expires |
|-----------------|--|---------------------|
| Chair | Daryl E. Clark Blake, Cassels & Graydon LLP 595 Burrard Street P.O. Box 49314 Suite 2600, Three Bentall Centre Vancouver BC V7X 1L3 Canada Direct: 604.631.3357 Fax: 604.631.3309 E-mail: daryl.clark@blakes.com | 2010 |
| Vice Chair | Jonathan M. Cooper Goldberg Kohn 55 East Monroe, Suite 3300 Chicago, IL 60603 Direct: 312-201-3980 Fax: 312-863-7480 Jonathan.cooper@goldbergkohn.com | |

Deposit Account Control Agreements Taskforce (Joint Taskforce with Banking Law, Consumer Financial Services and UCC Committees)

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Co-chair | R. Marshall Grodner McGlinchey Stafford PLLC 301 Main Street One American Place, 14th Floor Baton Rouge, LA 70825 Direct: 225.382.3651 Fax: 225.343.3076 E-mail: mgrodner@mcglinchey.com | N/A |
| Co-chair | Marvin D. Heilesen 1925 Miln House Road Williamsburg, VA 23185-7699 Phone: 757.220.9321 E-mail: heilesen@earthlink.net | N/A |
| Co-chair | John D. Pickering Balch & Bingham LLP 1901 Sixth Avenue North, Suite 1500 Birmingham, AL 35203-4644 Direct: 205.226.8752 Fax: 205.488.5690 Main Fax: 205.226.8799 E-mail: jpickering@balch.com | N/A |
| Co-chair | Edwin E. Smith Bingham McCutchen LLP 1 Federal Street Boston, MA 02110-1726 Direct: 617.951.8615; 212.705.7044 Fax: 617.428.6457 ; 212.752.5378 E-mail: edwin.smith@bingham.com | N/A |
| Co-chair | Oliver I. Ireland Morrison & Foerster 2000 Pennsylvania Avenue, NW Suite 5500 Washington, DC 20006-1888 Direct: 202.778.1614 Fax: 202.887.0763 E-mail: oireland@mofo.com | N/A |

| Position | Contact Information | Term Expires |
|---|--|---------------------|
| Reporter – Securitization DACA | Eric Marcus Kaye Scholer LLP 425 Park Avenue New York, NY 10022-3598 Direct: 212.836-8537 Fax: 212.836.8689 Email: emarcus@kayescholer.com | N/A |
| Reporter – Medicare/Medicaid Form | Leslie J. Polt Adelberg, Rudow, Dorf & Hendler, LLC 7 Saint Paul Street, Suite 600 Baltimore, MD 21202 Direct: 410.986.0832 Fax: 410.539.5834 Email: LPolt@AdelbergRudow.com | N/A |
| Reporter – Medicare/Medicaid Form | Heather Sonnenberg Blank Rome LLP One Logan Square 130 North 18th Street Philadelphia, PA 19103-6998 Direct: 215.569.5701 Fax: 215.832.5701 Email: Sonnenberg@BlankRome.com | N/A |

Filing Office Operations and Search Logic (Joint Taskforce with UCC Committee)

| Position | Contact Information | Term Expires |
|-----------------|--|---------------------|
| Co-chair | James D. Prendergast First American Title Insurance Company UCC Insurance Division 5 First American Way Santa Ana, CA 92707 Direct: 714.250.8622 Fax: 714.250.8694 E-mail: jprendergast@firstam.com | N/A |

| Position | Contact Information | Term Expires |
|-----------------|--|---------------------|
| Co-chair | Paul Hodnefield Associate General Counsel Corporation Service Company Suite 700 380 Jackson Street Saint Paul, MN 55101-4809 Direct: 800-927-9801 ext 2375 Cell: 952.649.1555 E-mail: phodnefi@cscinfo.com | N/A |

Intellectual Property Financing

| Position | Contact Information | Term Expires |
|-----------------|--|---------------------|
| Chair | Matthew W. Kavanaugh Buchalter Nemer PLC 1000 Wilshire Boulevard, Suite 1500 Los Angeles, CA 90017-2457 Direct: 213.891.5449 Fax: 213.630.5649 Main Fax: 213.896.0400 E-mail: mkavanaugh@buchalter.com | 2009 |
| Vice Chair | John E. Murdock III Boult, Cummings, Connors & Berry PLC 1600 Division Street, Suite 700 Nashville, TN 37203 Direct: 615.252.2359 Fax: 615.252.6359 Main Fax: 615.252.6380 E-mail: jmurdock@boultcummings.com | 2009 |

Lender Liability

| Position | Contact Information | Term Expires |
|-----------------|--|---------------------|
| Chair | Jeffrey W. Kelley Troutman Sanders LLP 600 Peachtree Street, NE, Suite 5200 Atlanta, GA 30308-2216 Direct: 404.885.3383 Fax: 404.962.6847 Main Fax: 404.885.3900 E-mail: jeffrey.kelley@troutmansanders.com | 2009 |
| Vice Chair | Mathew S. Rotenberg Blank Rome LLP One Logan Square 130 North 18th Street Philadelphia, PA 19103-6998 Direct: 215.569.5662 Fax: 215.832.5662 Main Fax: 215.569.5555 E-mail: rotenberg@blankrome.com | 2009 |

Loan Documentation

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Chair | Bobbi Acord Parker, Hudson, Rainer & Dobbs LLP 1500 Marquis Two Tower 285 Peachtree Center Avenue, N.E. Atlanta, GA 30303 Direct: 404.420.5537 Fax: 404.522.8409 Email: bacord@phrd.com | 2011 |
| Vice Chair | Scott Lessne CapitalSource Finance LLC 4445 Willard Ave. 12th Floor Chevy Chase, MD 20815 Direct: 301.634.6748 Email: slessne@capitalsourcebank.com | 2011 |

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Vice Chair | Cheryl Stacey McMillan LLP Brookfield Place, Suite 4400 Bay Wellington Tower 181 Bay Street Toronto, Ontario Canada M5J 2T3 Direct: 416-865-7243 Fax: 416-865-7048 Email: cheryl.stacey@mcmillan.ca | 2011 |

Loan Workouts

| Position | Contact Information | Term Expires |
|-----------------|--|---------------------|
| Chair | Steven B. Soll Otterbourg, Steindler, Houston & Rosen, P.C. 230 Park Avenue New York, NY 10169 Tel: 212-905-3650 Fax: 917.368.7133 Email: ssoll@oshr.com | 2010 |
| Vice Chair | Cathy L. Reece Fennemore Craig, PC 3003 N. Central Ave., Suite 2600 Phoenix, Arizona 85012-2913 Tel: (602) 916-5343 Fax: (602) 916-5543 E-mail: creece@fclaw.com | 2010 |

Maritime Financing

| Position | Contact Information | Term Expires |
|-----------------|--|---------------------|
| Chair | David McI. Williams Gorman & Williams Charles Center South, Suite 900 36 South Charles Street Baltimore, MD 21201-3754 Tel: 410.464.7062 Fax: 443.874.5113 E-mail: dmwilliams@gandwlaw.com | 2011 |

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Vice Chair | Mark J. Buhler Holland & Knight 200 Orange Avenue, Ste 2600 Orlando, FL 32801 Direct: 407-244-5113 Fax: 407-244-5288 E-mail: mbuhler@hkllaw.com | 2011 |

Model Intercreditor Agreement Taskforce

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Chair | Gary D. Chamblee Womble Carlyle Sandridge & Rice, PLLC One Wachovia Center Suite 3500, 301 South College Street Charlotte, NC 28202-6037 Direct: 704.331.4921 Fax: 704.338.7817 Main Fax: 704.331.4955 E-mail: gchamblee@wcsr.com | N/A |
| Vice Chair | Alyson B.G. Allen Ropes & Gray LLP One International Place Boston, MA 02110-2624 Direct: 617-951-7483 Fax: 617-951-7050 E-mail: alyson.allen@ropesgray.com | N/A |
| Vice Chair | R. Christian Brose McGuireWoods LLP 201 North Tryon Street, Suite 3000 Charlotte, NC 28202 Direct: 704.343.2315 Fax: 704.444.8871 E-mail: cbrose@mcguirewoods.com | N/A |
| Vice Chair | Richard K. Brown Winston & Strawn, LLP 100 North Tryon Street 33 rd Floor Charlotte, NC 28202 Direct: 704.350-7721 Main: 704.350.7700 Fax: 704.350.7800 E-mail: rbrown@winston.com | N/A |

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Vice Chair | Robert L. Cunningham, Jr. Gibson, Dunn & Crutcher LLP 200 Park Avenue, 47 th Floor New York, New York 10166-0193 Direct: 212.351.2308 Fax: 212.351.5208 E-mail: rcunningham@gibsondunn.com | N/A |
| Vice Chair | Jane Summers Latham & Watkins LLP 885 Third Avenue New York, NY 10022-4834 Direct: 212.906.1838 Fax: 212.751.4864 E-mail: jane.summers@lw.com | N/A |
| Vice Chair | Randall Klein Goldberg Kohn 55 East Monroe, Suite 3300 Chicago, Illinois 60603 Direct: 312.201.3974 Fax: 312.863.7474 Randall.klein@goldbergkohn.com | |

*Planning and Communications*³

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Co-Chair | Anthony R. Callobre Bingham McCutchen LLP 355 South Grand Avenue, Suite 4400 Los Angeles, CA 90071-3106 Direct: 213.680.6686 Fax: 213.830.8606 Main Fax: 213.680.6499 E-mail: anthony.callobre@bingham.com | 2011 |

³ Has assumed the functions of Programs and Seminars subcommittee – closed subcommittee (current ComFin leadership only)

| Position | Contact Information | Term Expires |
|--|---|---------------------|
| Co-Chair | Meredith S. Jackson Irell & Manella LLP 1800 Avenue of the Stars Suite 900 Los Angeles, CA 90067-4276 (310) 203-7953 Fax: (310) 556-5393 12/21/2007 12/21/2007 MJackson@irell.com | 2011 |
| Vice Chair ⁴ | R. Marshall Grodner McGlinchey Stafford PLLC 301 Main Street One American Place, 14th Floor Baton Rouge, LA 70825 Direct: 225.382.3651 Fax: 225.343.3076 E-mail: mgrodner@mcglinchey.com | 2010 |
| Vice Chair ⁵ | Norman M. Powell Young Conaway Stargatt & Taylor, LLP The Brandywine Building 1000 West Street, 17th Floor P.O. Box 391 Wilmington, DE 19899-0391 Direct: 302.571.6629 Fax: 302.576.3228 Main Fax: 302.571.1253 E-mail: npowell@yest.com | 2010 |
| Vice Chair - Newsletter Editor | Christine Gould Hamm Husch Blackwell Sanders LLP 1200 Main Street, Suite 2300 Kansas City, MO 64105 Direct: 816.283.4626 Fax: 816.421.0596 E-mail: christine.hamm@huschblackwell.com | N/A |
| Assistant Newsletter Editor and Young Lawyers Liaison | Stacey Walker PO Box 750340 Forest Hills, NY 11375-0340 Direct: (646) 242-5487 E-mail: swcounsel@gmail.com | 2010 |

⁴ Will also serve as co-liaison to the Website Management and Technology Committee.

⁵ Will also serve as co-liaison to the Membership Committee.

| Position | Contact Information | Term Expires |
|--------------------------------|---|---------------------|
| Assistant Newsletter Editor | Lauren E. Wallace Venable LLP 750 Pratt Street, Suite 900 Baltimore, MD 21202 Direct: 410.244.7770 Fax: 410.244.7742 lwallace@venable.com | 2010 |

Real Estate Financing

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Chair | Kathleen J. Hopkins Real Property Law Group PLLC 1326 Fifth Avenue, Suite 654 Seattle, Washington 98101 Direct: 206.625.0404 Fax: 206.374.2866 E-mail: khopkins@rp-lawgroup.com | 2010 |
| Vice Chair | Edgel C. Lester, Jr. Carlton Fields, P.A. Corporate Center Three at International Plaza 4221 West Boy Scout Boulevard, Suite 1000 Tampa, Florida 33607 Direct: 813.229.4231 Fax: 813.229.4133 E-mail: elester@carltonfields.com | 2010 |

Secured Lending

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Chair | Katherine Simpson Allen Stites & Harbison PLLC 401 Commerce Street, Suite 800 Nashville, TN 37219 Direct: 615.782.2205 Fax: 615.742.4100 Main Fax: 615.782.2371 E-mail: katherine.allen@stites.com | 2009 |

| Position | Contact Information | Term Expires |
|-----------------|--|---------------------|
| Vice Chair | Wansun Song Milbank, Tweed, Hadley & McCloy LLP 601 South Figueroa Street, 30th Floor Los Angeles, CA 90017-5735 Direct: 213.892.4348 Fax: 213.892.4748 Main Fax: 213.629.5063 E-mail: wsong@milbank.com | 2009 |

Surveys of State Commercial Laws Taskforce

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Co-Chair | Brian D. Hulse Heller Ehrman LLP 701 Fifth Avenue, Suite 6100 Seattle, WA 98104-7098 Direct: 206-389-6128 Fax: 206-515-8935 E-mail: brian.hulse@hellerehrman.com | N/A |
| Co-Chair | Jeremy S. Friedberg Leitess Leitess Friedberg + Fedder P.C. One Corporate Center 10451 Mill Run Circle, Suite 1000 Baltimore, MD 21117 Direct: 410.581.7403 Fax: 410.581.7410 E-mail: jeremy.friedberg@llff.com | N/A |
| Co-Chair | James H. Prior Porter Wright Morris & Arthur, LLP 41 South High Street Columbus, OH 43215 Direct: 614-227-2008 Fax: 614-227-2100 jprior@porterwright.com | N/A |

Syndications and Lender Relations

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Co-Chair | Gary D. Chamblee Womble Carlyle Sandridge & Rice, PLLC One Wachovia Center Suite 3500, 301 South College Street Charlotte, NC 28202-6037 Direct: 704.331.4921 Fax: 704.338.7817 Main Fax: 704.331.4955 E-mail: gchamblee@wcsr.com | 2011 |
| Co-Chair | Richard K. Brown Winston & Strawn, LLP 100 North Tryon Street 33 rd Floor Charlotte, NC 28202 Direct: 704.350-7721 Main: 704.350.7700 Fax: 704.350.7800 E-mail: rbrown@winston.com | 2011 |
| Vice Chair | Christine Gould Hamm Husch Blackwell Sanders LLP 1200 Main Street, Suite 2300 Kansas City, MO 64105 Direct: 816.283.4626 Fax: 816.421.0596 E-mail: christine.hamm@huschblackwell.com | |

Syndications Chapter for ABL Treatise Taskforce

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Co-Chair | Christine Gould Hamm Husch Blackwell Sanders LLP 1200 Main Street, Suite 2300 Kansas City, MO 64105 Direct: 816.283.4626 Fax: 816.421.0596 E-mail: christine.hamm@huschblackwell.com | N/A |

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Co-Chair | Scott Lessne CapitalSource Finance LLC 4445 Willard Ave. 12th Floor Chevy Chase, MD 20815 Direct: 301.634.6748 Email: slessne@capitalsourcebank.com | |

Liaisons

Diversity

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Co-Liaison | Jeremy S. Friedberg Leitess Leitess Friedberg + Fedder P.C. One Corporate Center 10451 Mill Run Circle, Suite 1000 Baltimore, MD 21117 Direct: 410.581.7403 Fax: 410.581.7410 E-mail: jeremy.friedberg@llff.com | 2010 |
| Co-Liaison | Neal J. Kling Sher Garner Cahill Richter Klein & Hilbert, L.L.C. 909 Poydras Street, Suite 2800 New Orleans, LA 70112 Direct: 504.299.2112 Fax: 504.299.2312 Main Fax: 504.299.2300 E-mail: nkling@shergarner.com | 2010 |

Educational Programming

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Liaison | Jeremy S. Friedberg Leitess Leitess Friedberg + Fedder P.C. One Corporate Center 10451 Mill Run Circle, Suite 1000 Baltimore, MD 21117 Direct: 410.581.7403 Fax: 410.581.7410 E-mail: jeremy.friedberg@llff.com | 2010 |

Meetings

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Liaison | Christopher J. Rockers Husch Blackwell Sanders LLP 1200 Main Street, Suite 2300 Kansas City, MO 64105 Direct: 816.283.4608 Fax: 816.421.0596 E-mail: christopher.rockers@huschblackwell.com | 2010 |

Membership

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Co-Liaison | Susan M. Tyler McGlinchey Stafford PLLC 643 Magazine Street New Orleans, LA 70130 Direct: 504.596.2759 Fax: 504-596-2796 E-mail: styler@mcglinchey.com | 2010 |
| Co-Liaison | Norman M. Powell Young Conaway Stargatt & Taylor, LLP The Brandywine Building 1000 West Street, 17th Floor P.O. Box 391 Wilmington, DE 19899-0391 Direct: 302.571.6629 Fax: 302.576.3228 E-mail: npowell@ycst.com | 2010 |

Pro Bono

| Position | Contact Information | Term Expires |
|-----------------|---|---------------------|
| Co-Liaison | Kathleen J. Hopkins Real Property Law Group PLLC 1326 Fifth Avenue, Suite 654 Seattle, Washington 98101 Direct: 206.625.0404 Fax: 206.374.2866 E-mail: khopkins@rp-lawgroup.com | 2010 |

| Position | Contact Information | Term Expires |
|-----------------|--|---------------------|
| Co-Liaison | Malcolm C. Lindquist Lane Powell PC 1420 Fifth Avenue, Suite 4100 Seattle, WA 98101-2338 Direct: 206.223.7101 Fax: 206.223.7107 E-mail: lindquistm@lanepowell.com | 2010 |

Website Management and Technology

| Position | Contact Information | Term Expires |
|-----------------|--|---------------------|
| Co-Liaison | R. Marshall Grodner McGlinchey Stafford PLLC 301 Main Street One American Place, 14th Floor Baton Rouge, LA 70825 Direct: 225.382.3651 Fax: 225.343.3076 E-mail: mgrodner@mcglinchey.com | 2010 |
| Co-Liaison | Mathew S. Rotenberg Blank Rome LLP One Logan Square 130 North 18th Street Philadelphia, PA 19103-6998 Direct: 215.569.5662 Fax: 215.832.5662 Main Fax: 215.569.5555 E-mail: rotenberg@blankrome.com | 2011 |

Photo Directory



Bobbi Acord



Alyson Allen



Katherine Simpson Allen



Peter B. Barlow



Carl J. Bjerre



Elizabeth M. Bohn



Christian Brose



Richard K. Brown



Mark J. Buhler



Anthony R. Callobre



Gary D. Chamblee



Daryl E. Clark



Jonathan M. Cooper



Robert L. Cunningham



Jeremy S. Friedberg



Michael S. Greco



R. Marshall Grodner



Christine Gould Hamm



R. Lawrence Harris

Marvin D. Heilesen



Paul Hodnefield



Kathleen J. Hopkins



Brian D. Hulse



Oliver I. Ireland



Meredith Jackson



Matthew W. Kavanaugh



Jeffrey W. Kelley

Randall Klein



Neal J. Kling



Scott Lessne



Edgel C. Lester, Jr.



Malcolm C. Lindquist



Eric Marcus



John E. Murdock, III



Shannon Lowry Nagle



John D. Pickering



Leslie J. Polt



Norman M. Powell



James D. Prendergast



James H. Prior



Cathy L. Reece



Christopher J. Rockers



Mathew S. Rotenberg



James C. Schulwolf



Steven L. Schwarcz



Edwin E. Smith



Stephen B. Soll



Wansun Song



Heather Sonnenberg



Lynn A. Soukup



Cheryl Stacey



Jane Summers



Drew K. Theophilus



Susan M. Tyler



Michael K. Vernier



Stacey Walker

Lauren Wallace



Thomas J. Welsh



David McI. Williams

**ABA BUSINESS LAW SECTION
UCC COMMITTEE**

LEADERSHIP DIRECTORY

September, 2008



UCC COMMITTEE LEADERSHIP

[All terms expire at the end of the ABA Annual Meeting in the year indicated]

| | | Group | Chair(s) & Vice-Chair(s) | Term Expires |
|-----------------------------------|---|-------------------------|--|--------------|
| Uniform Commercial Code Committee | | | Stephen L. Sepinuck (c) | 2009 |
| | | | Penelope Christophorou (vc) | 2009 |
| | | | Mario J. Ippolito (vc) | 2009 |
| Subcommittees | General Provisions & Relations to Other Law | | Kristen Adams (c) | 2009 |
| | International Commercial Law | | Kate Sawyer (c) | 2011 |
| | Investment Securities | | Meredith S. Jackson (co-c) | 2010 |
| | | | Howard Darmstadter (co-c) | 2010 |
| | | | Brad Gibson (vc) | 2011 |
| | Leasing | | Teresa Davidson (c) | 2011 |
| | | | Ruthanne C. Hammett (vc) | 2011 |
| | Letters of Credit | | George A. Hisert (c) | 2009 |
| | | | Anthony R. Calobre (vc) | 2011 |
| Payments | | Sarah H. Jenkins (c) | 2010 | |
| | | Greg Cavanagh (vc) | 2009 | |
| Sale of Goods | | David K. Daggett (co-c) | 2010 | |
| | | Candace Zierdt (co-c) | 2011 | |
| Secured Transactions | | Pauline Stevens (c) | 2011 | |
| | | Thomas E. Plank (vc) | 2011 | |
| Article 7 | | Anthony Schutz (c) | 2011 | |
| Editors | Annual Survey | | Russell A. Hakes Robyn Meadows Stephen L. Sepinuck | n/a |
| | Commercial Law Newsletter | | Carol Nulty | 2011 |
| | Developments Reporter | | Keith A. Rowley | 2011 |
| Task Forces | Article 9 Forms | | Cindy J. Chernuchin | 2010 |
| | Filing Office Operations & Search Logic | | Paul Hodnefield (c-UCC) | 2011 |
| | | | Jim Prendergast (c-ComFin) | 2011 |

| | Group | Chair(s) & Vice-Chair(s) | Term Expires |
|-----------------------|----------------------|--|---------------------|
| Liaisons | Consumer Fellows | Gail Hillebrand Yvonne Rosmarin Alan White | n/a |
| | Diversity Committee | | |
| | Pro Bono Committee | Michael Ferry | 2011 |
| | Publications Board | Carl Bjerre | 2010 |
| Regional Coordinators | Northeast Region | | |
| | Southeast Region | Jeremy S. Friedberg | 2010 |
| | Midwest Region | Darrell W. Pierce | 2010 |
| | South Central Region | Ruthanne C. Hammett | 2010 |
| | West Region | John A. Beckstead | 2010 |



Stephen L. Sepinuck



Penelope Christophorou



Mario J. Ippolito



Kristen Adams



Kate Sawyer



Meredith S. Jackson



Teresa Davidson



Brad Gibson



Ruthanne C. Hammett



George A. Hisert



Anthony R. Callobre



Sarah H. Jenkins



Greg Cavanagh



David K. Daggett



Candace Zierdt



Pauline Stevens



Thomas E. Plank



Anthony Schutz



Russell A. Hakes



Robyn Meadows



Carol Nulty



Keith A. Rowley



Cindy J. Chernuchin



Paul Hodnefield



Gail Hillebrand



Mike Ferry



Carl Bjerre



Jeremy S. Friedberg



Darrell W. Pierce



John A. Beckstead



COMMERCIAL FINANCE COMMITTEE

<http://www.abanet.org/dch/committee.cfm?com=CL190000>

The Commercial Finance Committee covers a broad range of finance transactions focusing on practical issues, new developments and industry practices. ComFin currently sponsors taskforces dealing with surveys of state laws applicable to finance transactions, intercreditor agreements and syndicated loans, deposit account control agreements, UCC filing and searching issues and a dictionary of commercial finance terms. Many of our subcommittees focus on issues relevant to all finance transactions (secured lending, documentation, creditor's rights, loan workouts and lender liability, and cross-border aspects of finance transactions), while others focus on specific industries or types of collateral (agricultural and agri-business, aircraft, intellectual property, maritime, real estate, and trade financing) or transaction structures such as syndicated credits and first and second lien structures.

Chair – Lynn A. Soukup lynn.soukup@pillsburylaw.com

Vice Chair – Neal J. Kling nkling@shergarner.com

Vice Chair – James C. Schulwolf jschulwolf@goodwin.com

Planning and Communications Co-Chair – Anthony R. Calobre anthony.calobre@bingham.com

Planning and Communications Co-Chair – Meredith Jackson mjackson@irell.com

Planning and Communications Vice Chair – R. Marshall Grodner
mgridner@mcglinchey.com

Planning and Communications Vice Chair – Norman M. Powell NPowell@yest.com

Planning and Communications Vice Chair/Newsletter Editor – Christine Gould Hamm
christine.hamm@huschblackwell.com

Assistant Newsletter Editor and Young Lawyers Liaison – Stacey Walker
swcounsel@gmail.com

Business Law Section Advisor – Professor Steven L. Schwarcz schwarcz@law.duke.edu

Please visit the Committee website <http://www.abanet.org/dch/committee.cfm?com=CL190000> and join the groups that interest you - subcommittees and taskforces are open to all ComFin members. Your involvement can range from receiving information that these groups circulate to their members to participating in meetings and drafting sessions and presenting programs. Please feel free to contact the group chairs and vice chairs if you have any questions or would like to get involved.

You can join the Committee, or any subcommittee or taskforce, using our website. The Committee, subcommittee and taskforce websites also provides information on upcoming events, access to the Commercial Law newsletter, archives of materials from programs and meetings and other information.

AGRICULTURAL AND AGRI-BUSINESS FINANCING

The Agricultural and Agri-Business Financing Subcommittee provides a forum for the discussion of emerging transactional and bankruptcy issues of importance for attorneys working with the agricultural industry.

Chair – R. Lawrence Harris rlharris@mhsllaw.com

Vice Chair – Drew K. Theophilus dtheophilus@bairdholm.com

<http://www.abanet.org/dch/committee.cfm?com=CL190002>

AIRCRAFT FINANCING

The Aircraft Financing Subcommittee provides a forum for lawyers and other participants in aircraft financing to discuss issues and recent developments in the U.S. and international aviation financing industry. The Subcommittee focuses on current legal issues and practices as well as on emerging trends in aircraft financing techniques and structures.

Chair – Michael K. Vernier Michael_Vernier@standardandpoors.com

Vice Chair – Peter B. Barlow pete.barlow@skybus.com

<http://www.abanet.org/dch/committee.cfm?com=CL190004>

COLLOQUIUM ON ADR IN COMMERCIAL FINANCE DISPUTES TASKFORCE

The purpose of the Colloquium is to provide information and a dialogue between academics and practitioners in the ABA Business Law Section with knowledge and expertise in financial transactions, including commercial, corporate and public finance transactions, and academics and practitioners in the ABA Dispute Resolution Section with knowledge and expertise in the use of alternative dispute resolution techniques and with alternative dispute resolution service providers. This dialog is intended to investigate the advisability of and challenges to use of alternative dispute resolution techniques in such matters and to recommend and consider required techniques, including, but not limited to, specialized rules and panels, to address issues raised. This Colloquium is intended as a first step in the process of investigating problems and issues and in developing agreed techniques and dispute resolution clauses for use in these transactions by business lawyers and to make dispute resolution practitioners, academics and service providers aware of the special needs and circumstances that must be addressed to make alternative dispute resolution a viable option in complex commercial finance transactions and disputes.

Chair – Thomas J. Welsh TJWelsh@BrownWelsh.com

<http://www.abanet.org/dch/committee.cfm?com=CL190021&edit=1>

COMMERCIAL FINANCE TERMS TASKFORCE (JOINT WITH UCC COMMITTEE)

The Commercial Finance Terms Taskforce plans to compile and publish a dictionary of terms used in any aspect of commercial finance law and practice, including asset based lending, syndicated credits, securitization, structured finance, project finance, derivatives, real estate finance, lease finance, etc.

Co-chair – Carl Bjerre cbjerre@law.uoregon.edu

Co-chair – Meredith Jackson mjackson@irell.com

<http://www.abanet.org/dch/committee.cfm?com=CL190040>

CREDITORS' RIGHTS

The Creditors' Rights Subcommittee provides a forum for discussion and presentation of cutting-edge legal issues of importance to creditors. We select and present issues that are relevant to transactional, workout and bankruptcy lawyers. We have an informal liaison with, and meet jointly with, the Bankruptcy Litigation Subcommittee of the Committee on Business and Corporate Litigation, and thus we also cover topics of interest to all constituencies in a Chapter 11 reorganization or liquidation.

Chair – Shannon Lowry Nagle snagle@omm.com

Vice Chair – Elizabeth M. Bohn EB@jordunusa.com

<http://www.abanet.org/dch/committee.cfm?com=CL190006>

CROSS BORDER AND TRADE FINANCING

The Cross Border and Trade Financing Subcommittee addresses existing law, legislative developments and legal practices regarding secured and unsecured lending and trade finance in cross-border transactions, and facilitates awareness of how such laws and legal practices impact the participants in such transactions.

Chair – Daryl Clark daryl.clark@blakes.com

Vice Chair – Jonathan M. Cooper jonathan.cooper@goldbergkohn.com

<http://www.abanet.org/dch/committee.cfm?com=CL190011>

DEPOSIT ACCOUNT CONTROL AGREEMENTS TASKFORCE (JOINT WITH BANKING LAW, CONSUMER FINANCE SERVICES AND UCC COMMITTEES)

The Deposit and Account Control Agreement Task Force is creating various forms of Deposit Account Control Agreements that can be accepted by parties with no or minimal negotiation, based on balanced input from commercial lenders, depository banks, and others in the commercial finance and securitization industries.

Co-chair – R. Marshall Grodner mgrodner@mcglinchey.com

Co-chair – Marvin D. Heileson heileson@earthlink.net

Co-chair – Oliver I. Ireland oireland@mofa.com

Co-chair – John D. Pickering jpickering@balch.com

Co-chair – Edwin E. Smith edwin.smith@bingham.com

Reporter (Securitization DACA) – Eric Marcus emarcus@kayescholar.com

Reporter (Medicare/Medicaid Form) – Leslie J. Polt LPolt@AdelbergRudow.com

Reporter (Medicare/Medicaid Form) – Heather Sonnenberg Sonnenberg@BlankRome.com

<http://www.abanet.org/dch/committee.cfm?com=CL710060>

FILING OFFICE OPERATIONS AND SEARCH LOGIC TASKFORCE (JOINT WITH UCC COMMITTEE)

The Task Force on Filing Office Operations and Search Logic has been formed to address issues relating to filing and searching under Article 9 of the Uniform Commercial Code. The Taskforce will cooperate closely with International Association of Commercial Administrators (IACA) to (i) collect and disseminate information on how filing systems operate, with particular attention to differences among individual filing offices; (ii) work with IACA and individual filing offices to develop, modify, and implement rules that will help filing offices perform their duties and serve their constituencies; (iii) communicate IACA's advice on how best to use the services of filing offices; and (iv) make recommendations on whether and how the UCC should be amended to make filing and searching easier, uniform, and more certain to yield the best results.

Co-chair – Paul Hodnefield phodnefi@cscinfo.com

Co-chair – James D. Prendergast jprendergast@firstam.com

<http://www.abanet.org/dch/committee.cfm?com=CL710051>

INTELLECTUAL PROPERTY FINANCING

The Intellectual Property Financing Subcommittee (i) provides a forum for discussion of current legal developments and other aspects of financial transactions secured by intellectual property and "cyber" assets, and (ii) coordinates with other ABA subcommittees and taskforces dealing with related areas of the law and shaping legislation. Subcommittee members come from diverse backgrounds, and include in-house and outside counsel for developers, licensors, licensees and financiers of intellectual property.

Chair – Matthew W. Kavanaugh mkavanaugh@buchalter.com

Vice Chair – John E. Murdock III jmurdock@boultcummings.com

<http://www.abanet.org/dch/committee.cfm?com=CL190008>

LENDER LIABILITY

The Lender Liability Subcommittee provides a forum for discussion of commercial litigation in which financial institutions are defendants. As part of the Commercial Finance Committee, the Subcommittee emphasizes the needs of transactional, workout and bankruptcy lawyers, and also coordinates with the litigator-oriented Financial Institution Litigation Subcommittee of the Section's Business and Corporate Litigation Committee.

Chair – Jeffrey W. Kelly jeffrey.kelley@troutmansanders.com

Vice Chair – Mathew S. Rotenberg Rotenberg@BlankRome.com

<http://www.abanet.org/dch/committee.cfm?com=CL190014>

LOAN DOCUMENTATION

The Loan Documentation Subcommittee facilitates the exchange of ideas and forms among financial lawyers. Meetings are structured around the presentation and discussion of form. Goals of the Subcommittee include: (i) introducing interesting and topical forms and clauses for the commercial lending field at its regular meetings, and (ii) maintaining an ongoing forum through its website and listserve for the exchange of a commercial lending forms - and explanations of the reasons behind the forms - regardless whether they are new, mundane, or just different.

Co-Chair – Bobbi Acord bacord@phrd.com

Co-Chair – Scott Lessne slessne@capitalsource.com

Vice Chair – Cheryl Stacey cheryl.stacey@mcmillan.ca

<http://www.abanet.org/dch/committee.cfm?com=CL190016>

LOAN WORKOUTS

The Loan Workouts Subcommittee considers current legal issues and trends of importance to lenders in loan restructuring, workout, enforcement and insolvency proceedings. The Subcommittee focuses on issues relevant to lawyers representing financial institutions in single and multiple lender loan transactions in workout, restructuring, and remedy enforcement contexts, including intra-lender issues in syndicated loan facilities and intercreditor issues in multi-tranche borrowing structures.

Chair – Steven B. Soll ssoll@oshr.com

Vice Chair – Cathy L. Reece creece@fclaw.com

<http://www.abanet.org/dch/committee.cfm?com=CL190018>

MARITIME FINANCING

The Maritime Financing Subcommittee monitors and reports on legal developments affecting lawyers involved in the financing of vessels and marine operations. The Subcommittee maintains close ties with the U.S. Coast Guard and MARAD. Members are involved in issues relating to the federal Vessel Identification System, state legislation on vessel titling, and vessel flagging.

Chair – David Mcl. Williams DMWilliams@GandWlaw.com

Vice Chair – Mark J. Buhler mbuhler@hkclaw.com

<http://www.abanet.org/dch/committee.cfm?com=CL190020>

MODEL INTERCREDITOR AGREEMENT TASKFORCE

The Model Intercreditor Agreement Task Force seeks to develop a balanced, market-based model form of intercreditor agreement that specifies the rights of first lien and second lien lenders holding pari passu senior debt secured by identical collateral that fairly protects the respective interests of first lien and second lien lenders while reflecting market expectations and standard practices. The form is intended to include alternative and optional provisions as well as commentary.

Chair – Gary D. Chamblee gchamblee@wcsr.com

Vice Chair – Alyson Allen alyson.allen@ropesgray.com
Vice Chair – Christian Brose cbrose@mcquirewoods.com
Vice Chair – Richard K. Brown rbrown@winston.com
Vice Chair – Robert L. Cunningham, Jr. rcunningham@gibsondunn.com
Vice Chair – Jane Summers jane.summers@lw.com

<http://www.abanet.org/dch/committee.cfm?com=CL190029>

REAL ESTATE FINANCING

The Real Estate Financing Subcommittee provides a forum for discussion of the financing of real estate, both as primary collateral in conventional mortgage loan facilities and as a portion of the collateral in commercial finance loan facilities. Many members of the Subcommittee represent creditors in traditional commercial finance matters as well as in real estate loans.

Chair – Kathleen J. Hopkins khopkins@rp-lawgroup.com
Vice Chair – Edgel C. Lester, Jr. elester@carltonfields.com

<http://www.abanet.org/dch/committee.cfm?com=CL190030>

SECURED LENDING

The Secured Lending Subcommittee provides a forum for discussion of legal issues related to security interests in personal property in a variety of financing arrangements, from traditional asset-based loans and factoring arrangements to securitizations and more exotic forms of receivables sales and financings, whether under UCC Article 9, common law, international conventions, or otherwise. The Subcommittee welcomes discussion relating to collateral of all types.

Chair – Katherine Simpson Allen katherine.allen@stites.com
Vice Chair – Wansun Song wsong@milbank.com

<http://www.abanet.org/dch/committee.cfm?com=CL190032>

SURVEYS OF STATE COMMERCIAL LAWS TASKFORCE

The Surveys of State Commercial Laws Taskforce was formed to update and publish the state-by-state surveys of laws affecting commercial finance transactions that can be found at the ComFin website.

<http://www.abanet.org/buslaw/committees/CL190000pub/surveys.shtml>

Chair – Brian D. Hulse brian.hulse@hellerehrman.com
Co-Chair – Jeremy S. Friedberg jeremy.friedberg@lfff.com
Co-Chair – James H. Prior jprior@porterwright.com

<http://www.abanet.org/dch/committee.cfm?com=CL190039>

SYNDICATIONS AND LENDER RELATIONS

The Syndications and Lender Relations Subcommittee provides a forum for discussion of legal developments in syndicated commercial and real estate loan transactions among lawyers who represent all the major stakeholders in syndicated loan transactions (including administrative agents, syndicate members, participants and borrowers) and explores the relationships between different classes of lenders, including the emerging market standards in inter-creditor negotiations between first-lien and second-lien lenders.

Co-Chair – Gary D. Chamblee gchamblee@wcsr.com
Co-Chair – Richard K. Brown rbrown@winston.com
Vice Chair – Christine Gould Hamm christine.hamm@huschblackwell.com

<http://www.abanet.org/dch/committee.cfm?com=CL190035>

SYNDICATIONS CHAPTER FOR ABL TREATISE TASKFORCE

The Syndications Chapter for ABL Treatise Taskforce was formed to contribute a new chapter to Howard Ruda's multi-volume treatise, *Asset Based Financings: A Transactional Guide*. At Professor Ruda's suggestion, the chapter will discuss the issues and law affecting modern syndicated (multi-lender and multi-tranche) asset based loans.

Co-Chair – Scott Lessne slessne@capitalsource.com

Co-Chair – Christine Gould Hamm christine.hamm@huschblackwell.com

<http://www.abanet.org/dch/committee.cfm?com=CL190037>