

Commercial Law Newsletter

Messages from the Chairs



[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 Developments**
- **Committee News**
- **Annual Meeting**

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[Committee on Commercial Finance](#)

Lynn Soukup, Chair, Pillsbury Winthrop Shaw Pittman LLP

Chicago, Chicago - ABA 2009 Annual Meeting July 31- August 3, 2009

We have a full schedule of CLE programs and subcommittee and taskforce meetings beginning on the afternoon of Friday July 31 and ending at lunchtime on Monday August 3rd. The planned schedule [is attached](#). A final schedule with topics for the subcommittee and taskforce meetings will be distributed by email to ComFin members closer in time to the meeting date.

ComFin is sponsoring the following CLE programs at the Annual Meeting:

- Anatomy of a Workout (Saturday 10:30-12:30)
- Seeking Perfection: The Proposed Revisions to UCC Article 9 (Sunday 8:00-10:00)
- It Seemed Like a Good Idea at the Time: Current Issues with Alternative Financing Vehicles (Sunday 8:30-10:00) - RPTe Section CLE program co-sponsored by ComFin
- Ethics in a World of Change - Consolidating Clients, Disappearing Firms and Other Ethical Issues in the Transactional Context (Sunday 2:30-4:30)

Also plan to attend the ComFin/UCC joint committee meeting on Saturday from 2:30-4:30 for a discussion of current topics of interest to commercial lawyers.

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Featured Articles

[The Existing Dispute Resolution Program Designed by and for the Financial Services Industry: An Update](#)

Donald Lee Rome, Retired Partner from Robinson & Cole LLP, and Sandra Partridge, Vice President of American Arbitration Association

Financial issues and disputes dominate today's news and are likely to continue as the long tangle of mistakes, misrepresentations, misjudgments and frauds in the financial sector unwinds. Commercial finance attorneys are facing larger and more complex caseloads than ever as financial institutions and insurers reveal the fragile underpinnings of many types of financial transactions—sub-prime mortgages, securitized debt obligations, commercial loans and mortgages, interest rate swap agreements, and other financial products. This situation is producing disputes not only between borrower and lender, but also between financial institutions that are counter-parties themselves. The recession with its ripple effects is also causing failures by companies to meet contractual obligations, leading to business-to-business commercial disputes. These realities call for additional participation and alternatives to time-consuming and costly litigation.

[More...](#)

[Beneficiaries Beware: Standby Letters of Credit Are Not Bullet Proof](#)

Frederick L. Klein and David Krohn, DLA Piper LLP

Many believe that standby letters of credit are "better than cash." Now, because of the turmoil in the financial services sector, beneficiaries of standby letters of credit issued by FDIC-insured banks in receivership are learning the hard way that these instruments may be worthless. Standby letter of credit beneficiaries should review their documents and take immediate action to ensure that they have the protections they expected.

[More...](#)

[Possible Changes in the Works for UCC Forms](#)

Paul Hodnefield, Associate General Counsel for Corporation Service Company

Article 9 provides a safe harbor that prevents the filing office from refusing to accept records submitted in the form and format contained in UCC Section 9-521. The safe harbor has simplified the form preparation process for secured parties and helped reduce indexing errors by the filing office.

Nevertheless, some states have removed the safe harbor from statute and there is growing pressure to make changes to the forms incorporated into Section 9-521. This article explains why states have eliminated the forms safe harbor and what changes may be in store for the forms.

[More...](#)

Committee on Uniform Commercial Code: Spotlight

[Spotlight June 2009](#)

Stephen L. Sepinuck, UCC Committee Chair

Kristen Adams, Chair, Subcommittee on General Provisions & Relation to Other Law

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.

Moore v. Wells Fargo Construction ***903 N.E.2d 525 (Ind. Ct. App. 2009)***

This case is one that will appeal to Clint Eastwood fans because it represents the good, the bad, and the ugly.

The case involved a \$558,000 loan by Wells Fargo Construction, formerly known as The CIT Group/Equipment Financing, Inc., to McCawith Energy, Inc. to refinance an excavator apparently used in McCawith's mining operations. The loan was secured by the excavator and guaranteed by Richard Moore and several other principals of McCawith. The debtor defaulted and ceased operations. CIT eventually located the excavator, which was then inoperable, and proceeded to conduct a disposition.

[More...](#)

Synergy Group Report

Neal Kling, Kathleen Hopkins and Chris Rockers, Liaisons

The Synergy Group is a coalition of entities with similar interests in finance and real estate, including BLS, RPTE, ACCFL, ACREL, ISCS, ACMA, and CREW. Neal Kling, Chris Rockers and Kathleen Hopkins represent BLS ComFin in the Synergy Group. The Synergy Group is working on two projects of interest to ComFin members.

First, Chris Rockers and Kathleen Hopkins are representing ComFin in connection with the Synergy Group's development of "**Good Practices Guidance for Lawyers Based on FATF Guidance.**" It is now in draft form and in June the Synergy Group solicited comments from the Department of Treasury. Please contact Chris Rockers or Kathleen Hopkins if you would like an opportunity to review and comment on the current draft. For more information on the FATF Guidance, please see the [Winter 2009 Commercial Law Newsletter](#).

Second, through the Synergy Group, ComFin's [Real Estate Financing Subcommittee](#) is co-sponsoring a CLE at the ABA 2009 Annual Meeting with its counterpart in the ABA-RPTE. The CLE program will be conducted on August 1, 2009 at the Chicago Hyatt at 8:30am, it is entitled "**It Seemed Like a Good Idea at the Time: Current Issues with Alternative Financing Vehicles.**" The Synergy Group also plans to meet during the ABA 2009 Annual Meeting in Chicago, and we are certain this program is just the beginning of many collaborative projects.

Committee on Uniform Commercial Code: Subcommittee Reports and Developments Report

- [Subcommittee on General Provisions and Relations to Other Law](#)
- [Subcommittee on Leasing](#)
- [Subcommittee on Letters of Credit](#)
- [Subcommittee on Payments](#)
- [Subcommittee on Sale of Goods](#)
- [Developments Reporter](#)

Committee on Commercial Finance: Subcommittee and Task Force Reports

- [Subcommittee on Agricultural and Agri-Business Financing](#)
- [Subcommittee on Aircraft Financing](#)
- [Subcommittee on Creditors' Rights](#)
- [Subcommittee on Cross-Border and Trade Financing](#)
- [Subcommittee on Lender Liability](#)
- [Subcommittee on Loan Workouts](#)
- [Subcommittee on Maritime Financing](#)
- [Subcommittee on Real Estate Financing](#)
- [Subcommittee on Syndications and Lender Relations](#)
- [Model Intercreditor Agreement Task Force](#)

Joint Subcommittee and Task Force Reports

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

Committee Leadership Rosters

- [Committee on Uniform Commercial Code](#)
(Summer 2009)
- [Committee on Commercial Finance](#)
(Summer 2009)

CHAIR'S COLUMN

June 2009



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 DEVELOPMENTS

Texas Protects LLCs and Partnerships from Article 9's Anti-assignment Rules

The Texas legislature recently amended § 101.106 of the Texas Business Organizations Code by adding the following new subsection (c):

(c) Sections 9.406 and 9.408, Business & Commerce Code, do not apply to a membership interest in a limited liability company, including the rights, powers, and interests arising under the company's certificate of formation or company agreement or under this code. To the extent of any conflict between this subsection and Section 9.406 or 9.408, Business & Commerce Code, this subsection controls. It is the express intent of this subsection to permit the enforcement, as a contract among the members of a limited liability company, of any provision of a company agreement that would otherwise be ineffective under Section 9.406 or 9.408, Business & Commerce Code.

It also added the following new subsection (d) to § 154.001 of the Texas Business Organizations Code:

(d) Sections 9.406 and 9.408, Business & Commerce Code, do not apply to a partnership interest in a partnership, including the rights, powers, and interests arising under the governing documents of the partnership or under this code. To the extent of any conflict between this subsection and Section 9.406 or 9.408, Business & Commerce Code, this subsection controls. It is the express intent of this subsection to permit the enforcement, as a contract among the partners of a partnership, of any provision of a partnership agreement that would otherwise be ineffective under Section 9.406 or 9.408, Business & Commerce Code.

Tex. S.B. 1442, § 39, 57. Conforming amendments were made to the Texas versions of §§ 9-406 and 9-408. *See* Tex. S.B. 1442, § 60. Thus, Texas has joined a few other states – notably Delaware, *see* Del. Stat. tit. 6, §§ 9-406(i)(5), 9-408(e)(4) – in protecting LLCs and Partnerships from Article 9's anti-assignment rules. Thus, if a partnership agreement or the founding documents of an LLC prohibit a partner or member from assigning its interest, the partner or member will apparently not be able to grant a security interest in the interest.

Virginia Becomes Fourth State with Non-Uniform Rule on Debtor's Name

The Virginia legislature passed and Governor Kaine recently signed S.B. 1100. This new law amends the Virginia version of § 9-503(a) to provide that if the debtor is an individual, a financing statement properly identifies the debtor if it provides “the individual’s name shown on the individual’s driver’s license or identification card issued by the individual’s state of residence.” The Virginia rule appears to create a sort of safe harbor (the new language conspicuously omits the phrase “only if” found in the other paragraphs of § 9-503(a)), and is thus somewhat similar to the approach previously adopted by the State of Texas. *See* 2007 Tex. Sess. Law Ch. 565.

In contrast, Tennessee created multiple alternative safe harbors: (i) a state-issued driver’s license or identification card; (ii) a birth certificate; (iii) a passport; (iv) a social security card; or (v) a military identification card. 2008 Tenn. Pub. Ch. No. 648. Nebraska amended its version of § 9-506(c) to provide that an error in the debtor’s name is not seriously misleading if a search under the debtor’s correct *last* name reveals the filing. 2008 Neb. Laws Leg. Bill. 851. In response to some vocal criticism of that approach, however, the Nebraska legislature then delayed the effective date of this new rule to give the Code’s sponsoring organizations more time to craft a uniform solution to the problems surrounding uncertainty about an individual debtor’s name. 2008 Neb. Laws Leg. Bill 308A.

Article 9 Revisions

The Joint Review Committee for Article 9 of the Uniform Commercial Code has prepared draft amendments to Article 9 for presentation to the Uniform Law Commission at its annual meeting in July. This will be the first reading of the amendments, and no action on them is expected at this time. Instead, the Committee plans to continue to gather input and refine the proposals. Then, if all goes well, the Committee will present the proposals to the American Law Institute for consideration and approval in the spring of 2010 and to the ULC for consideration and approval in the summer of 2010. A copy of the current draft of the proposed amendments is available on the UCC Committee [web page](#).

COMMITTEE NEWS

I am extremely pleased to report that [Penelope Christophorou](#) will be taking over as chair of this Committee at the conclusion of the ABA Annual Meeting, in early August. As many of you know, Penny is of counsel at Cleary Gottlieb Steen & Hamilton in New York, where she focuses on commercial financing, including a specialty in secured transactions law. She represents investment banking institutions, broker-dealers, banks, clearing organizations and corporate borrowers, among others. Penny is currently vice-chair of the Committee and formerly chaired the Subcommittee of Investment Securities. I complete my term as chair knowing that the Committee will rest in very able hands and will flourish under Penny’s leadership.

Assisting Penny will be three new vice-chairs: [Kristen D. Adams](#), [Thomas J. Buiteweg](#), and [Norman M. Powell](#). Kristen is a professor at Stetson Law School and author of *Commercial Transactions: A Survey of United States Law with International Perspective*. She is also the outgoing chair of the Subcommittee of General Provisions and Relations to Other Law and the co-author of the *Spotlight* column that appears regularly in this newsletter. Tom is a partner at Hudson Cook, LLP in Ann Arbor, where he focuses on helping financial institutions, sales finance companies, motor vehicle dealers, and manufacturers to establish and maintain national consumer automobile finance and leasing programs, mortgage and other credit programs. Tom is also a Uniform Law Commissioner from Michigan, a member of the Joint Review Committee for Article 9 of the UCC, and the incoming chair of the Subcommittee on General Provisions and Relations to Other Law. Norm is a partner at Young Conaway Stargatt & Taylor, LLP in Wilmington, Delaware where his practice concentrates on the use of Delaware entities in structured finance and general business transactions. Norm is a former chair of the Delaware Bar Association's Real and Personal Property Section, a Fellow and Regent of the American College of Commercial Finance Lawyers, and an active member of both the UCC and Commercial Finance Committees of the ABA.

ANNUAL MEETING

The ABA Annual Meeting will be held July 31 – August 3 in Chicago. A copy of the Committee's schedule is on the following pages (a complete schedule for the entire Business Law Section is available on the [section web site](#)). The Committee's schedule includes the following CLE program:

Seeking Perfection: The Proposed Revisions to UCC Article 9
Sunday, August 2 at 8:00-10:00am

In addition, the UCC Committee and the Commercial Finance Committee will be having a joint dinner on Saturday, August 1 at Maggiano's, which is within walking distance of the conference hotel. The cost will be \$75 per person; reservation forms were distributed electronically and are available on the Annual Meeting [web page](#). I hope to see you there.

[Stephen L. Sepinuck](#)
Professor, Gonzaga University School of Law
ssepinuck@lawschool.gonzaga.edu

ABA ANNUAL MEETING
July 31 – August 3, 2009
Chicago, IL
(as of 6/20/09)

Friday, July 31		
Time	Com Fin	UCC
2:00-2:30pm	Subcommittee Meeting: Aircraft Financing (Part 1)	
2:30-3:00pm		
3:00-3:30pm		
3:30-4:00pm		
4:00-4:30pm		
4:30-5:00pm		
5:00-5:30pm		
5:30-6:00pm		
6:00-6:30pm		
6:30-7:00pm		
7:00-7:30pm	Aircraft Subcommittee Dinner	
7:30-8:00pm		
8:00-8:30pm		

Saturday, August 1

Time	Com Fin	UCC
8:00-8:30am		Subcommittee Meeting: General Provisions and Relations to Other Law
8:30-9:00am		
9:00-9:30am	Subcommittee Meeting: Aircraft Financing	Subcommittee Mtg.: Creditor's Rights
9:30-10:00am		
10:00-10:30am		Joint Task Force Meeting on Filing Office Operations & Search Logic
10:30-11:00am		
11:00-11:30am		
11:30-12:00pm		
12:00-12:30pm		
12:30-1:00pm		
1:00-1:30pm	Subcommittee Meeting: Loan Documentation	
1:30-2:00pm		
2:00-2:30pm		
2:30-3:00pm	Joint Committee Meeting: Commercial Finance & Uniform Commercial Code	
3:00-3:30pm		
3:30-4:00pm		
4:00-4:30pm		
4:30-5:00pm	Leadership Meeting	Leadership Meeting
5:00-5:30pm		
5:30-6:00pm		
6:00-6:30pm		
6:30-7:00pm		
7:00-7:30pm	Com Fin / UCC Dinner	
7:30-8:00pm		
8:00-8:30pm		
8:30-9:00pm		

Sunday, August 2

Time	Com Fin		UCC
8:00-8:30am			Program: Seeking Perfection The Proposed Revisions to UCC Article 9
8:30-9:00am	Program (co-sponsored by Com Fin): It Seemed Like a Good Idea at the Time: Current Issues with Alternative Financing Vehicles		
9:00-9:30am			
9:30-10:00am			
10:00-10:30am			
10:30-11:00am	Joint Subcommittee Meeting: Secured Lending (Com Fin) and Secured Transactions (UCC)		
11:00-11:30am			
11:30-12:00pm			
12:00-12:30pm			
12:30-1:00pm			Subcommittee Meeting: Sales of Goods
1:00-1:30pm	Subcommittee Mtg: IP Financing	Subcommittee Mtg: Maritime Financing	
1:30-2:00pm			Subcommittee Meeting: Letters of Credit
2:00-2:30pm			
2:30-3:00pm	Program: Ethics in a World of Change – Consolidating Clients, Disappearing Firms and Other Ethical Issues in the Transactional Context		
3:00-3:30pm			
3:30-4:00pm			
4:00-4:30pm			
4:30-5:00pm			
5:00-5:30pm			

Monday, August 3

Time	Com Fin	UCC
9:00-9:30am		
9:30-10:00am		
10:00-10:30am		
10:30-11:00am	Joint Subcommittee Mtg.: Syndications & Lender Relations (w/ Bus. Fin. Subcom. on Syndicated Bank Financing)	
11:00-11:30am	Taskforce Meeting: Model Intercreditor Agreement	Joint Subcommittee Meeting: Payments (w/ Cyberspace Subcommittee on Electronic Payments)
11:30-12:00pm		
12:00-12:30pm		

ComFin Chair's Column Summer 2009 Commercial Law Newsletter

Chicago, Chicago – ABA 2009 Annual Meeting July 31- August 3, 2009

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- **It Seemed Like a Good Idea at the Time: Current Issues with Alternative Financing Vehicles (Sunday 8:30–10:00) – RPTE Section CLE program co-sponsored by ComFin**
- **Ethics in a World of Change – Consolidating Clients, Disappearing Firms and Other Ethical Issues in the Transactional Context (Sunday 2:30-4:30)**

Also plan to attend the ComFin/UCC joint committee meeting on Saturday from 2:30–4:30 for a discussion of current topics of interest to commercial lawyers.

Our joint dinner with the UCC Committee will be held Saturday evening at 6:30 p.m. at Maggiano's Little Italy. The dinner reservation form can be accessed [here](#).

Registration information for the meeting is available on the [ABA website](#).

Looking Ahead

Broadcast News For those who missed the fast-paced and funny annual recap of cases on UCC and other commercial law issues at the Vancouver meeting, here's your chance – Steve Weise and Teresa Harmon will present a web/audio cast of the 8th Annual Commercial Law Developments program on July 16th – to register click [here](#).

Supermodels. Following on the success of the Model Deposit Account Control Agreement (which you can assess at the [DACA webpage](#), the Model Intercreditor Agreement Taskforce plans to complete its work later this week and publish its form and commentary – please visit the [MICA webpage](#) to see how the project is progressing and the drafts of the agreement that the MICA Taskforce has already produced. The [ComFin IP Financing Subcommittee](#) plans to start a project on model documents for IP financing transactions and we'll update as that project gets underway this year.

Viva Las Vegas. The ComFin Fall Meeting will be held Wednesday, November 4, 2009 in Las Vegas, Nevada, in conjunction with the Commercial Finance Association Annual Convention. We'll have our usual four hours of CLE programs and a networking lunch. If you have

suggestions for topics or speakers please contact Neal Kling (nkling@shergarner.com) or Norm Powell (NPowell@ycst.com) who are chairing the ComFin Fall Meeting.

Survey SaysState Commercial Laws. An updated survey of the laws applicable to commercial finance transactions in 50 states and DC will be published by the ABA later this year. Stay tuned for details and a link to order your copy. The 2004/2005 survey is available to ComFin members on the [Survey Taskforce webpage](#).

The [Mark Your Calendars](#) section of this newsletter lists other upcoming events.

A Blast From the Past

Many of our CLE programs are presented as audio conferences – if you missed the program live, you can now listen to the recorded version:

- ***Nightmare on Main Street: What Keeps Lenders Up at Night?*** Lender liability and bankruptcy issues continue to be of increased interest to lenders and borrowers in the current economic environment. The audio CD package is available [here](#).
- ***Loan Restructuring: Let's Make a (New) Deal.*** Pre-bankruptcy and workout due diligence, issues surrounding the explosion of second lien financings and current issues in securing cash collateral and/or DIP financing. The audio CD package is available [here](#).
- ***Getting Blood from a Stone: Commercially Reasonable Foreclosure on Collateral and the Availability of a Market.*** Foreclosure and other remedies available to secured parties when there is no or a limited market for collateral. The audio CD package is available [here](#).

2101 by 29,029

ComFin Breadth... at over 2100 members ComFin has grown to be the third largest committee in the Section of Business Law. We'd like to keep growing – which means we need to develop and communicate content you can use.

Let me know what areas you'd like to see us cover, programs you'd like to see presented, model agreements you think should be developed ... or anything we haven't thought about that we should use to communicate information on legal and market developments to ComFin members.

A complete list of the ComFin subcommittees and taskforces and a description of their activities can be accessed [here](#). In addition, the [ComFin website](#) provides a calendar of upcoming events, access to program materials and news on developments (including the UCC Article 9 revisions currently under discussion and the progress of the UNCITRAL Secured Transactions Guide application to IP collateral).

... and ComFin Heights. For those following the accomplishments of one of our founding members, Bill Burke, in safely summiting (29,029 feet) and returning from Everest this year, please see the [article](#) published in the *ABA Journal* and the [longer piece](#) from the *OC Register*. Congratulations to Bill!

I hope to see many of you in Chicago and at the ComFin Fall Meeting in Las Vegas.

Lynn

ComFin Committee Chair

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Work/Life Balance

2 Calif. Lawyers Scale Everest in Possible Record-Setting Climbs

Posted Jun 3, 2009, 08:27 pm CDT

By [Martha Neil](#)



Screen shot of the [Strange on Everest](#) site.

When Bill Burke won a lifetime achievement award from the American College of Commercial Finance Lawyers, the retired attorney wasn't able to accept it in person, the would-be presenter tells the ABA Journal. That's because Burke was climbing Mount Everest.

Although he had to stop short of the fabled mountain's summit on two earlier efforts, the 67-year-old Californian reached the top on his third try late last month. He may be the oldest American to have successfully completed the climb, reports the [Orange County Register](#).

Meanwhile, another California lawyer, 53-year-old Brian Strange, also helped make history on Mount Everest at about the same time last month by reaching the summit with his climbing partner and 17-year-old son, Johnny

Strange, the Polaris public relations agency tells the ABA Journal. They believe the 17-year-old is the youngest American ever to have scaled Everest. Johnny Strange will also be the youngest individual in the world to have completed the so-called seven summits, they believe, once he and his father scale Mount Kosciusko in Australia within the next week or so. Brian Strange focuses his Los Angeles law practice on class actions.

Burke, a former practitioner at Sheppard Mullin Richter & Hampton and Shearman & Sterling, trained five days a week for the climb. As part of his regimen, the grandfather of 14 would pull his training partner, an 8-year-old grandson with special needs, in a covered wagon behind his bicycle for 50 miles or so, the Orange County Register recounts.

Burke's website, [Eight Summits](#), provides additional details.

Both Burke and Johnny Strange, on his own [Strange on Everest](#) website, describe a perilous passage over ladders apparently positioned high above the mountain's infamous Khumbu icefall. (The Los Angeles Times provides a photo of Strange crossing the crevasse on its [Outposts](#) blog.)

The Register provides Burke's description of the experience: "We swapped together four ladders," he says, and "they were damaged and they sagged in the middle. And when you crossed you'd sag down in the middle and the ladders moved. It was quite scary crossing those ladders."

Updated at 1:55 p.m. on June 4 to include information from Brian Strange.

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Mark Your Calendars

- **July 16, 2009 – 8th Annual Commercial Law Developments Program – (Broadcast CLE)**

For those who missed the fast-paced and funny annual recap of cases on UCC and other commercial law issues at the ABA 2009 Spring Meeting, you have another chance - Steve Weise and Teresa Harmon will present a web/audio cast of the 8th Annual Commercial Law Developments program on July 16th.

- **July 30, 2009 – ABA Annual Meeting – Chicago, Illinois**

The ABA 2009 Annual Meeting will be returning to Chicago this summer from July 30th until August 4th. The meeting features over 250 CLE programs, committee, subcommittee and task force meetings and social events. Registration and additional information can be accessed at the Annual Meeting's [website](#) and you can register onsite at the meeting.

- **September 23-25, 2009 – National Conference for the Minority Lawyer – Philadelphia, Pennsylvania**

The ABA Business Law Section has announced the 2009 National Conference for the Minority Lawyer to be held in Philadelphia at the Hotel Sofitel Philadelphia. More information is available [here](#).

- **September 25-26, 2009 - Joint Review Committee for Uniform Commercial Code Article 9 - Minneapolis, MN**

The Joint Review Committee for Uniform Commercial Code will meet Friday, September 25 and Saturday, September 26 to discuss the recommended amendments to Article 9.

- **November 4, 2009 - ComFin Fall Meeting - Las Vegas, Nevada**

Viva Las Vegas. The ComFin Meeting will be held Wednesday, November 4, 2009 in Las Vegas, Nevada, in conjunction with the Commercial Finance Association Annual Convention.

- **November 20-21, 2009 – ABA 2009 Fall Meeting – Washington, D.C.**

The ABA Business Law Section has announced and asked that you “save the date” for the 2009 Annual Meeting to be held in Washington, D.C. at The Ritz Carlton. More information will become available [here](#).

THE EXISTING DISPUTE RESOLUTION PROGRAM
DESIGNED BY AND FOR
THE FINANCIAL SERVICES INDUSTRY

AN UPDATE

BY DONALD LEE ROME[†] AND SANDRA PARTRIDGE^{††}

Financial issues and disputes dominate today's news and are likely to continue as the long tangle of mistakes, misrepresentations, misjudgments and frauds in the financial sector unwinds. Commercial finance attorneys are facing larger and more complex caseloads than ever as financial institutions and insurers reveal the fragile underpinnings of many types of financial transactions—sub-prime mortgages, securitized debt obligations, commercial loans and mortgages, interest rate swap agreements, and other financial products. This situation is producing disputes not only between borrower and lender, but also between financial institutions that are counter-parties themselves. The recession with its ripple effects is also causing failures by companies to meet contractual obligations, leading to business-to-business commercial disputes.

These realities call for additional participation and alternatives to time-consuming and costly litigation. The American Arbitration Association[®] (AAA) has a history of working with various individuals from the American College of Commercial Finance Lawyers (ACCFL) to meet the needs of parties and their representatives involved in disputes stemming from financial transactions.

For present disputes arising out of the credit collapse of 2008-2009, lawyers can submit cases for arbitration and mediation using the Model Clause developed by the ACCFA and the AAA. A useful guide to use when drafting an alternative dispute resolution (ADR) submission agreement for arbitration or mediation is the AAA booklet, *Resolving Commercial Financial Disputes—A Practical Guide: Including Sample Clauses and Mediation and Arbitration Rules; Amended and Effective September 15, 2005*. (The Booklet is also available at the AAA's Web site at <http://www.adr.org>.) The Booklet contains a full description and explanation of the ongoing AAA Commercial Financial Services arbitration and mediation program.

A set of Supplementary Procedures for use with ADR providers' rules is being considered by the Task Force of the Business Law Section of the ABA in concert with its Dispute Resolution Section in order to streamline and customize drafting future commercial finance contracts. Information about the Task Force's work, as well as the current commercial finance rules and drafting guide, is available on the ADR Task Force page on the [ComFin Web site](#) (through the link [American Arbitration Association 2005 Financial Disputes Guide—Reprinted with Permission](#)—just click on the link). The "Discussion Draft" of Supplementary Rules is available on the ADR Task Force page of the ComFin Web site under the heading "Documents."

What Is the Existing AAA Commercial Finance Dispute Resolution “Program?”

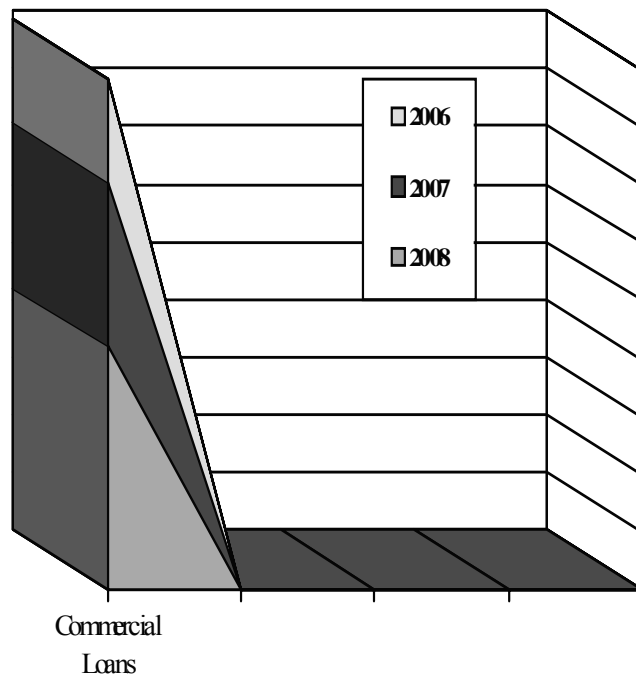
Commercial financial services and ADR experts, in a collaborative effort, designed flexible ADR Model Clauses (Model Clause) for use in the commercial financial services industry. The Model Clause was developed as the result of the joint efforts of the ADR Committee of the American College of Commercial Finance Lawyers (ACCFL) and the American Arbitration Association (AAA). The “Working Draft” of Short and Long Form “Model Mediation and Arbitration Clause for Commercial Financial Services Dispute Resolution” and “Working Draft” for Mediation Rules and Arbitration Rules were unveiled at the 1997 Spring Meeting Program of the Business Law Section. The Program “ADR and the Financial Services Industry: Techniques for Successful Cost-Effective Dispute Resolution” was presented by the Committee on Commercial Financial Services, the Committee on Banking Law and the Committee on Dispute Resolution, together with the American Arbitration Association and the American College of Commercial Finance Lawyers.

The final product provided for a commercial finance-experienced panel of arbitrators, mainly at the time from members of ACCFL, and was launched in 1998 by AAA with the publication and national distribution of its booklet, *Resolving Commercial Financial Disputes—A Practical Guide*. The booklet includes sample clauses, mediation and arbitration rules, and a full explanation of the program.

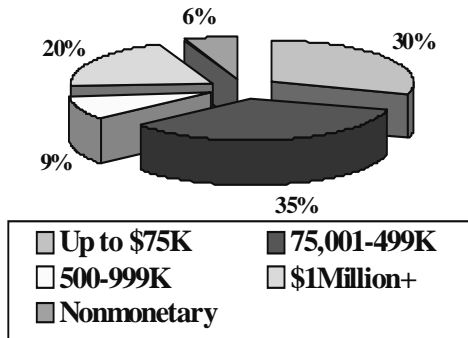
Since the program was developed, many lenders have recognized the value of the undertaking. It continues to be a unique resource for the financial services industry when addressing techniques for dispute resolution designed for the industry. But there are commercial financial services lawyers, in house and in private firms, who simply don’t know that the program is available for consideration and use by their clients.

Dispute-savvy commercial finance lawyers and their litigation partners consider all forms of dispute resolution not only when advising clients on contract construction but also when a dispute arises; a one-size-fits-all litigation approach is no longer adequate. Mediation and arbitration have achieved mainstream status for the efficient, party-controlled resolution of disputes.

The American Arbitration Association has seen an increase in case filings in nearly all of the key segments of the commercial financial sector over the last three years. As the chart to the right reveals, cases arising out of commercial loans are growing, e.g. cases where the mortgage purchaser is claiming breach of the



warranties against the originator about the value of the property or financial health of the borrower. This trend is expected to continue as parties use ADR to achieve speed, cost control, and especially access to arbitrators who have expertise in commercial financial services. This is especially significant, as the nature of financial disputes now involves interest rate swaps and other modern financial transactions between institutions with specialized commercial needs in dispute resolution—thus the increased relevance of the AAA-ACCFL Program.



As the number of claims filed has risen, so has the size of the claims. Arbitrations concerning hundreds and even thousands of mortgages (not consumer transactions) and reaching into the hundreds of millions of dollars are being filed. In 2008, 20% of the AAA’s claims were for \$1 million or more, and 6% sought declaratory awards or other relief. The breakout of claim filing in the commercial financial area at the AAA is shown in the pie chart here.

The Model Clause was created to meet the specialized needs of all parties involved in commercial finance transactions. The Model Clause provides for mediation and arbitration of disputes where the claim is for money damages (and only with the agreement of the parties to other types of disputes). The reason for this is the need to carve out from the arbitration access to judicial and self-help remedies relating to the preservation and realization of the lender’s collateral and to preserve statutorily mandated rights of borrowers under applicable law.

This “carve-out” from the arbitration is a practical and legal necessity. Arbitrators are neither equipped nor authorized to carry out in the arbitration statutory mandates, court rules and other due process procedures required for the administration of foreclosures, replevins, attachments, judicial sales, etc. Debtors, junior lienors, and other third parties may have disputed lien priority rights, claims to sale proceeds, defenses, etc.; but the jurisdiction of the arbitrator is limited to those who are actually parties in the arbitration. Third parties will not normally even have notice of the arbitration. The arbitrator is not the equivalent of the Clerk’s office at the courthouse, and is not authorized to carry out notice and other statutorily and/or judicially mandated procedures or to be a repository for all documents filed and available for those with an interest in the case. Arbitrators and ADR providers have no obligation to retain files beyond a very limited time. Court files are normally public; arbitration files are not.

The Model Clause contains numerous drafting options, allowing it to be specifically tailored to particular financial services needs and uses. The clause is suitable for loan agreements, inter-creditor agreements, subordination agreements, syndication and participation agreements, and workout agreements, among others. With this clause, commercial finance institutions can obtain the benefits of speedy, cost-effective, and predictable dispute resolution while preserving essential statutory and constitutional

rights with respect to the ongoing borrower-lender relationship. With some modifications, the Model Clause could be appropriate for claims and counterclaims for money damages arising out of financial transactions beyond classic commercial lending—derivatives, swaps, etc. They have much in common as to their needs in dispute resolution.

What Is So Different About Commercial Finance Transactions?

Why Must Commercial Finance Arbitration and Mediation Be Limited in Scope?

The commercial lending relationship is a complex one, involving ongoing payment and performance obligations by both the lender and the borrower. These parties frequently must make quick business and credit decisions based upon their legal relationship and the borrower's business activities, knowing that in many situations the decision may lead to the exercise of legal rights by the other party. These decisions may be based on the parties' understanding of the applicable law and the legal remedies available to them.

Disputes between parties in the commercial finance setting often involve not only Uniform Commercial Code (UCC) issues, but also surety law, lending and rate formulas, interpretation of loan agreement covenants, bankruptcy law, asset valuation issues, balance sheet and other financial analysis, lien priority issues other than those governed by the UCC, cross-collateralization problems, corporate law, and matters relating to shareholders and other third parties with financial involvement with the borrower. Rarely while the ongoing lending relationship exists will these disputes ripen into discrete litigation. These disputes may be resolved quickly by agreement because of the exigencies of the situation, or simply by the passage of time because of the inability of one party under applicable law to force the other party to perform its obligation.

For example, if the borrower wants to draw down on a line of credit, and the lender refuses because the lending formula and financial ratios under the loan agreement allow it to decline to lend, the parties may agree on what to do. If they don't agree, the lender simply may not lend at that time. It will all happen quickly because of pressing business issues; neither party will look to a court to resolve the immediate problem.

However, litigation may arise out of the dispute. The lender may decide to call a default and demand repayment of the loan because of the borrower's failure to maintain the collateral and financial ratios, or other breaches of the loan documents. The borrower may respond with a claim for damages due to the lender's failure to lend, and assert defenses to the lender's claims. When this happens, the lending relationship is over and litigation or mediation and/or arbitration becomes the focal point of their relationship.

Lenders rely on specific legal remedies designed to recover the loan and preserve, foreclose, and liquidate collateral. Lenders lend based upon the knowledge that predictable legal remedies and procedures are available in the event of a default or a need to preserve the collateral without a default. The law allows a lender to take speedy action to protect, preserve, or liquidate its collateral position. Similarly, borrowers rely on the specific protections available under applicable debtor/creditor laws to protect their rights. Thus, a borrower can take speedy action, to the extent allowed by law, to try to prevent the lender from exercising remedies that could impair the borrower's continued operation. Neither party, however, can obtain an order of specific performance directing a

lender to lend or a borrower to perform its covenants under a loan agreement (other than those relating specifically to collateral preservation and maintenance).

Depending on the specific situation, the lender will decide whether to call a default and exercise its remedies, and the borrower will decide whether to defend against the exercise of remedies by the lender and/or assert a claim for damages against it.

For these reasons, lenders have found that the standard arbitration clause calling for mediation or arbitration of “any controversy or dispute” does not comport with the business and legal realities of the commercial finance relationship. The industry needs a commercial finance arbitration clause that

- allows the parties to conduct business as they will,
- preserves currently available judicial and self-help remedies for the lender and currently available legal safeguards for the borrower, and
- provides for mediation and arbitration of disputes only over legal defenses and claims for money damages; the arbitration and/or mediation clause should not create specific performance remedies that would not even be available in the courts.

Key Features of the ACCFL Model Clause

The key features of the Model Clause are

- terms defining when a “controversy” becomes an “ADR dispute” ripe for mediation and/or arbitration,
- provision for mediation first (optional) and thereafter arbitration if a resolution does not materialize,
- limitations on arbitral remedies only to those appropriate in a commercial finance setting after preserving well-established available and statutorily mandated rights and remedies,
- inclusion in the ADR process of all parties necessary for resolution of the dispute,
- provision for neutrals from a national roster with commercial finance knowledge and experience, and
- numerous optional provisions to further tailor the agreement.

Definition of “Controversy” and “ADR Dispute” (§1)

The Model Clause limits the type of controversy to be mediated and/or arbitrated by defining two key concepts: a “controversy” and an “ADR dispute.” “Controversy” is an all-encompassing term that embraces any problem that might arise in the lending relationship. “Controversy” means any action, dispute, claim, counterclaim, or controversy of any kind, whether founded in contract, tort, statutory, or common law, now existing or hereafter arising, based upon or arising out of, or pertaining to or related to or in connection with the loan agreements, extensions of credit, and/or the transactions and events arising out of or related thereto.

“ADR dispute” is a narrower term. It sets the criteria for the type of controversy that will be mediated and/or arbitrated. Thus, the parties are contracting that only an “ADR dispute,” not any controversy, will require the parties to use ADR.

What, then, is an “ADR dispute”? This term is defined to mean any controversy if and only if the controversy is such at the time any provision of this Article 00 is invoked that the prevailing Party could under applicable law be adequately compensated by ascertainable money damages, and

one Party to this Agreement has made a claim for money damages against another Party to this Agreement in a writing that has been delivered to the other Party, provided, however, that a demand made by a lender or other financial services provider for repayment of money or for compliance with contracted-for obligations, whether based upon contractual default or otherwise, shall not be an ADR Dispute.

The Model Clause also provides that the parties may mutually agree in writing that a controversy shall be treated as an ADR dispute even though at the time of the agreement the controversy did not meet the above criteria.

Preservation of Rights. The Model Clause provides that an ADR dispute shall be resolved solely and exclusively under the procedures specified in the clause. However, preserved to the parties are the right to pursue equitable judicial relief, injunctive relief, appointment of a receiver, and other self-help and judicial remedies. Unlike the traditional ADR clause exclusions for “provisional remedies,” which are limited to foreclosure-type remedies, the Model Clause includes “protection, continuation and preservation of lien rights and priorities, the processing and payment or return of checks, the right of set-off, recoupment, foreclosure, or repossession, whether such occurs before, during or after the pendency of any negotiation, mediation, or arbitration proceeding.”

Dispute Resolution Methods. In many cases, especially in multi-party transactions, and where a continuing relationship may be desirable, mediation can cut costs and bring about an early resolution of the dispute. This is especially true in commercial financial disputes where workout techniques—which are very similar to mediation techniques—are used.

The mediation clause requires good-faith efforts by the parties. However, the parties are not bound to a resolution in the absence of reaching mutual agreement in the mediation. If the ADR dispute is not resolved by mediation, binding arbitration is required.

Consistent with debtor/creditor law, an arbitrator acting under the Model Clause does not have authority to order specific performance of any obligation or duty of any party, or to issue injunctions.

Optional Provisions. The Model Clause provides a number of drafting options:

Choice of Law (§4). Many in the commercial financial community want to know that the ultimate decision will be governed by applicable law in a particular jurisdiction. The option permits selection of the jurisdiction whose law is to be applied.

Defenses/Punitive Damages (§4). Another option is to exclude defenses based upon the passage of time during negotiation, mediation and arbitration and to choose whether punitive, exemplary, or statutory damages may be awarded in arbitration.

Discovery (§4). There is an option to limit discovery to disputes over a certain size.

Costs and Expenses (§§3,4). While the Model Clause calls for the sharing of mediation and arbitration costs and expenses, an option may be selected to have costs and expenses shared or awarded in accordance with the loan agreement, promissory note, and/or other loan documents.

The Award (§4). The Model Clause provides options as to the specificity of the award. Must the award contain (1) the factual and legal basis for the award, (2) findings of fact and law, or (3) a reasoned opinion? Absent one of these choices, the arbitrator would normally include in the award only the final result. Many lenders will have more confidence in the arbitration process if they have the option of requiring a more detailed award. In addition, an option is provided for either a unanimous decision or a majority decision of the panel.

Time Limitations (§§2,3,10). Another optional provision imposes limitations on the time when the various ADR procedures must be commenced with respect to an ADR dispute.

Other Provisions. Consolidation (§4)/Parties (§§1,5). The Model Clause prohibits consolidation with another arbitration proceeding without the parties' consent. It specifically provides that it is for the benefit only of the signatories and their respective successors and assigns, and therefore is not available to third parties. However, in order to avoid piecemeal resolution of disputes, the clause broadly defines "parties" (in §1) to include "the respective employees, officers, directors, attorneys and other agents of the parties to this Agreement," with the option to include "any partner, limited liability member, shareholder, beneficiary or other equity holder or person who authorized or approved its related parties' execution of this Agreement."

FAA (§4). An arbitration under the Model Clause will be governed by the Federal Arbitration Act, which permits a broad spectrum of enforceable contractual arbitration options.

Survival of Clause (§9). The Model Clause is designed to continue in effect after the last payment to a lender has been made and after contractual termination may have occurred.

Qualifications and Selection of Neutrals. One of the obstacles to both mediation and arbitration in the commercial lending community has been concern over the qualifications of the neutral. The better-informed lenders have recognized that an evaluative approach by a mediator knowledgeable in commercial finance (which can provide a helpful reality check for the borrower) can be especially beneficial. If the case goes to arbitration, it is even more important for the arbitrator to be well versed in commercial finance transactions and issues, since a binding decision will result.

The AAA has a national roster of exceedingly qualified commercial finance mediators and arbitrators available to handle cases under the Model Clause. Members are nominated to the panel by the AAA and the American College of Commercial Finance

Lawyers (ACCFL). However, election to the ACCFL is not a requirement for appointment to the panel.

Selecting the right mediator or arbitrator for a commercial finance case is a critical decision for a lawyer and client. The neutral's experience should include both process and subject matter expertise; this is especially important in selecting an arbitrator because the result is a final and binding award. The AAA provides parties with a list of names (usually 10-15 from panels with experience in that kind of case) and full biographies from which to make their choice. For claims above \$500,000, the Association offers (without charge) an *Enhanced Neutral Selection Process* that, *inter alia*, allows both sides, in the presence of a trained AAA case manager, to submit questions to arbitrators before making their selections, after which conflict checks are conducted. This extensive process provides the parties maximum control and enables them to make informed decisions.

ComFin ADR Task Force. It is especially timely for ComFin members to review the existing AAA commercial finance dispute resolution Program, Rules and Clauses, currently available for commercial finance transactions when evaluating the Task Force project. Failure to do so in analyzing the Task Force project for Supplementary Rules could lead to professional responsibility issues in advising commercial finance clients about arbitration and/or mediation. The Supplementary Rules, if promulgated, should be viewed as standing side by side with the basic rules of the ADR provider selected by the parties if Supplementary Rules are adopted by clients in their arbitration clauses. Careful review of two sets of Rules and the arbitration clause itself will be required for lawyers advising clients, once client preferences and goals have been determined. The main provider rules, the Supplementary Rules, and the arbitration clause itself may be in conflict if they are not modified. Potential conflicts between two sets of rules and the arbitration clause itself in the same arbitration case could be a real problem for the clients.

To avoid conflict problems, we suggest that after review of the AAA Program and the Task Force Discussion Draft of Model Supplementary Arbitration Rules, ComFin members make known their suggestions and comments on the Task Force Project before a final draft is before ComFin for ABA endorsement.

The ABA ComFin ADR Task Force is seeking to promulgate Model Supplementary Arbitration Rules; it is not seeking to propose Model Arbitration Clauses or to substitute the proposed Supplementary Arbitration Rules of ADR providers. Thus, this ADR Task Force project should not be confused with the existing Commercial Financial Services dispute resolution program of AAA. They are independent of each other. One is a work in progress; the other is an ongoing program.

The authors of this article are both working with the Task Force to assist in the process of meeting current needs of financial world clients, while at the same time not creating costly and time-consuming issues if two sets of rules govern for those who select a proposed ABA-sponsored set of Supplementary Rules for various types of finance transactions.

Your input to the ADR Task Force with comments and suggestions for the Discussion Draft is vital. Input from your clients is essential for avoiding problems and meeting their needs. Knowledge of what the Task Force is doing and an awareness of the existing AAA program will provide the basis for the most helpful input.

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BENEFICIARIES BEWARE:
STANDBY LETTERS OF CREDIT ARE NOT BULLET PROOF

BY FREDERICK L. KLEIN AND DAVID KROHN

Many believe that standby letters of credit are “better than cash.” Now, because of the turmoil in the financial services sector, beneficiaries of standby letters of credit issued by FDIC-insured banks in receivership are learning the hard way that these instruments may be worthless. Standby letter of credit beneficiaries should review their documents and take immediate action to ensure that they have the protections they expected.

Letters of credit play a key role in a variety of real estate transactions. For example:

- Landlords accept letters of credit as security deposits for leases
- Mortgage lenders require letters of credit as collateral for commercial mortgage debt
- Letters of credit are often used as earnest money deposits for real estate purchase and sale transactions
- Letters of credit are often provided to municipalities as security for bonding obligations

Many market participants view letters of credit as the equivalent of cash – and in some cases, even better than cash. For example, commercial landlords have long assumed that a letter of credit is preferable to a cash security deposit because of case law arising out of tenant bankruptcies that limits landlord access to these deposits.

Letters of Credit Can Become Worthless

The deep and prolonged crisis in the financial services industry will result in numerous FDIC-insured banks facing receivership or conservatorship. **Undrawn letters of credit issued by these institutions are likely to be worthless.** Parties to letter of credit transactions are advised to look carefully at their letters of credit and related documentation and enforce their right to require certain letters of credit to be replaced or, where possible, revise documents to require replacement of letters of credit issued by troubled institutions. At the end of this Alert, we have provided several suggested courses of action.

About Letters of Credit

The parties to a letter of a credit are as follows:

Issuer – the bank or thrift issuing the letter of credit is the Issuer.

Account Party – the party who obtains the letter of credit from the Issuer is the Account Party. Often, the Account Party arranging for a standby letter of credit delivers cash or other collateral to the Issuer to secure repayment of any draws on the letter of credit.

Beneficiary – the party who holds the standby letter of credit and who is authorized to draw under the letter of credit on the conditions stated in the letter of credit is the Beneficiary.

A standby letter of credit is issued by the Issuer to the Beneficiary at the request of the Account Party, and requires the Issuer to pay a specified sum to the Beneficiary upon satisfaction of the conditions of drawing specified in the standby letter of credit. The standby letter of credit will specify the maximum amount that may be drawn, the expiration date, the place where drafts must be presented and what certifications or deliveries must be made in connection with the draw request. Virtually all letters of credit utilized in real estate transactions are “sight draft” letters of credit, which means that the Beneficiary can require payment under the letter of credit upon delivery of a simple sight draft, which looks very much like a bank check, together with any other required certifications.

Letters of credit are governed by Article 5 of the Uniform Commercial Code (the “UCC”), which has been enacted in every state and the District of Columbia. In addition, parties generally agree that the letter of credit will be governed by the Uniform Customs and Practice for Documentary Credits (the “UCP”) or the International Standby Practices 98 (the “ISP”), both of which are promulgated by the International Chamber of Commerce. Standby letters of credit issued by US financial institutions are also subject to regulation by one or more of the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Federal Reserve Board and the Office of the Comptroller of the Currency.

Standby letters of credit are generally issued and held pursuant to a separate contract between the Account Party and the Beneficiary – such as a lease, loan agreement, purchase agreement or public improvement agreement. The “underlying contract” between the Account Party and the Beneficiary is separate and independent of the letter of credit as a legal matter, but it will specify the requirements that the letter of credit must satisfy and when it can be drawn. If these documents are drafted properly, they will generally contain language that requires the Issuer to meet certain specified standards as to its financial strength.

Following is some typical lease language (although any actual language you use should be crafted to fit the particular case):

The Letter of Credit shall be issued by a commercial bank acceptable to [Landlord] and (1) that is chartered under the laws of the United States, any State thereof or the District of Columbia, and which is insured by the Federal Deposit Insurance Corporation; (2) whose long-term, unsecured and unsubordinated debt obligations are rated in the highest category by at least two of Fitch Ratings Ltd. (Fitch), Moody’s Investors Service, Inc. (Moody’s) and Standard & Poor’s Ratings Services (S&P) or their respective successors (the Rating Agencies) (which shall mean AAA from Fitch, Aaa from Moody’s and AAA from Standard & Poor’s); and (3) which has a short term deposit rating in the highest category from at least two Rating Agencies (which shall mean F1 from Fitch, P-1 from Moody’s and A-1 from S&P) (collectively, the LC Issuer Requirements). If at any time the LC Issuer Requirements are not met, or if the financial condition of such issuer changes in any other materially adverse way, as determined by [Landlord] in its sole discretion, then [Tenant] shall within [five (5)] days of written notice from [Landlord] deliver to [Landlord] a replacement Letter of Credit which otherwise meets the requirements of this [Lease] and that meets the LC Issuer Requirements (and [Tenant]’s failure to do so shall,

notwithstanding anything in this [Lease] to the contrary, constitute an Event of Default for which there shall be no notice or grace or cure periods being applicable thereto other than the aforesaid [five-day] period). Among other things, [Landlord] shall have the right under such circumstances to immediately, and without further notice to [Tenant], present a draw under the letter of credit for payment and to hold the proceeds thereof.

Following is some typical language for the governing documents (and once again, any actual language you use should be crafted to fit the particular case):

In the event the issuer of any letter of credit held by [Landlord] is insolvent or is placed into receivership or conservatorship by the Federal Deposit Insurance Corporation, or any successor or similar entity, or if a trustee, receiver or liquidator is appointed for the issuer, then, effective as of the date of such occurrence, said Letter of Credit shall be deemed to not meet the requirements of this Section, and then [Tenant] shall within [five (5)] days of written notice from [Landlord] deliver to [Landlord] a replacement Letter of Credit which otherwise meets the requirements of this [Lease] and that meets the LC Issuer Requirements (and [Tenant]'s failure to do so shall, notwithstanding anything in this [Lease] to the contrary, constitute an Event of Default for which there shall be no notice or grace or cure periods being applicable thereto other than the aforesaid [five-day] period); or, alternatively, [Tenant] shall, within such [five-day] period deliver cash to [Landlord] in the amount required above.

Letters of credit typically follow a fairly pre-determined format. However, the Issuer will often agree to include customized language which might include, among other things, the Beneficiary's automatic right to draw in the event the letter of credit is due to expire without being renewed or replaced, or if the Issuer's credit rating drops below a specified level.

It is obvious that a Beneficiary is in a much better position if it draws upon a letter of credit for payment, and retains the proceeds, *before* the Issuer is subject to a receivership or conservatorship order by FDIC. Failure to do so could render the letter of credit worthless and leave the Beneficiary without a viable course of action to re-establish the deposit or other security.

While beyond the scope of this article, the type of account in which the proceeds are held, in the case of a tenant security deposit, should be carefully considered in order to minimize potential bankruptcy risks.

FDIC May Repudiate Letters of Credit from Banks in Receivership

US banks and thrifts are failing at an alarming pace, and the Rating Agencies have dramatically downgraded the credit ratings for numerous institutions whose financial strength would have been unquestioned just a year or two ago. For banks, 2008 was a very painful year. In 2007, only three banks were placed into receivership; last year, 25 failed, an increase of more than 800 percent.

This year, 2009, is looking ominous for the banking industry, and many experts predict that large

numbers of banks and thrifts will be placed under government control throughout the year. Meanwhile, the Rating Agencies will downgrade ratings as institutions' prospects dim. While the government agencies often transfer assets and liabilities of a failed institution to a successor, the government has the statutory right to repudiate all "burdensome" contracts – including letters of credit – when it places a bank or thrift under government control.

FDIC has recently reminded letter of credit Beneficiaries – most notably commercial landlords – that **FDIC may not honor undrawn standby letters of credit issued by banks that have been placed under government receivership or conservatorship**. In other words, the FDIC has announced that it can repudiate undrawn letters of credit, and that no damages against the Issuer will be available to the Beneficiary, unless the conditions for drawing were fully satisfied before the receivership or conservatorship occurred. Because the United States Supreme Court has held that letters of credit are typically not deposits, the **Beneficiary is not protected up to the FDIC insurance limit for deposit accounts** – currently \$250,000 – if a letter of credit is repudiated. Letters of credit can, of course, be assumed by any bank that accepts the obligations of a failed institution, but the critical message here is that this may occur at the sole discretion of the FDIC and the acquiring bank. FDIC has wide latitude in the way it structures the transfer of assets of a failed institution, so even if a failed bank "merges" into a healthy institution, letters of credit may still be at risk.

Meanwhile, in the event the Issuer is placed under FDIC control, any cash deposited with the Issuer by the Account Party as collateral for a letter of credit will likely be considered a deposit account that is insured only up to \$250,000.

What to Do If You Are a Letter of Credit Beneficiary

First, check all agreements between you and the Account Party to identify the requirements that the standby letter of credit and the Issuer must satisfy.

Second, frequently check all standby letters of credit you may be holding to confirm maturity dates, conditions for draws and, most importantly, the identity of the Issuer. To determine whether the Issuer meets the standards appearing in your agreements with the Account Party, you can easily check the ratings on the rating agencies' websites, as applicable – www.standardandpoors.com; www.moody.com, and www.fitchratings.com. If it appears that the Issuer's rating has fallen below the specified standard, consider advising the party who is required to maintain the letter of credit of such failure in light of its contractual duties. Be sure to follow the document's notice requirements, and check the default provisions to determine whether the party is entitled to notice and a right to cure. FDIC does not publish its *FDIC Watchlist*; if you have concerns about any particular institution, please note it is unlikely the FDIC will either confirm or deny that institution's status.

A notice to a tenant might provide as follows:

Dear Tenant:

In accordance with the requirements of Section ___ of the Lease dated ____, by and

between ABC, LLC (“Landlord”) and XYZ, Inc. (“Tenant”), _____ Bank, the issuer of the letter of credit required under your Lease, no longer meets the LC Issuer Requirements specified therein. Accordingly, pursuant to the requirements of the Lease, Tenant has [five (5)] days from the date of this letter to deliver a replacement letter of credit from a bank that meets such requirements, failing which, Landlord has the right to present the existing letter of credit for payment and to hold the proceeds pursuant to your Lease.

Very truly yours,

[Landlord]

Third, as noted above, many standby letters of credit permit a drawing in full in the event that the Issuer fails to meet the requirements of the underlying contract and no replacement letter of credit has been delivered within a specified time period. When a Beneficiary holds a standby letter of credit with such language, the beneficiary should consider presenting a draw before the Issuer is placed under receivership or conservatorship. Look carefully at notice and cure provisions in the underlying document (such as the lease), and the letter of credit itself, to ensure that no liability will arise from such an action. Under applicable law, the Issuer may have as long as five business days to honor a draft for payment, so **quick and decisive action** will be imperative.

Fourth, in some instances, letters of credit are held in an escrow arrangement by a title company, bank or other entity. Because you should never assume that the escrow agent will be monitoring the Issuer’s financial condition (even if the escrow holder has agreed to do so), **review the applicable terms and conditions** to ensure that the appropriate protections are in place.

Fifth, to the extent that you are involved in documenting a new transaction, **review carefully** how the letter of credit provisions in your documents work, and be mindful of the fact that bank ratings can change dramatically in the course of a day. In addition, from a drafting standpoint, counsel will want to ensure that the documents do not grant back-to-back notice and grace periods that could make decisive action impossible. A tenant may be unable, as a practical matter, to replace a repudiated letter of credit if the Issuer is subject to a receivership or conservatorship action and the FDIC does not transfer the Issuer’s obligations to a successor bank.

Conclusion

Letters of credit play an important role in a variety of real estate and other commercial transactions. The documents associated with the letter of credit, and the letter of credit itself, need to be drafted in a way that recognizes the current volatility in the financial markets. While most documentation will work as the parties intended, increased vigilance is imperative until the banking industry stabilizes.

POSSIBLE CHANGES IN THE WORKS FOR UCC FORMS
BY PAUL HODNEFIELD

Article 9 provides a safe harbor that prevents a filing office from refusing to accept a record submitted in the form and format contained in UCC Section 9-521. The safe harbor has simplified the form preparation process for secured parties and helped reduce indexing errors by the filing office.

Nevertheless, some states have removed the safe harbor from statute and there is growing pressure to make changes to the forms incorporated into Section 9-521. This article explains why states have eliminated the forms safe harbor and what changes may be in store for the forms.

Background

Many UCC veterans will remember the bad old days when every state had its own set of UCC forms. Filers had to use state-approved forms or face the consequences. Some states simply rejected any UCC record submitted on an unapproved form. Others charged a hefty non-standard form fee.

The old state-specific forms had another drawback for both filers and filing offices. The forms often used one field for both the debtor name and address. If there was more than one debtor, the filer either had to combine the information in one field, or provide the additional debtor information on an attached exhibit. Sorting out crowded name fields could be a real challenge. The filing office could only do its best to determine the filer's intent and index the information accordingly. That resulted in a lot of indexing errors.

The situation substantially improved when Revised Article 9 took effect in 2001. The new version of Article 9 contained the Section 9-521 forms safe harbor. Filing offices were still free to accept other forms, but Section 9-521 gave filers certainty that the safe harbor forms would be universally accepted.

The safe harbor forms also simplified the indexing process for filing offices. The forms contained separate sections for each debtor. Each debtor section contained a single field for an organization name or separate fields for the first, middle and last names of an individual debtor. By separating the name fields, the new forms took the guesswork out of indexing.

The final versions of the forms incorporated into Section 9-521 (REV. 07/29/98) were completed well before Revised Article 9 took effect. In practice, the forms have proven a solid success. They simplified the filing process and helped reduce indexing errors. Nevertheless, some filing offices have reservations about the forms because they included space for an individual debtor's Social Security Number ("SSN").

The SSN Problem

The safe harbor forms were designed while at a time when several states required the financing statement to provide an individual debtor's SSN. The SSN was a handy identifier for distinguishing between individuals with the same name. Even in states that

did not require the debtor's SSN, secured parties often provided it out of habit or for their own tracking purposes.

Today, it seems incredible that a public record, freely available on the Internet, should contain space specifically for a debtor's most sensitive personally identifiable information. The form designers, however, did not have the luxury of hindsight. They could not have anticipated the identity theft concerns arising from the explosive growth of the Internet. They had to design forms that reflected the requirements and practices of the day. Consequently, the safe harbor forms included a space labeled specifically for the individual debtor's SSN.

Since 2001, the SSN field has become a political issue for filing offices and the elected officials that oversee them. Threats of negative publicity and lawsuits have motivated filing offices to discourage the filing of SSNs. The Ohio Secretary of State, for example, was sued after an individual found his SSN on the filing office web site. Whether justified or not, the forms have taken some of the blame for the SSN problem.

The International Association of Commercial Administrators ("IACA"), a professional organization that includes state-level UCC filing office supervisors, attempted to address the SSN issue in 2002. IACA slightly modified the safe harbor forms to remove the SSN field label. The SSN space remained, but the label was changed to simply "See Instructions." However, IACA lacked authority to make filers use the new 2002 revision form.

Erosion of the Forms Safe Harbor

The IACA form changes didn't solve the problem. The filing offices still had to accept the REV. 07/29/98 forms. Many UCC filers continued to provide individual debtor SSNs, either out of habit or ignorance. To reduce the frequency of filers completing the SSN field "because it's there," filing offices and state legislatures considered removing the temptation through elimination of the Section 9-521 safe harbor.

At least partially in response to the SSN issue, several states have amended Section 9-521 to give the filing office authority to decide which forms to accept. Nearly all of these states still accept the REV. 07/29/98 forms if they do not include an SSN. However, they could stop accepting them anytime through a simple change in administrative rules.

IACA sought to find a solution that would prevent further non-uniformity. In a 2007 memo to the Permanent Editorial Board for the UCC, IACA suggested an amendment to Article 9 that would delete the REV. 7/29/98 forms from the safe harbor and substitute the most recent forms approved for nationwide use by IACA.

Revision of Section 9-521

In 2008, the Uniform Law Commission and American Law Institute appointed an Article 9 Joint Review Committee ("JRC") to address a number of ongoing issues with Article 9, including the Section 9-521 forms safe harbor. The JRC considered IACA's suggestion along with the option of substituting new forms for the existing forms in Section 9-521.

Initially, some members of the JRC did believe the SSN issue was a compelling reason for making any changes to Section 9-521. After all, the states have been free to encourage use of other forms that do not contain the SSN field, such as the IACA 2002 versions. Nothing prevented the states from developing and promoting their own forms. Moreover, the growing trend towards electronic filing would, over time, reduce the number of SSNS filed on written forms.

On the other hand, some JRC members expressed concern that more states would eliminate the safe harbor unless there were changes to the forms. After extended discussion, the JRC eventually agreed to consider options for replacing the safe harbor forms and requested that IACA develop proposals.

Draft Safe Harbor Forms

IACA began the redesign process in February 2009 and quickly developed new form proposals. The drafts made some significant changes, but largely retained the current field structure. The new design proposals eliminate the SSN field, but the changes don't stop there. The drafts also remove the organization information fields from each debtor section.

The organization information fields were originally intended to help interested parties distinguish between similar debtor names. Later, the drafters of Revised Article 9 decided to require filing in the location of the debtor rather than the collateral. That all but eliminated any problem distinguishing between organization debtors. States generally do not allow unaffiliated organizations to use closely similar names.

Elimination of the SSN and organization information fields allowed the draft forms to use that space for other purposes. Checkboxes that indicate the debtor is an estate, trust or trustee acting with respect to property held in trust could be moved from the Financing Statement Addendum Form to the separate debtor fields. The collateral field could expand to use the remaining available space.

The proposed forms contain other minor layout changes as well. UCC filers will need to become familiar with the new forms if they are adopted. Current drafts of the revised safe harbor forms can be viewed at <http://www.iaca.org/node/126>.

Statutory changes are necessary to substitute the forms proposed by IACA for the current safe harbor forms. For example, Section 9-521 requires changes to reflect the new forms and Section 9-516(b)(5)(C), which requires the debtor's organization information, should be deleted entirely.

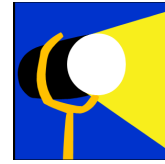
Conclusion

It appears likely that there will be new safe harbor UCC forms within a couple years. The new forms will delete the SSN fields that some filing offices find objectionable. That new design takes away the primary motivation for states to eliminate the safe harbor, preventing further movement towards non-uniformity.

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SPOTLIGHT

June 2009



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.

Moore v. Wells Fargo Construction **903 N.E.2d 525 (Ind. Ct. App. 2009)**

This case is one that will appeal to Clint Eastwood fans because it represents the good, the bad, and the ugly.

The case involved a \$558,000 loan by Wells Fargo Construction, formerly known as The CIT Group/Equipment Financing, Inc., to McCawith Energy, Inc. to refinance a excavator apparently used in McCawith's mining operations. The loan was secured by the excavator and guaranteed by Richard Moore and several other principals of McCawith. The debtor defaulted and ceased operations. CIT eventually located the excavator, which was then inoperable, and proceeded to conduct a disposition.

CIT initially notified both McCawith and Moore that it planned to sell the excavator by private disposition some time after December 16, 2003. Efforts to sell the excavator in that manner were apparently unsuccessful and, almost two years later, CIT notified McCawith and Moore that it planned to conduct an internet auction of the excavator. The second notification provided as follows:

Day & Date:	Wednesday, October 19, 2005
Time:	8 am till sold
Place:	www.salvagesales.com Salvage Sale, Inc. 1001 McKinney Houston, TX 77002 (713) 286-4660

CIT was unable to sell the excavator through the web auction but later, in January 2006, sold it privately for \$54,000. CIT then pursued a deficiency action against Moore on his guaranty. Moore raised two arguments in defense: (i) that CIT had not provided adequate notification of the disposition; and (2) that the disposition had not been conducted in a commercially reasonable manner.

The good. With respect to the notification issue, the court began by noting that Moore had purported to waive the right to notification of the disposition in the written guaranty, but that such a pre-default waiver is ineffective under § 9-624. That is undoubtedly correct. The court then moved on to Moore’s contention that the second notification was improper. Section 9-613(1)(E) requires that the notification include the time and “place” of a public disposition, and Moore contended that CIT’s notification failed to do this because it did not identify a physical location of the sale. The court’s response to this argument is noteworthy because, as more and more creditors seek to conduct collateral dispositions via the internet, the issue of how the notification requirement applies has become the subject of increasing concern.¹

The court observed that “[a]n internet auction has no physical location and is not a situs in the traditional sense.” Nevertheless, the court ruled that CIT’s notification, by including “the web address of the auction and the physical address of the auction company,” adequately apprised Moore where the auction would be held.

This aspect of the court’s decision is both good and bad. There is no good reason why dispositions of collateral cannot be conducted via the internet. Even if there were a good reason to limit such dispositions, the notification requirement would not be the appropriate place to codify such a restriction. In other words, § 9-613(1)(E) is designed to provide some modicum of information to the parties with an interest in the disposition, not to regulate or restrict how the dispositions are to be conducted. Accordingly, courts should not apply the notification requirement in a manner that frustrates commercial practices. The willingness of the court in this case to regard the URL of the auction as the place of the disposition is therefore laudable. Indeed, the Joint Review Committee for Article 9 has independently reached the same conclusion and provisionally approved the following additional language to § 9-613 comment 2:

This section applies to a notification of a public disposition conducted electronically, such as on the Internet. In such a disposition, the place of disposition is the electronic location. For example, under current technology, a notification containing the URL or other Internet address at which the site of the public disposition can be accessed suffices.

The bad. Unfortunately, there are two questionable aspects to the court’s analysis of this issue. First, the court expressly based its conclusion in part on the fact that CIT’s notification included the physical location of the auction company. The court offered no explanation as to why that information should be necessary or is even relevant. The Joint Review Committee seems to be of the view that the URL alone should suffice and any suggestion by the *Moore* court to the opposite is regrettable. Second, recall that CIT did not in fact conduct a public disposition pursuant to the terms in the second notification. It attempted to do so, but ultimately conducted a private sale three

¹ See Michael Korybut, *Using an Online Auction to Sell Article 9 Collateral*, 61 CONSUMER FIN. L.Q. REP. 792 (2007); Michael Korybut, *Online Auctions of Repossessed Collateral Under Article 9*, 31 RUTGERS L.J. 29 (1999).

months later. As a result, CIT's notification should not have had to indicate the place of the disposition at all, merely the time after which the disposition was to be made. *See* § 9-613(1)(E).

The ugly. In dealing with Moore's claim that the disposition was commercially unreasonable, the court went widely astray. In the guaranty agreement, Moore had purported to waive his right to have a disposition conducted in a commercially reasonable manner. However, this right is not one that debtors or obligors may waive. *See* § 9-602(7). While some states have a non-uniform rule to allow secondary obligors (*e.g.*, guarantors) to waive this and other rights,² Indiana does not appear to be one of them. Unfortunately, the court completely ignored § 9-602 and cited no authority in support of its conclusion that this waiver was effective. Perhaps it was poorly briefed. In any event, this portion of the decision should be ignored because it is emphatically at odds with the approach taken in Article 9.³

In re Badour

2009 WL 1139409 (Bankr. N.D.W. Va. 2009)

This case involves a depository bank's efforts to use the funds credited to a customer's deposit account to satisfy a debt the customer owed to the bank. The bank had established a \$35,000 line of credit for Mr. Badour, who in return granted the bank a security interest in his deposit accounts – other than a Keogh account – to secure the debt. The promissory note also expressly allowed the bank to exercise setoff rights against Badour's deposit account (other than the Keogh account). Badour apparently defaulted on the loan and ultimately filed for bankruptcy protection.

On the date of the petition, Badour had approximately \$18,800 in two deposit accounts at the bank (other than his Keogh account, which had a balance of about \$430,000). He claimed \$2,600 as exempt. Some time later, the bank sought permission to offset the funds remaining in the account – approximately \$12,750 – and Badour objected. Badour claimed that the bank could not go after the funds to the extent that the balances were either traceable to transfers from the Keogh account or exempt.

The court rejected Badour's arguments but its analysis was convoluted and unnecessary. First the court evaluated the bank's setoff rights. Noting that a bank is usually not permitted to set off a depositor's indebtedness against a "special account segregated for a specific purpose," if the bank has notice of that purpose, the court ruled that the special nature of the Keogh account did not

² *See, e.g.*, Wash. Rev. Code § 62A.9A-602. *See also* RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY §§ 42(1), 48 (1996) (providing that impairment of collateral is a suretyship defense but that this defense can be waived in a guaranty agreement).

³ After this analysis was written, the court reconsidered its position and concluded that Moore had indeed not waived his right to challenge the commercial reasonableness of the disposition. *Moore v. Wells Fargo Constr.*, 2009 WL 1576468 (Ind. Ct. App. June 5, 2009). Unfortunately for Moore, the court also concluded that the sale was commercially reasonable.

extend to the other deposit accounts. To the extent that the funds credited to the other accounts were traceable to the Keogh account, Badour himself was responsible for the commingling and had done so without notifying the bank.

The court then analyzed the bank's security interest and held that it took precedence over Badour's exemption. Although bankruptcy debtors have authority to avoid some liens that impair exemptions, *see* 11 U.S.C. § 522(f), they do not have the right to impair a security interest on a deposit account.

In sum, the court permitted the bank to exercise setoff because the bank's setoff rights were unaffected by the commingling of funds and its security interest defeated Badour's claimed exemption.

The court's conclusion was undoubtedly correct. Unfortunately, the opinion arguably implies that the bank's two rights – setoff and security interest – were necessary for the bank to win. Specifically, the court's methodology suggests that the bank's setoff rights were needed to overcome the tracing of funds from the Keogh account and its security interest was needed to overcome the claimed exemption. In fact, either right alone should suffice. The bank's setoff rights are treated as a secured claim, *see* 11 U.S.C. § 506(a), and while they are subject to some avoidance in bankruptcy, *see* 11 U.S.C. § 522(h), they are not generally subject to the debtor's exemption rights. More important, the grant of the security interest should make it completely unnecessary to go through the traditional common-law analysis of special deposits. The bank's security interest attached to the two deposit accounts and the source of the funds later credited to the deposit accounts is and should be totally immaterial. Accordingly, the court's whole tracing discussion should be regarded as dicta that supports – but is unnecessary to – its conclusion.

U.S. v. Two Bank Accounts In Amount of \$197,524.99 at Bank of America 2009 WL 803615 (D.S.D. Mar. 24, 2009)

This case arose out of a civil forfeiture action by the U.S. government against two corporate deposit accounts. Timothy Jewell moved to intervene, claiming to have a security interest in the deposit accounts. Jewell had apparently sold his stock in the two corporations to Harvey Dockstader in return for a promissory note. Dockstader granted Jewell a security interest in the stock to secure the note. In addition, Dockstader had both corporations guaranty the debt and purport to grant Jewell a security interest in their deposit accounts to secure the guarantees.

Despite the seemingly common nature of these transactions, the court ruled that Jewell lacked standing to intervene because the transactions were void as against public policy. The court cited some old precedents – dating back to 1895 – to the effect that corporate officers could not use corporate assets to satisfy personal debts. The court also discounted the corporate guarantees, concluding that they too were unenforceable as against public policy. If this portion of the court's analysis were to influence other cases, countless routine transactions would be rendered highly suspect.

As if this were not bad enough, the court went on to conclude that there was a second basis for rejecting Jewell's efforts to intervene. Noting that *unsecured* creditors do not have standing to challenge a forfeiture action, the court concluded that Jewell was unsecured because he lacked a control agreement and thus was *unperfected*. Of course, this analysis completely confuses attachment – which deals with the existence of a security interest – with perfection. If there is some law or rule that prohibits *unperfected*, secured creditors from challenging a forfeiture action, the court failed to cite it. Indeed, prevailing law appears to be opposite. The leading case on standing to challenge a civil forfeiture, *U.S. v. Schwimmer*, 968 F.2d 1570, 1580 (2d Cir. 1992), sets forth a five-part test. Chief among these is that the claimant must “assert a right, title, or interest . . . in the property which has been ordered forfeited.” Nothing about *Schwimmer*, or the many cases that interpret it, suggests that an attached but unperfected security interest would fail this test. Instead, the focus is on excluding general creditors who have, as the *Schwimmer* court notes, “neither title to nor interest in any specific asset in the . . . forfeiture pool.” Consistent with this, every case the *Bank of America* court cited on this point dealt with general, unsecured creditors. Accordingly, the portion of the court's decision confusing attachment with perfection is emphatically wrong and should be consigned to oblivion.

In re Excalibur Machine Co., Inc.
2009 WL 1315985 (Bankr. W.D. Pa. 2009)

In this case, a steel supplier consigned steel plate to a machine manufacturer. After the manufacturer filed for bankruptcy protection, the steel supplier sought, among other things, adequate protection for its interest in the steel plate and its proceeds.

The law governing consignments is somewhat confusing and before discussing the court's analysis in this case, it may be helpful to review the different kinds of consignment-like transactions and how they are treated.

Some retailers, particularly those who sell used goods or locally produced arts and crafts, do not own the goods they are selling. Instead, the owner (the “consignor”) has merely delivered possession of the goods to the retailer (the “consignee”) for sale with the understanding that, upon sale, the retailer will remit the proceeds to the owner, after deducting a specified amount or percentage (a commission) for itself. In short, a consignment is a bailment for sale. The consignor retains title to the goods and the consignee must return the goods to the consignor if they are not sold. In effect, the consignee is functioning as the consignor's selling agent.

Of course, just as the retention of title in a lease can be a security device, *see* §§ 1-201(b)(35), 1-203, the retention of title in a consignment may be a security device. In short, a true consignment bears striking similarity to a security arrangement and distinguishing between a true consignment and a disguised security transaction has long been troublesome in commercial law. In many circumstances, it is almost impossible to tell whether a transaction is really a consignment or a disguised security interest.

Article 9 deals with this problem by bringing most – but not all – true consignments within its scope. See §§ 9-102(a)(20), 9-109(a)(4). By doing this, the need to distinguish between a true consignment and a disguised security interest is significantly lessened. If the true consignment is governed by Article 9, the consignor’s interest in the consigned goods is called a “security interest,” § 1-201(b)(35), the consignor qualifies as an Article 9 “secured party,” § 9-102(a)(21), (72)(C), and the consignee is an Article 9 “debtor,” § 9-102(a)(19), (28)(C). To protect itself against the consignee’s other creditors, a true consignor must then comply with the requirements of Article 9 (e.g., perfect its security interest). See § 9-319 (making clear that the consignee has the ability to grant to other parties a security interest in the consigned goods).

Unfortunately, there is yet another possibility: a “sale or return” transaction. A sale or return is not an Article 9 transaction, instead it is governed by § 2-326. In a sale or return transaction, the goods are sold to a merchant for resale but the merchant has the option to return the goods for credit against the obligation to pay the price. This transaction may look a lot like a true consignment. The key difference is that in a true consignment, the goods are not sold to the consignee and the consignee has an *obligation* to return them if they are not sold; in a sale or return, the goods are sold and the buyer has merely an *option* to return them if they are not sold.⁴

The following chart may be helpful in distinguishing among these various possibilities:

	Distinguishing Characteristics	Governing Law
True Consignment	Goods are not sold. Instead, title is retained by the consignor, who is entitled to return of all goods not sold by the consignee. In the purest form, the consignor may demand the goods back at any time. Often, however, the consignor is entitled to the goods only if the consignee is unable to sell them within a specified time.	Article 9 generally, § 9-109(a)(4), unless excluded from the definition of “consignment” in § 9-102(a)(20) (because, e.g., the property is worth less than \$1,000 or the goods were consumer goods in the hands of the consignor). If excluded, the transaction is a bailment.
Consignment Transaction That Is Really a Credit Sale	Title is retained by the “consignor.” Perhaps little or no expectation that the goods will ever be returned to the “consignor.” Perhaps “consignee” controls the terms of any sale to its customers or in fact plans to use the goods rather than to sell them.	Article 9. § 9-109(a)(1).
Sale or Return	Goods are sold to merchant, who has a right to return them.	Article 2. § 2-326.

In the case at hand, the court concluded that the parties’ consignment transaction was really a security agreement. The court noted that the parties did not intend that the manufacturer would sell

⁴ See *In re Morgansen’s Ltd.*, 302 B.R. 784 (Bankr. E.D. N.Y. 2003); *In re Haley & Steele, Inc.*, 2005 WL 3489869 (Mass. 2005).

the steel plate to third parties. Instead, they expected that the steel plate would be segregated in the manufacturer's facility until needed in its manufacturing process. At that point, the manufacturer was to and did notify the supplier, who invoiced the manufacturer for the goods. Therefore, the transaction was really a sale with a retained security interest, at least after the invoice was sent. So far, so good. The court's analysis, while brief, was sound.

The steel supplier (now deemed a secured party) still claimed that it was entitled to adequate protection. Specifically, it did not want the manufacturer to sell machines made with the steel plate it had provided without paying over the cash proceeds. The court rejected this argument. In doing so, the court looked at the language of the consignment agreement (now a security agreement) and concluded that the only collateral was the steel plate, not the machines made with the steel plate. In doing so, the court cited neither § 9-335 (on accessions) nor § 9-336 (on commingled goods).

The opinion does not explain what types of the machines the manufacturer made or whether the identity of the steel plate was lost when it was incorporated into the machines. If the identity of the steel plate was not lost – that is, if it remained steel plate and could be removed without altering its character – then the steel plate became an “accession.” *See* § 9-102(a)(1). In such a case, whether the supplier's security interest attaches to the whole machine is a matter that rests on the collateral description in the security agreement. *See* § 9-335 comment 5. However, in either case, the security interest remains in the steel plate. § 9-335(a). While the parties could surely change that rule by agreement – in other words, they could provide for the security interest to de-attach to the steel plate when it becomes an accession – nothing in the parties' agreement suggested that they intended such a result. More important, as evidenced by the court's reference to the security interest as existing only in “raw material that remained in segregated storage,” the court did not appreciate that the security interest would continue to cover the steel throughout the manufacturing process unless the security agreement said otherwise. Instead, the court's analysis was premised on the assumption that the security interest continued only if the security agreement expressly so provided.

If the identity of the steel plate was lost, then the court's error is even more significant. In that case, the steel became “commingled goods” and the security interest would automatically attach to the whole resulting product. § 9-336(a)–(c). This rule is much like the rule in § 9-315(a)(2), which provides that a security interest extends to proceeds of the collateral. It is an automatic rule that need not be expressed in the security agreement. While parties could no doubt provide for an exception, silence in the security agreement is not a basis for finding such an exception.

As a result, the supplier's security interest in the steel plate should have continued either in the steel plate itself or in the entire machines made with it. The receipts generated from the sale of the machines would then be identifiable cash proceeds of the supplier's collateral. The court was wrong to focus so heavily on the language of the security agreement.

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ABA Business Law Section

GENERAL PROVISIONS AND RELATIONS TO OTHER LAW
SUBCOMMITTEE

SUMMER 2009

Kristen David Adams, Chair

At the Business Law Section meeting in Vancouver, one of the UCC Committee programs addressed the Restatement of Restitution and the extent to which it might be incorporated by reference into the UCC through 1-103 as a "supplementary general principle." To follow up on this presentation, the General Provisions and Relation to Other Law Subcommittee will be exploring some of the ways in which courts have used 1-103 over the past 5 years to bring in some of these background principles, including but not limited to the following: statutes of limitations, negligence, common-law subordination agreements, common-law breach of contract, and punitive damages. Some of these applications of 1-103 are relatively uncontroversial, while others can be seriously contested. In addition to discussing recent cases involving 1-103, we will also focus on how courts should determine whether the UCC has "occupied the field" in a given area, so as to displace supplementary general principles that might otherwise apply. The following short article is meant to serve as a brief introduction to our discussion.

Uniform Commercial Code § 1-103 (b) provides the general rule that courts must apply when seeking to determine whether the UCC pre-empts certain common-law claims. Section 1-103 (b) provides as follows:

Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

While the language seems fairly straightforward, its application has proven to be challenging and sometimes controversial. *Straughter-Carter v. Wachovia Bank, N.A.* is a recent case exploring the question of when the UCC "displaces" a common-law cause of action. *Straughter-Carter v. Wachovia Bank, N.A.*, 2009 WL 1140124 (E.D. Pa. April 28, 2009). The case involved claims by Plaintiffs Straughter-Carter Post No. 6627, Veterans of Foreign Wars of the United States, and Veterans of Foreign Wars of Pennsylvania against Defendant Wachovia Bank, N.A. Plaintiffs claimed that Wachovia acted negligently and converted funds belonging to Plaintiffs by (1) permitting a certain Charles Covington to open an account in the name of Straughter Carter Post even though Covington had no authority to do so, (2) accepting a check from Covington for deposit that was made payable to Plaintiffs and improperly indorsed by Covington in his own name, and (3) allowing Covington to withdraw the funds represented by the check.

Wachovia moved to dismiss Plaintiffs' negligence claim, contending that UCC § 3-420 pre-empted any common-law cause of action under these facts. In support of its motion, Wachovia relied on *Gress v. PNC Bank, N.A.*, 100 F. Supp.2d 289 (E.D. Pa. 2000), in which the court found that §3-420 displaced both common-law conversion and negligence claims. *Gress*, like *Straughter-Carter*, involved a motion to dismiss. The *Gress* court's principal justification for granting the motion insofar as it pertained to this pre-emption claim was its determination "that the UCC intends to produce interjurisdictional uniformity as to the commercial activities it governs and, further, that displacing common law tort liability with respect to such activities is vital to that project." *Id.* at 292. This was true, the *Gress* court held, notwithstanding the fact that § 3-420 mentioned only conversion and not negligence, because the statute's "intended purpose is to provide exclusive regulations to govern the unauthorized payment of negotiable instruments." *Id.*

Even though the *Gress* case appears to be on all fours with *Straughter-Carter*, the court nevertheless found for the Plaintiffs and denied the motion to dismiss. The court was persuaded by language taken from two cases, *New Jersey Bank, N.A. v. Bradford Security Operations, Inc.*, 690 F.2d 339 (3d. Cir. 1982), and *Bucci v. Wachovia, N.A.*, 591 F. Supp. 2d 773 (E.D. Pa. 2008). The *New Jersey Bank* case sets forth a two-part test to be used to determine whether pre-emption has occurred in a given case: "[P]arallel Code and common law claims may be maintained except in circumstances where (1) the Code provides a comprehensive remedial scheme, and (2) reliance on the common law would undermine the purposes of the Code." *Bucci*, 591 F. Supp.2d at 779, citing *New Jersey Bank*, 690 F.2d at 346. In *New Jersey Bank*, which was an Article 8 case, the court found that Article 8 did not preclude a parallel common-law negligence claim. In *Bucci*, which was a § 3-420 case like *Gress*, the court struck down a common-law conversion claim on the ground that "[p]ermitting a parallel common law conversion claim where recovery is specifically provided for by the Code would render the Code meaningless," but allowed a common-law negligence claim to survive the motion to dismiss. In so holding, the *Bucci* court essentially limited *Gress* to its facts, citing *New Jersey Bank* for the proposition that "it is well established in the Third Circuit (and *Gress* does not hold otherwise) that under some fact patterns, a plaintiff may maintain a common-law claim for negligence parallel to a claim under the [UCC]." The *Bucci* court held that it was too early in the litigation process to tell whether "the totality of the [Plaintiff's] allegations . . . are fully redressable by . . . the Code."

I believe it is fair to say that *Bucci* and now *Straughter-Carter* represent significant steps away from the holding in *Gress*, which seemed clearly to establish that neither common-law conversion nor negligence could survive a motion to dismiss in a §3-420 case. Readers who are interested in learning more about how others have handled the issue of pre-emption in similar contexts may enjoy reading Professor Brooke Overby's excellent Winter 2005 article, *Check Fraud in the Courts After the Revisions to UCC Articles 3 and 4*, 57 Ala. L. Rev. 351 (2005) (especially Part III. A., "Viability of Common Law Claims"). An older article that may also be of interest is Steven B. Dow & Nan S. Ellis, *The Payor Bank's Right to Recover Mistaken Payments: Survival of Common Law*

Restitution under Proposed Revisions to Uniform Commercial Code Articles 3 and 4, 65 Ind. L.J. 779 (1990) (especially Part III, describing the “narrow view” and “expansive view” of displacement).

In preparation for our upcoming meeting, I am in the process of preparing a selected bibliography that will include interesting cases and articles addressing the proper application of 1-103 (b). If there are any that you would particularly like to see included, please let me know. I can be reached at (727) 562-7870 or adams@law.stetson.edu.

ABA Business Law Section

SUBCOMMITTEE ON LEASING

Summer 2009

Teresa Davidson, Chair, and Ruthanne Hammett, Vice Chair

Vessel Lease Financing

*Submitted by Marjorie F. Krumholz**

The Maritime Law Association of the United States (“MLA”) is sponsoring legislation to amend the ship mortgage laws to give financing lessors preferred mortgagee status if the underlying lease/bareboat charter is either agreed or deemed to be a lease intended to create a security interest in a vessel. Under current law (Chapter 313 of Title 46 of the United States Code), only holders of mortgages on vessels that are filed and recorded with the Coast Guard are entitled to preferred mortgagee status, and current law does not permit the bareboat charterer to file a preferred ship mortgage on the vessel in favor of the lessor. The proposed law expressly permits the financing lessor to document the vessel in its name and provides that a lease/bareboat charter intended as security may be deemed a preferred mortgage entitled to all of the benefits of a preferred mortgage if such lease/bareboat charter is filed with the Coast Guard and meets the other procedural requirements of the proposed law. The MLA and Equipment Leasing and Finance Association are promoting this legislation in the new Congress.

**Marjorie F. Krumholz, a member of the District of Columbia bar, practices with Thompson Coburn LLP in Washington, DC. Ms. Krumholz is Vice Chair of the Marine Financing Committee of the Maritime Law Association of the United States.*

Committee Business

At the Spring meeting in Vancouver, the Article 2A Leasing Subcommittee heard and discussed a presentation from Marlin Horst of Cassels, Brock & Blackwell LLP entitled “*What U.S. lawyers need to know about leasing in Canada.*” With both U.S. and Canadian lawyers attending the meeting, a good comparative discussion of the PPSA and UCC relative to leasing ensued.

The Article 2A Leasing Subcommittee will not be meeting at the ABA annual meeting in Chicago. The next meeting will be held at the Business Law Section Spring meeting.

ABA Business Law Section

LETTERS OF CREDIT SUBCOMMITTEE

SUMMER 2009

**George Hisert, Chair
Tony Callobre, Vice Chair**

Our Subcommittee will be meeting at the ABA Annual Meeting in Chicago on Sunday, August 2, from 1:30 - 2:30 p.m. Here is our current agenda:

1. The latest on the UN Convention on Independent Guarantees and Standby Letters of Credit. (There have been significant changes since our April report in Vancouver.)
2. Two's Company, Three's a Crowd - Procedural issues on seeking (or defending against) an injunction barring payment on a letter of credit. (We skimmed over this topic in Vancouver. We intend to go into more detail in Chicago.)
3. The continuing saga of the impact of the economic crisis on letter of credit practice.
4. Recent Developments.

We look forward to seeing you in Chicago.

ABA Business Law Section

SUMMER 2009

SUBCOMMITTEE ON PAYMENTS

Sarah Howard Jenkins, Chair

Greg Cavanagh, Vice Chair

Payments & Pandemic Influenza

By Sarah Howard Jenkins

On Monday, August 3, 2009, the Payments Subcommittee will jointly sponsor its meeting with the Electronic Payments and Financial Services Subcommittee of the Cyberspace Law Committee and the Payments & Electronic Banking Subcommittee of the Banking Law Committee. Our meeting topic is Payments & Pandemic Influenza.

As the global community braces for the possibility of pandemic influenza in the winter of 2009/2010, government and the private sector are engaged in preparedness planning to minimize the impact of a pandemic on society and to manage effectively responses to the crisis if a pandemic materializes. The World Health Organization declares that “[e]ffective pandemic preparedness around the world is essential to mitigate the effects of a pandemic, particularly if it becomes severe.” On its official website, the U.S. Department of Health and Human Services Interagency Public Affairs Group on Influenza Preparedness and Response advises that business and other employers must play a key role in protecting the health and safety of employees as well as limiting the negative effect of a pandemic on the economy. Preparedness plans must, of necessity, increase public awareness on the methods of transmitting the disease and implement tools that minimize the spread of disease throughout society.

From a payments perspective, of concern is whether forms of payment such as cash and checks and the use of ATM touch pads increase the risk of transmitting viruses; whether banks, the Federal Reserve, clearinghouses, and other industries have taken or should be required to take steps such as sanitizing cash, checks, and ATM pads to prevent the spread of disease; and whether, as part of a preparedness plan, regulatory agencies or relevant industries should mandate the use of electronic payments such as mobile payments, remote deposit capture, ACH, and pre-paid cards to increase social distancing and minimize the threat of a pandemic.

What counsel should business, corporate, and payments attorneys be sharing with their clients as the client formulates its preparedness plan or engages its response to the pandemic? What obligations are owed by the client to its employees and customers? What steps must be taken to ensure business continuation if the pandemic materializes? A panel of experts will address these and other relevant issues.

Confirmed panelists and their area of discussion include:

Suzet McKinney, Acting Deputy Commissioner, Chicago Public Health Department
(Pandemic Influenza, H1N1, and the transmission of viruses);

Jim Devlin, Special Advisor for Operational Risk, Office of the Comptroller of the Currency
(Regulatory Preparedness Planning: implemented, recommended, and envisioned;
Preparedness Planning in the Banking Sector, Handling of Cash, and Economic Impact
Issues);

Alastair Sinclair, Emergency Management Consultancy, United Kingdom
(Role of Legal Counsel in Preparedness Planning; the United Kingdom's experience and
perspective on emergency management by regulatory, governmental, and political bodies);

Jane Larimer, EVP ACH Network Services, General Counsel
NACHA - The Electronic Payments Association
(Electronic Payments – ACH, Remote Deposit Capture);

Stephen T. Middlebrook, Senior Counsel, U.S. Department of the Treasury
(Electronic Payments -- Mobile Payments);

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

Robert C. Hunter, Senior Counsel, The Clearing House Payments
Company LLC.

Meeting time: 11a.m. until 12:30 p.m., Monday, August 3, 2009
Sheraton Chicago Hotel & Towers
Telephone access will be requested

ABA Business Law Section

SUMMER 2009

SALE OF GOODS SUBCOMMITTEE

David Keith Daggett and Candace M. Zierdt, Co-Chairs

At the 2009 Spring mid-year meeting in Vancouver, the Sale of Goods Subcommittee and the General Scope and Provisions Subcommittee held a joint meeting to explore the meaning of notice as defined in UCC Article One and used in different Articles throughout the UCC. If you would like to receive a copy of the handouts, please let me know. Although the Sale of Goods Subcommittee will not meet at the annual meeting in Chicago, we are interested in any suggestions you may have for a program at the 2010 spring meeting in Denver. If there are any topics that you think may be particularly interesting or timely, please send ideas to me at czierdt@law.stetson.edu.

A few UCC Article Two cases have been decided by U.S. District Courts in the past month or so that are interesting. I will highlight one – not because it is from my home turf of Florida – because it raises interesting issues of illusory contracts, 2-207, and the use of 2-305 to supply a price term when the written contract fails. It is Petroleum Traders Corporation (PTC) v. Hillsborough County and the City of Tampa, 2009 WL 1456430 (M.D. Fla.).

The PTC case was before the District Court on a summary judgment motion. Hillsborough, on behalf of itself and other entities, invited bids for a cooperative purchase of gasoline and fuel. They attempted to contract by using a bid process that the court ultimately determined was illusory because the county retained complete control of everything.¹ Unfortunately for the defendants, Hillsborough County and others, they ordered and accepted fuel assuming they were buying the fuel at the bid price, although they had been notified in advance that PTC intended to bill them at a higher price because PTC had to deliver a different and more expensive product than originally mentioned in the contract. Since the defendants assumed they were operating under a contract using the original bid price, they continued to order and accept fuel from PTC and pay at the bid price instead of the more expensive invoice price. PTC continued to bill the defendants at the higher price. When the defendants refused to pay for the delivered fuel at the invoiced price, PTC sued to recover the difference between the two prices.

Once the documents in the bid process were judged illusory, the court determined that, although there were no enforceable written contracts, there were still a series of contracts between the parties because all of the parties conducted themselves as though there were a contract. Certainly, neither party would have continued to order or deliver fuel if it had not believed it was operating pursuant to a contract.

¹ See Petroleum Traders Corp. v. Hillsborough County 2008 WL 4570318 at p. 5 (M.D. Fla. 2008) where the trial court held that the bid process was illusory because, although PTC committed to selling fuel, the defendants “promised only to do what they wanted, when they wanted, if they wanted.”

After the written documents were deemed useless, the main problem presented was what price the defendants would have to pay for the accepted fuel – would it be the bid price or the invoiced price. The defendants attempted to use UCC 2-207 (2) in an effort to claim that the invoice price would be a material alteration of the original bid and therefore not permissible; however, the court determined that this case was not governed by 2-207 (2) because there was no contract on the written documents. Thus, the parties were relegated to 2-207 (3) which allows a court to find a contract even though the written documents fail to prove an enforceable contract.

Because the court used 2-207 (3) instead of 2-207 (2) it had to resort to the gap fillers of UCC Article Two to establish the price to be paid for the delivered fuel. After the bid price and the invoiced price were knocked out, the court determined that 2-305 controlled and the price would be the reasonable price at the time of delivery. Because this is a question of fact and not appropriate for summary judgment it had to go back to the fact finder. PTC now has the chance to argue that the reasonable price for the fuel is the invoiced price as opposed to the bid price. Thus, it appears that PTC may get a windfall since it is not bound by the bid price. The moral of the story is draft your contracts so they are not illusory because you cannot have your cake and eat it too!

ABA Business Law Section
SUMMER 2009

DEVELOPMENTS REPORTER

**Keith A. Rowley, William S. Boyd Professor of Law, William S. Boyd School of Law,
University of Nevada Las Vegas and Developments Reporter, UCC Committee**

With most state legislatures having concluded their business for the year, here is the 2009 mid-year legislative update.

Revised Article 1

As of July 1, 2009, Revised Article 1 will be in effect in the same thirty-four states in which it was in effect as of January 1: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia.

Notwithstanding my suggestion in the [Winter 2009 newsletter](#) that the promulgation of a substitute § R1-301 might “grease the skids” for additional enactments, 2009 has turned out to be a relatively quiet legislative year for Revised Article 1, with only three enactments – down from five in 2008, and seven in 2007. While the most noteworthy nonuniformity among the thirty-seven enactments remains the definition of “good faith” – with 26 states having adopted the uniform § R1-201(b)(20) definition and 11 having retained the pre-revised definition that imposes a different good faith standard on merchants and non-merchants – all three 2009 enactments adopt the uniform definition and one of the eleven states (Indiana) that retained the pre-revised definition has amended its version of Revised Article 1 to adopt the uniform definition effective July 1, 2010.

As of June 26, Alaska ([HB 102](#)), Maine ([LD 1403](#)), and Oregon ([SB 558](#)) have enacted Revised Article 1 thus far this year. The Alaska and Oregon enactments take effect on January 1, 2010, with Maine’s following on February 15, 2010.

The Washington legislature failed to act on [SB 5155](#) before adjourning sine die on April 26. (That’s probably just as well, because the introduced version of SB 5155 appeared to be drawn directly from the language of official Revised Article 1 circa 2001 and included the [no-longer-official version of Revised 1-301](#) that all 37 enacting states have declined to adopt).

It is possible that the Massachusetts legislature will consider a Revised Article 1 bill sometime this year; however, having waited months for HD 89 to be assigned a bill number, and given the failure of four prior bills to garner a floor vote in either chamber, I would be surprised to see definitive action anytime soon.

Article 2 and 2A Amendments

As of June 26, 2009, only three state legislatures (Kansas, Nevada, and Oklahoma) had considered bills proposing to enact the 2003 amendments to UCC Articles 2 and 2A. In 2005, Oklahoma amended Sections 2-105 and 2A-103 of its Commercial Code to add that the definition of “goods” for purposes of Articles 2 and 2A, respectively, “does not include information,” see 12A Okla. Stat. Ann. §§ 2-105(1) & 2A-103(1)(h) (West Supp. 2008), and amended its Section 2-106 to add that “contract for sale” for purposes of Article 2 “does not include a license of information,” see id. § 2-106(1). The net effect is similar to having enacted Amended §§ 2-103(k) & 2A-103(1)(n), both of which exclude information from the meaning of “goods” for purposes of Article 2 and 2A, respectively. Otherwise, no state has enacted the 2003 amendments and rumor has it that the Uniform Law Commission (NCCUSL) will withdraw its support.

Article 3 and 4 Amendments

As of July 1, 2009, the 2002 amendments to Articles 3 and 4 will be in effect in the same six states in which they were in effect as of January 1: Arkansas, Kentucky, Minnesota, Nevada, South Carolina, and Texas. However, within the year, that number will increase by at least one-half.

As of June 26, Indiana ([SB 501](#)), New Mexico ([SB 74](#)), and Oklahoma ([SB 991](#)) have enacted the 2002 amendments to Articles 3 and 4 thus far this year. Oklahoma SB 991 will take effect on November 1, 2009; New Mexico SB 74 will take effect on January 1, 2010; and Indiana SB 501 will take effect on July 1, 2010.

In addition to enacting the 2002 amendments to Articles 3 and 4 and the usual conforming amendments, Indiana SB 501 also revises the definition of “good faith” in IND. CODE § 26-1-1-201(19) – Indiana’s counterpart to UCC § 1-201(b)(20) – to require all parties to act honestly and to observe reasonable commercial standards of fair dealing. At present, IND. CODE § 26-1-1-201(19) requires only “honesty in fact.”

Revised Article 7

As of January 1, 2009, Revised UCC Article 7 was in effect in thirty-one states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, and West Virginia. As of July 1, 2009, Revised Article 7 will be in effect in South Dakota, as well.

This has been a relatively active legislative year for Revised Article 7. In addition to South Dakota [SB 89](#), which will be in effect by the time you read this, Alaska ([HB 102](#)), Maine ([LD 1405](#)), and Oregon ([SB 558](#)) have already enacted Revised Article 7 in 2009, and Louisiana [HB 403](#) will become law within the week unless Governor Bobby Jindal vetoes it. Alaska HB 102 and Oregon SB 558 will take effect on January 1, 2010, as will Louisiana HB 403, if enacted. Maine LD 1405 will take effect on February 15, 2010.

Georgia [HB 451](#) made significant progress toward adoption. First introduced on February 18, the Georgia House unanimously passed the House Judiciary Committee's substitute version on March 12, and the Senate Judiciary Committee recommended passage on March 26. However, the legislature adjourned on April 3 without a third reading and final action in the senate.

Washington [SB 5154](#) stalled, like its Revised Article 1 counterpart, but without as compelling a reason.

UETA

While the Georgia legislature did not pass HB 451 prior to adjourning, it did pass the Uniform Electronic Transactions Act ([HB 126](#)), to which Governor Sonny Perdue affixed his signature on May 5. As a result, effective July 1, 2009, Illinois, New York, and Washington will be the only states in which UETA is not in effect.

ABA Business Law Section

SUMMER 2009

AGRICULTURAL AND AGRI-BUSINESS FINANCING SUBCOMMITTEE

Robert L. Harris, Chair
Drew Theophilus, Vice Chair

Our next meeting will be held at the ABA 2009 Annual Meeting in Chicago. The time and agenda for our meeting has yet to be determined, but we would welcome any suggestions regarding programming.

ABA Business Law Section

SUMMER 2009

AIRCRAFT FINANCING SUBCOMMITTEE

Michael K. Vernier, Chair

Peter Barlow, Vice Chair

The Aircraft Financing Subcommittee had very successful meetings in Vancouver with sessions on many international aviation issues, such as the state of the international leasing market, airline liquidity problems and solutions, aviation terrorism, Eurocontrol liens, and aircraft financing closings in Canada. The Subcommittee continued its focus on the implications of the adoption of the Cape Town Convention and its establishment of an International Registry for registration of interests in “aircraft objects” with a report from one of our representatives on the International Registry Advisory Board, a discussion of Cape Town registration conflicts, and an update on issues relating to FAA and International Registry filings and opinions. We expect to continue this focus on Cape Town at the ABA 2009 Annual Meeting, highlighted by a discussion of the implications of the adoption of Cape Town by the European Union and issues arising from interpretations of the “power to dispose” of aircraft interests in the Convention. We also expect to have sessions on attorneys’ ethical issues arising in representations for typical aircraft financings. And, as usual, we expect to have a festive Subcommittee dinner on Friday evening, July 31st.

ABA Business Law Section

SUMMER 2009

CREDITORS' RIGHTS SUBCOMMITTEE

Shannon Nagle, Chair
Elizabeth Bohn, Vice Chair

At the ABA Business Law Section meeting in Vancouver, the Creditors' Rights Subcommittee presented **"Catch Me If You Can, Cross Border: A discussion and comparison of creditors' rights under Chapter 15 and Canadian Insolvency Law."**

Speakers Peter Cal of Sherman & Howard in Colorado and David Gruber of Blakes in Vancouver led a discussion of options available to creditors in cross-border insolvencies, focusing on recent cases and developments in the United States and Canada, and the advantages and disadvantages, from the perspective of creditors, of a Chapter 15 ancillary proceeding in the United States compared to a plenary Chapter 11 bankruptcy proceeding in the United States in conjunction with a concomitant plenary proceeding in Canada.

Topics discussed included the use of protocols between the U.S. and Canadian courts, claims and distribution procedures, recovery of assets and pursuit of claims in each jurisdiction, avoidance actions, and protection of local creditors. Cal represented the Canadian foreign representative in the Chapter 15 proceeding *In re Ernst & Young, Inc., as Receiver of Klytie's Developments, Inc., et al.*, in the United States Bankruptcy Court for the District of Colorado. Gruber has been involved in a number of significant cross border insolvency matters in Canada. Their materials are attached [here](#).

At the Annual Meeting in Chicago, the subcommittee will present: "Battle of the Rollup DIP financier and the pre-petition lender: What's a lender to do to avoid getting steamrolled in the borrower's bankruptcy?" Massive amounts of prepetition first lien debt have been rolled up into superpriority DIP loans recently. Was your client/holder of first lien paper invited to the party?

To learn how to make sure your clients get the benefit of participating in a roll-up DIP loan, or position themselves to fight being primed by more aggressive majority lenders in a bank group, join our discussion. We will provide summaries of recent roll-up DIP loan cases, discuss behind-the-scenes negotiations, highlight provisions in loan agreements to monitor in distressed situations and exchange tips on what to add to forbearance agreements or amendments that will protect your client from getting steamrolled by a roll-up.

**CREDITOR CONSIDERATIONS
IN CHAPTER 15 PROCEEDINGS:
IS THE BEST DEFENSE
A GOOD DEFENSE?**

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OVERVIEW OF CHAPTER 15

- Concept is to have one main insolvency case with ancillary cases as necessary.
- Whether to grant recognition is determined by Section 1517. Unlike former practice under Section 304, comity is not relevant at this stage.
- Once recognition is granted, comity is important among the considerations for the relief to be granted. Sections 1501, 1507(b), 1508, 1525.
- After recognition is granted, court must approve entrusting the administration or realization of the debtor's assets within the U.S. to the foreign representative.
- Useful internet tool – www.chapter15.com

CHAPTER 15 REQUIREMENTS FOR RECOGNITION

- The foreign proceeding is either a main proceeding or non-main proceeding as defined in Section 1502.
- A foreign representative is defined in Section 101(24) and 1517.
- Meet the mechanical requirements of Section 1515.
- Helpful to have the court in the foreign proceeding authorize the foreign representative to seek recognition; to request the assistance of foreign courts; and to find that there is a foreign proceeding and a foreign representative. Section 1516(a).

CHAPTER 15 BATTLEFIELD

- To date, the vast majority of cases have dealt with center of main interests (COMI) for a main proceeding or establishment for a non-main proceeding.
- COMI is presumed to be the debtor's registered office. Section 1516(c).
- Establishment means a place of operation where a "debtor carries out a non-transitory economic activity." Section 1502(2).

DOES THE CREDITOR WANT AN INSOLVENCY PROCEEDING

- Same reasons a creditor may want to appoint a receiver or commence an involuntary bankruptcy proceeding
- Is the debtor grossly mismanaged?
- Are there avoidance actions best pursued in an insolvency proceeding?
- If there are cross-border assets and an insolvency is already filed, what is the best way to collect and administer those assets?

ANCILLARY CHAPTER 15 V. PLENARY CHAPTER 11

- A foreign representative may have the option to commence a chapter 11 plenary case even without recognition under chapter 15. *See In re Bear Stearns*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007); Section 303(b)(4); Section 1509(f).
- A foreign representative also has the option to commence chapter 11 after recognition is granted. Section 1511(a).
- Is the stay essential?
- Until the chapter 15 petition is recognized as a foreign main proceeding, the imposition of the stay is discretionary.
- The stay takes effect immediately upon the filing of a chapter 11 petition
- Are there avoidance actions to be pursued? Avoidance actions cannot be brought in a chapter 15 proceeding. To bring avoidance actions, the foreign representative would have to commence a plenary chapter 11. *See* Sections 1521(a)(7) and 1523; *In re Condor Ins. Ltd.*, 2009 WL 321627 (S.D. Miss. Feb. 9, 2009).
- Costs. It is likely a plenary chapter 11 will be more expensive than a chapter 15.
- A chapter 15 does not require bankruptcy court approval for retention of professionals under Section 327 and compensation of professionals under Section 330

CREDITOR CONSIDERATIONS WHETHER TO OPPOSE A CHAPTER 15

- Do local creditors want to avoid sharing local assets with foreign creditors?
- Is the priority scheme in the foreign jurisdiction contrary to the priority scheme in the local jurisdiction to the detriment of local creditors. If you represent a secured creditor, for example, would administrative expenses in the foreign jurisdiction be paid ahead of the secured creditor's claims? *See Bank of New York v. Treco*, 240 F.3d 148 (2d Cir. 2001).
- Would the claims process in the foreign court be readily accessible to local creditors?
- Would punitive/exemplary damages be recognized in the foreign court?
- Does the foreign court recognize equitable subordination or re-characterization of claims?
- Would local creditors be allowed to participate in the foreign proceedings through the local court?

KLYTIES: A CASE STUDY

- *In re Ernst & Young, Inc., as Receiver of Klytie's Developments, Inc., et al.*, 383 B.R. 773 (Bankr. D. Colo. 2008).
- The Friedmans are Israeli citizens who lived in Canada.
- Established Klytie's Developments, Inc. as a Canadian company to raise funds through real estate development and investment funds.
- Many of the investors were Israelis and Europeans.
- Established Klytie's Developments, LLC as a Colorado Company to raise funds from U.S. investors.
- Many funds from European and Israeli investors flowed through Klytie's U.S. bank accounts to Klytie's Canadian bank accounts.
- Investigated and prosecuted by regulatory authorities in Canada and Colorado.
- Criminal prosecution in Colorado.
- Receivership proceeding commenced in Canada.
- Colorado investors commence litigation in United States District Court for the District of Colorado.
- Colorado Securities Commissioner commences litigation in Colorado state court.
- Use of chapter 15 avoids the "grab rule," and provides equal treatment of all investors/creditors regardless of domicile and location of debtor's assets.

Cross-Border Insolvency

International and Canadian Developments

David E. Gruber

Blakes

Overview

1. Background
2. UNCITRAL Model Law
3. UNCITRAL in Canada
4. Chapter 15 Cases
5. Observations

Blakes

Background

- Prior to 1997, strictly governed by principles of comity
- i.e. based on conflicts of laws principles
- But not all foreign jurisdictions applied the same principles
- Uncertainties and inefficiencies

Blakes

UNCITRAL Model Law

- Drafted to address increasing incidents of cross-border insolvencies because of globalization and to facilitate capital flow
- Also designed to address fraud by insolvent debtors from concealing assets or transferring them to foreign jurisdictions

Blakes

UNCITRAL Model Law

- Goal to provide more predictability and reliability than application of doctrine of comity or civil law equivalent
- Not designed to achieve substantive unification of insolvency law
- Applies to insolvencies broadly, including receiverships and reorganizations with debtor in possession

Blakes

UNCITRAL Model Law

- Designed to facilitate international recognition of representatives of the insolvent without expensive and time-consuming procedures
- Key provisions are recognition of foreign proceedings

Blakes

UNCITRAL Model Law

- Foreign proceedings defined as either "foreign main proceeding" or foreign "non-main proceeding"
- Recognition of foreign main proceeding results in broad automatic relief, including stay and freeze of debtor's property

Blakes

UNCITRAL Model Law

- Recognition of foreign non-main proceeding leads to more tailored or discretionary relief
- Difference is whether foreign proceeding occurring in center of debtors main interest (COMI) - most troublesome provision thus far

Blakes

UNCITRAL Model Law

- Provisions included for cross-border cooperation and coordination of concurrent proceedings according to flexible and discretionary provisions

Blakes

UNCITRAL Model Law

- Currently in force in Australia, BVI, Columbia, Eritrea, UK, Japan, Mexico, Montenegro, New Zealand, Poland, South Korea, Romania, Serbia, South Africa and USA (Chapter 15)

Blakes

Cross-border in Canada

- 2 primary pieces of legislation governing bankruptcy
- *Bankruptcy and Insolvency Act* (BIA)
- *Companies' Creditors Arrangement Act* (CCAA)
- Both amended in 2005 to implement UNCITRAL Model Law, but amendments not yet in force

Blakes

1997 Amendments

- BIA Part XIII [ss. 267-275] & CCAA s. 18.6
- Made in Canada attempt to provide more formal framework
- Still largely based on comity
- Presently in force pending proclamation of 2005 amendments

Blakes

1997 Amendments - BIA

- Applies to foreign debtors with property in Canada and Canadian debtors with property abroad
- Intended to facilitate coordination of BIA proceedings with foreign proceedings

Blakes

1997 Amendments - BIA

- "Foreign Proceeding" has narrow meaning, not including extra-statutory proceedings like receivership [*Re: Fracmaster Ltd.*(1999) 11 C.B.R. (4th) 245]

Blakes

BIA - Canadian Debtors

- Absent a foreign proceeding, a Canadian trustee takes title to worldwide property and administers
- If a foreign proceeding exists, court may limit property subject to bankruptcy in Canada to coordinate [s.268(2)]

Blakes

BIA - Canadian Debtors

- Court also has powers to make coordination orders [ss. 268(3)-(4)]
- Absent coordination orders, court has power to make legal or equitable rules governing recognition of foreign insolvency orders and assistance to foreign representatives where not BIA inconsistent [s. 268(5)]

Blakes

BIA - Canadian Debtors

- Court not required to make enforcement orders or orders non-compliant with laws of Canada [s.268 (6)]

Blakes

BIA - Foreign Debtors

- Foreign stay orders not applicable in respect of creditors who reside or carry on business in Canada with respect to property in Canada [s. 269]
- Foreign representatives may bring applications to stay proceedings in Canada on basis of foreign proceeding [s. 271(2)]

Blakes

BIA - Foreign Debtors

- Jurisprudence suggests comity is governing principle [*Re: Singer Sewing Machine Co. of Canada Ltd.* (2000), 18 C.B.R. (4th) 127]
- Foreign representatives may apply for appointment of interim receiver and may make proposal [ss. 270, 271(2)-(3)]

Blakes

BIA - Foreign Debtors

- Attornment of foreign representative limited to costs and compliance with court orders [s. 272]
- Foreign representative may examine debtor or others [s. 271(5)]

Blakes

1997 Amendments - BIA

- Public policy of part XIII is "plurality approach"
- International coordination is important but not controlling
- Exercise of discretion is fact specific, balancing injustice to parties [*Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)* (2001), 30 C.B.R. (4th) 6]

Blakes

1997 Amendments – CCAA

- Scope and powers of court to make coordination order similar to BIA but less detailed in keeping with CCAA scheme
- Court will recognize foreign proceeding as having principal control where real and substantial connection exists [*Re: Matlack Inc.* (2001), 6 C.B.R. (4th) 45]

Blakes

1997 Amendments – CCAA

- However, foreign proceedings must meet Canadian standards to be recognized [*Menegon v. Phillip Services Corp.* (1999), 11 C.B.R. (4th) 262; *Re Teleglobe Inc.* (2005), C.B.R. (5th) 120]
- Coordination includes voluntary reorganization in foreign proceedings involving non-insolvent Canadian subsidiaries [*Re: Atkins Nutritionals Inc.* (2005), 14 C.B.R. (5th) 157]

Blakes

2005 Amendments

- Canadian implementation of UNCITRAL 1997 Model Law on Cross-Border Insolvency

Blakes

2005 Amendments

- Proclamation in force in Canada awaiting rest of 2005 amendments – expected imminently
- Replaces Part XIII *BIA* [ss. 267-284] and adds Part IV to *CCAA* [ss. 44-61]

Blakes

2005 Amendments – Purpose

- Express purpose [*BIA* s. 267, *CCAA* s. 44] is to promote:
 - Cooperation with foreign courts
 - Increased legal certainty for trade and investment
 - Fair and efficient administration in interests of stakeholders
 - Protection and maximization of value
 - Rescue of financially troubled businesses to protect investment and preserve employment.

Blakes

UNCITRAL in Canada

- *BIA* Part XIII and *CCAA* Part IV drafted somewhat differently from UNCITRAL model law
- Accordingly, UNCITRAL guide to enactment may be of limited interpretive assistance

Blakes

UNCITRAL in Canada

- Areas that are similar between the two are Statement of Purpose [*BIA* s. 267, *CCAA* s. 44], Definitions [*BIA* s. 268, *CCAA* s. 45] and Recognition of Foreign Proceedings [*BIA* s. 269, *CCAA* s. 46]

Blakes

UNCITRAL in Canada

- Canadian implementation also differently drafted from Chapter 15 *US Bankruptcy Code*, which is closer to UNCITRAL Model Law

Blakes

2005 Amendments - Interpretation

- “Foreign proceeding” broadly defined, including interim receiverships, reorganizations, etc.
- “Foreign main proceeding” is foreign proceeding in a jurisdiction where the debtor has the centre of the debtors main interests (COMI)

Blakes

2005 Amendments - Interpretation

- "Foreign non-main proceeding" means other foreign proceedings
- "Foreign representative" includes those administering the debtor's property or those acting as a representative in respect of foreign proceedings

Blakes

2005 Amendments - Interpretation

- "Foreign court" includes judicial and other authorities with control or supervision
- COMI is presumed to be location of debtor's registered office in the absence of proof to the contrary

Blakes

2005 Amendments – Recognition

- Application for recognition of foreign proceeding must be supported by certified copies of relevant instruments and statement identifying all foreign proceedings known [BIA s. 269, CCAA s. 46]

Blakes

2005 Amendments – Recognition

- Recognition to be granted if court satisfied of existence of foreign proceeding and status of foreign representative [BIA s. 270(1), CCAA s. 47(1)]
- Recognition order to state whether foreign proceeding is main or non-main [BIA s. 270(2), CCAA s. 47(2)]

Blakes

2005 Amendments – Recognition

- Recognition of foreign main proceeding results in automatic stay and order debtor not to dispose of assets outside ordinary course of business [BIA s. 271, CCAA s. 48]

Blakes

2005 Amendments – Recognition

- If recognition of a foreign non-main proceeding, such provisions are discretionary [BIA s. 272(1)(a), CCAA s. 49(1)(a)]

Blakes

2005 Amendments – Recognition

- For either type of foreign proceeding, court may make orders for obtaining evidence & appointing monitor or trustee in Canada [BIA s. 272(1)(b)-(d), CCAA s. 49 (1)(b),(c)]

Blakes

2005 Amendments – Recognition

- Recognition orders must be consistent with any prior Canadian insolvency orders [BIA s. 272(2), CCAA s. 49(2)]
- Other insolvency proceedings under Canadian legislation not precluded by recognition order [BIA s. 272(3), CCAA s. 49(3)]

Blakes

2005 Amendments – Recognition

- Foreign representative may take further proceedings under Canadian insolvency provisions, including interim receivers, proposals, etc. [BIA s. 274, CCAA s. 51]

Blakes

2005 Amendments - Obligations

- Upon recognition, Court to cooperate with foreign representative and foreign court [BIA s. 275(1), CCAA s. 52(1)]

Blakes

2005 Amendments - Obligations

- Foreign representative obliged to inform court of changes in foreign proceeding, authority to act or further foreign proceedings and must publish notice with prescribed information [BIA s. 276, CCAA s. 53]

Blakes

2005 Amendments – Multiple Proceedings

- Order made under BIA or CCAA after a recognition order must be reviewed for consistency and will be set aside if inconsistent [BIA s. 277, CCAA s. 54]

Blakes

2005 Amendments – Multiple Proceedings

- If recognition of a foreign main proceeding follows recognition of a foreign non-main proceeding, or there are subsequent recognitions of foreign non-main proceedings, recognition orders will be reviewed for consistency and amended or revoked as necessary [BIA s. 278, CCAA s. 55]

Blakes

2005 Amendments - General

- Court can authorize entities to act as representatives in foreign proceedings [BIA s. 279, CCAA s. 56]
- Foreign representatives applying for recognition in Canada atorn only to the extent of exposure to costs and compliance with court orders [BIA s. 280, CCAA s. 57]

Blakes

2005 Amendments - General

- Proceedings in Canada by foreign representatives not stayed by foreign appeals [BIA s. 281, CCAA s. 58]
- Certified copy of foreign order is proof of insolvency in absence of evidence to contrary [BIA s. 282, CCAA s. 59]

Blakes

2005 Amendments - General

- Claimants in Canada must give credit for recovery in other jurisdictions [BIA s. 283, CCAA s. 60]
- Court may apply further legal or equitable rules not inconsistent with legislation [BIA s. 284(1), CCAA s. 61(1)]

Blakes

2005 Amendments - General

- Courts not required to make orders inconsistent with Canadian law or to enforce foreign court orders [BIA s. 284(2), CCAA s. 61 (2)]

Blakes

Chapter 15 Cases

- May provide some insight on how 2005 Amendments will be interpreted
- But, still early days in U.S., so jurisprudence there not settled
- Most contentious area is COMI for offshore registered U.S. based entities

Blakes

Chapter 15 Cases

- *Re Sphinx, Ltd., et al., Debtors in Foreign Proceedings*, United States Bankruptcy Court for the Southern District of New York, 351 B.R. 103, 2006 – proceedings recognized as non-main on policy grounds

Blakes

Chapter 15 Cases

- *Re Sphinx, Ltd.*, United States District Court for the Southern District of New York, 371 B.R. 10; 2007 – decision affirmed

Blakes

Chapter 15 Cases

- *Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, United States District Court for the Southern District of New York; 389 B.R. 325; 2008 – COMI not found in Caymans even though registered and no evidence to contrary

Blakes

Chapter 15 Cases

- *Re Basis Yield Alpha Fund*, United States Bankruptcy Court for the Southern District of New York, 381 B.R. 37; 2008 – evidence of registration offshore and absence of contrary evidence or objection not conclusive of COMI

Blakes

Chapter 15 Cases

- *Zuriel Lavie v. Yuval Ran*, United States District Court for the Southern District of Texas, 384 B.R. 469; 2008 – remitted recognition to bankruptcy court to assess COMI factors

Blakes

Chapter 15 Cases

- *Re Tri-Continental Exchange Ltd.*, United States Bankruptcy Court for the Eastern District of California, 349 B.R. 627; 2006 – rejection of creditor assertion COMI not offshore when regular business conducted there

Blakes

Chapter 15 Cases

- *Re Katsumi Iida*, United States Bankruptcy Appellate Panel for the Ninth Circuit, 377 B.R. 243; 2007 – recognition of foreign main proceeding despite argument Japanese insolvency proceedings contrary to U.S. public policy

Blakes

Chapter 15 Cases

- *Re Jonathan A. Loy*, United States Bankruptcy Court for the Eastern District of Virginia, 380 B.R. 154; 2007 – recognition of foreign main proceeding where debtor temporarily resident in U.S.

Blakes

Chapter 15 Cases

- *Re Petition of Ernst & Young, Inc.*, United States Bankruptcy Court for the District of Colorado, 383 B.R. 773; 2008 – foreign main proceedings in Alberta recognized

Blakes

Chapter 15 Cases

- *Re Oversight and Control Commission of Avanzit*, United States Bankruptcy Court for the Southern District of New York, 385 B.R. 525; 2008 – foreign pending proceedings recognized as main proceedings

Blakes

Chapter 15 Cases

- *Re Ephedra Products Liability Litigation*, United States District Court for the Southern District of New York, 2006 – Canadian proceedings recognized as main despite lack of jury trial and other U.S. procedures more favourable to creditors
- Highlights strategic use of rules

Blakes

Chapter 15 Cases

- *Re Zoran Milovanovic*, United States Court of Appeals for the Second Circuit, 2008 U.S. App. LEXIS 24120
- Recognition of foreign non-main proceeding denied as the individual debtor's "habitual residence" in the U.S. constituted the debtor's COMI

Blakes

Observations

- Uncertainty about COMI may diminish usefulness of Chapter 15
- COMI was meant to be functional rather than legalistic, but ironically may undermine goal of greater predictability

Blakes

Observations

- Still seeing concurrent Chapter 11 and CCAA filings in U.S./Canada cross-border insolvencies instead of Chapter 15
 - Quebecor
 - Pope & Talbot
 - Calpine

Blakes

Co-ordinating plenary cases

- A.L.I. Guidelines provide model co-ordination protocol for dual Chapter 11/CCAA cases
- Direct communication between courts including videoconference joint hearings
- Direct communication between courts and administrators
- Acceptance of documents as authentic without further proof or exemplification
- Non-resident service list & appearance protocols

Blakes

Observations

- Plenary vs Recognition Proceedings
- What are the relative strategic advantages/disadvantages for creditors?
 - cost of recognition proceedings likely lower
 - resolution through recognition proceeding likely faster
 - however, recognition proceeding may not provide the same priorities or procedural rights
 - COMI may be hard to establish

Blakes

ABA Business Law Section

SUMMER 2009

CROSS-BORDER AND TRADE FINANCING SUBCOMMITTEE

Daryl Clark, Chair
Jonathan Cooper, Vice Chair

At the Spring Meeting in Vancouver, our Subcommittee was given a presentation by Linc Rogers of Blakes, Toronto office regarding recent changes to the Canadian *Bankruptcy and Insolvency Act*. The changes dealt with company wage and pension obligations and the effect these provisions have on priorities of secured creditors in Canada. The presentation was very well attended and the feedback we received from those in attendance indicated that the information was both interesting and timely.

Our Subcommittee will not be meeting at the ABA 2009 Annual Meeting this summer in Chicago. In the coming months, we will be looking at ideas for next year's presentation at the ABA 2010 Spring Meeting in Denver.

ABA Business Law Section

SUMMER 2009

LENDER LIABILITY SUBCOMMITTEE

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

Our most recent subcommittee meeting took place at the ABA 2009 Spring Meeting in Vancouver. Jeff Kelly and Mat Rotenberg led a discussion on recent lender liability cases of interest.

Our subcommittee will not meet at the Annual Meeting in Chicago. Our next meeting will take place at the ABA 2010 Spring Meeting in Denver. If you are interested in making a presentation at the Spring Meeting, please contact Mat (rotenberg@blankrome.com).

We want to thank Jeff for his years of service as Chair of our subcommittee. Jeff will be stepping down as Chair in August. Mat will become the new Chair and he will be joined by Vivieon Kelley of the Office of the United States Trustee as Vice Chair.

As always, if you are aware of recent case or other developments in the lender liability area, please let us know. Have a great summer!

ABA Business Law Section

SUMMER 2009

LOAN WORKOUTS SUBCOMMITTEE

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

The Loan Workouts Subcommittee presented a panel at the ABA Section of Business Law's 2009 Spring Meeting in Vancouver, British Columbia entitled: "*Commercial Loan Workout and Bankruptcy Issues in the Non-Mega Case.*" The panel was moderated by Steven B. Soll, a Member of the Firm of Otterbourg, Steindler, Houston & Rosen, P.C. and included presentations by Ragan Powers, Esq., Partner, Davis Wright Tremaine LLP, Kibben Jackson, Esq., Partner, Fasken, Martineau, DuMoulin LLP, Jay Kornfeld, Esq., Partner, Bush Strout & Kornfeld and Nicole Horton, Senior Vice President, MacQuarie Capital. The panel discussed a variety of legal issues that arise in loan workout and bankruptcy matters, with particular emphasis upon comparing the different treatment of these issues in the United States and Canada. The topics discussed included: director and officer liability, enforceability of waivers, secured lender "gifts" to other creditor classes, enforceability of default rate interest in insolvency proceedings, comparative treatment of trade creditors, assumption, rejection or assignment of real property leases, intellectual property rights, pension plans and asset sales free and clear of claims and liens. The panel presented and distributed a PowerPoint presentation that included an analytical outline, and statutory and case authorities, applicable to each topic. An active question and answer session followed each topic discussion.

The Subcommittee intends to organize a panel presentation for the Fall Meeting and solicits ideas and volunteers for this panel. Active participation by Subcommittee members is sought. Please contact Steve at (212) 905-3650/ssoll@oshr.com or Cathy at (602) 916-5343/creece@fclaw.com with your thoughts, comments and suggestions.

ABA Business Law Section

SUMMER 2009

MARITIME FINANCING SUBCOMMITTEE

David McL. Williams, Chair
Mark J. Buhler, Vice Chair

The Maritime Financing Subcommittee will be meeting at the ABA 2009 Annual Meeting in Chicago, on:

Sunday, August 2, 2009
1:00 PM until 2:30 PM

Topics for discussion at our August 2, 2009 meeting will include:

- (1) Report on Drafting Committee on Certificate of Title Act for Boats, National Conference of Commissioners on Uniform State Laws (ULC).

The ULC has recently convened a Drafting Committee on Certificates of Title for Boats. Currently, approximately 34 states (including the District of Columbia) require that boats be titled, while 16 are non-title states. Mississippi is an optional title state. The National Association of Boating Law Administrators has previously drafted a model law for boat titling but the laws of many titling states do not follow it. The US Coast Guard has promulgated regulations for boat titling pursuant to the Vessel Identification System (VIS), but 21 years after enactment, the VIS is still not yet implemented. Boats are now numbered by all 50 states in accordance with federal law but the lack of uniformity in boat titling and lack of coordination with vessel documentation creates difficulties for boat financing. A report on the work of the ULC Drafting Committee now underway will be presented with Subcommittee input requested.

- (2) Discussion of Offshore Registration and Financing of Foreign Flag Yachts.

Larger yachts are often registered offshore for a wide variety of reasons. A duly executed foreign mortgage on a foreign flag vessel duly registered in a public registry under the foreign laws may qualify as a “preferred mortgage” in federal *in rem* foreclosure proceedings. Discussion will address the foreign registries most often used with considerations from the point of view of both owner and lender.

- (3) Report on Legislative Initiative, Preferred Mortgage Liens on Vessels Under Construction to be Documented Under US Flag.

Much vessel newbuilding in the US is financed in 2 stages, a construction loan during the period of construction and permanent financing secured by a “preferred mortgage” after documentation has occurred. Difficulties and potential risks attend the timing of the transition between the financings. A legislative initiative to avoid these risks by permitting construction financing to achieve the priority of a preferred mortgage under US flag will be presented.

- (4) Report on Legislative Initiative, Surrender of State Boat Title for US Documented Vessels.

For many years US vessel documentation laws have required that any certificate of title issued by a state for a documented vessel be surrendered in accordance with regulations prescribed by the Secretary, but more than a decade later, no regulations have yet been prescribed. A legislative initiative in process to address the matter will be discussed.

- (5) Report on Revisory Initiative, Vessel Documentation, CG form 1258.

The Coast Guard has considered revision of its Application for Vessel Documentation, CG form 1258, from time to time. Recent discussions have addressed certain aspects of the form designed to prevent or help avoid fraud and clarify the transition upon documentation of a vessel between financing secured under state law and preferred mortgage financing. Possible initiatives will be presented.

- (6) Other topics of interest to the Subcommittee may be addressed as well, time permitting. These may include recent legislative amendments to accommodate lease financing or a discussion of fractional yacht ownership. Persons interested in specific additional presentation topics are asked to contact the Subcommittee Chair or Vice Chair:

David McI. Williams, Chair
(410) 528-0600
DMWilliams@GandWlaw.com

Mark J. Buhler, Vice Chair
(407) 681-7000
Mark.Buhler@earthlink.net

ABA Business Law Section

SUMMER 2009

REAL ESTATE FINANCING SUBCOMMITTEE

Kathleen Hopkins, Chair

Ed Lester, Vice Chair

The ComFin Real Estate Financing Subcommittee had a lively panel presentation during our ABA 2009 Spring Meeting, moderated by our Vice Chair, Ed Lester, during which we discussed the ills of the commercial real estate financing industry, how we got here, what needs to happen to get us out and how we can negotiate workouts in the interim. Thank you to our panelists and in particular our Vice Chair, Ed Lester, who did a Herculean job of keeping us on track. Materials from that program have been posted to our Subcommittee's [website](#).

I only wish we had more answers, but the topic we discussed in April is worth continued exploration. Accordingly, at the ABA 2009 Annual Meeting in Chicago **on Sunday August 1, 2009 at 8:30-10:00 a.m. at the Hyatt Regency** (Gold Level, West Tower, Acapulco Room) our subcommittee is co-hosting a CLE program with the ABA Real Property Probate and Trust Section entitled: "***It Seemed Like a Good Idea at the Time: Current Issues with Alternative Financing Vehicles.***" We will review current issues with the use of REMICs, mezzanine lending, tenant in common financing and Delaware statutory trusts, and the prospects for use of these alternative financing vehicles in the future. Panelists include Timothy Boyce of Dechert LLP, Steven Davidson of Sonnenschein Nath & Rosenthal, LLP, Norman Powell of Young Conaway Stargatt & Taylor, LLP and Ed Hannon of Freeborn & Peters, LLP. The moderator will be the vice chair of the RPTE Real Estate Financing Group, Rod Clement of Brunini, Grantham, Grower & Hewes, PLLC. PLEASE NOTE: This is a CLE program and you will need to purchase the appropriate admission pass when you register so that you can join us for what promises to be an interesting and helpful program (ABA Registration Desk will also sell CLE passes on-site).

As an aside, the annual meeting program is a product of the Synergy Group, which is a coalition of entities with similar interests in finance and real estate, including BLS, RPPT, ACCFL, ACREL, ISCS, ACMA, and CREW. Neal Kling, Chris Rockers and Kathleen Hopkins represent BLS ComFin in the Synergy Group and we look forward to similar joint programs and projects going forward.

Kathleen Hopkins, Chair
Real Property Law Group, PLLC
Seattle, Washington

Ed Lester, Vice Chair
Carlton Fields, P.A.
Tampa, Florida

ABA Business Law Section

SUMMER 2009

SYNDICATIONS AND LENDER RELATIONS SUBCOMMITTEE

**Gary Chamblee and Richard Brown, Co-Chairs
Christine Gould Hamm, Vice Chair**

If You Want to Do Something Right...

Then you must attend the ABA 2009 Annual Meeting! Plans are well underway for a fantastic panel presentation sponsored by the Syndications and Lender Relations Subcommittee at the ABA 2009 Annual Meeting in Chicago on Monday, August 3, 2009 at 10:00 AM. The panel is entitled "***If You Want to Do Something Right, Do it Yourself – Self-Help Strategies in the Age of Illiquidity.***" Our panel of legal experts and business representatives from some of the most well-known banking institutions will examine cutting edge strategies to deal with problems created by today's illiquid credit market. Topics to be covered include "amend and extend" transactions, forward start facilities, debt buybacks and defaulting lender issues. This is one presentation you will not want to miss. We will be sending periodic emails with more information, so stay tuned!

Model Intercreditor Agreement Task Force.

Immediately following the panel presentation, the Model Intercreditor Agreement Task Force will meet in Chicago to begin wrapping up their last two years of work. This meeting will focus on any remaining bankruptcy issues, drafting assignments and a timetable for roll-out of the Model Form.

The Model Intercreditor Agreement Task Force convened at the Spring Meeting in Vancouver to review and revise the purchase option provisions of the Model Agreement. This was one of the last remaining segments of the Model Agreement to be reviewed. Much progress was made at this lively meeting and we are now proceeding to complete this project.

Topics and Speakers Wanted!

The Subcommittee would like to soon begin presenting periodic non-CLE audio presentations or webinars on subjects of topical interest to subcommittee members. Each presentation would consist of either a single speaker or small panel and last no more than one hour. We have arranged for funding of the calls through the ABA for the upcoming year. If you have ideas for topics or would like to present a seminar or know of someone who does, please let us know!

ABA Business Law Section

SUMMER 2009

MODEL INTERCREDITOR AGREEMENT TASK FORCE

Gary 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 Agreement Task Force met at the Spring Meeting in Vancouver and discussed the provisions of the form Intercreditor Agreement dealing with the right of second lien lenders to purchase the outstanding first lien debt, DIP financing and other topics. The discussion of the purchase right provisions was one of the last substantive sections remaining to be discussed in the Model Agreement and the Task Force is now pushing to complete the Model Agreement this year. Howard Darmstadter is serving as the Editor for the Project and recently completed an extensive edit of the Model Agreement, simplifying definitions and revising the substantive provisions for clarity and to eliminate duplication. Howard is a remarkable editor and his work will soon be available to Task Force members and later on the MICA website. The next step in the process will be to circulate the edited draft for final comments on the text by members of the Task Force and for preparation of commentary for each major section. The Task Force will meet at the ABA 2009 Annual Meeting in Chicago on Monday, August 3, 2009 from 11:00 AM to 12:30 PM.

The Model Intercreditor Agreement Task Force was formed to develop a market-based form of intercreditor agreement for intercreditor arrangements between first and second lien creditors holding liens on common collateral. The Task Force has over 195 members and there has been active participation by members in discussions of the evolving drafts of the Model Agreement. Information about the Task Force and the latest draft of the Model Agreement is posted on the Task Force [website](#).

ABA Business Law Section

SUMMER 2009

JOINT TASK FORCE ON ADR IN COMMERCIAL FINANCE TRANSACTIONS

Thomas J. Welsh, Chair¹

The Joint Task Force on ADR in Commercial Finance Transactions (the “**Task Force**”) was formed in 2008 and is coordinating its work with the ABA Section of Dispute Resolution Subcommittee on ADR in Commercial Finance Transactions (the “**DRS Subcommittee**”) formed in the summer of 2008.

I. Overview and History

The activities of the Task Force and the DRS Subcommittee sprang from a long-standing effort by the American College of Commercial Finance Attorneys, Inc., affiliated with the ABA Business Law Section (“**BLS**”), to integrate alternative dispute resolution techniques into commercial finance transactions. Initially this effort was led in the 1990s by Attorney Donald Lee Rome, of West Hartford, Connecticut, who worked with the American Arbitration Association (“**AAA**”) to draft a 1998 publication titled *Resolving Commercial Financial Disputes – A Practical Guide* (the “**AAA Guide**”). The AAA Guide included mediation and arbitration rules crafted specifically for a dispute involving “any commercial financial arrangement, product or other matter or conduct related thereto.” The AAA guide included provisions for the AAA to designate a National Roster of qualified arbitrators to arbitrate such disputes and was a complete, self-contained set of mediation and arbitration rules that the parties could adopt for the resolution of such disputes. The AAA Guide also included a model draft mediation and arbitration clause that was admittedly “written from the lender’s perspective” but which could be modified to suit the nature of the particular transaction and the negotiations of the parties.

In general, discussions with counsel for lenders reveals that, while a few lenders attempted using the rules and procedures in the AAA Guide, most lenders have either stopped using them, citing inconsistent results and “push-back” from borrowers, or rejected their use in the first instance. Ten years after its publication, most counsel for lenders and borrowers now is unaware of the AAA Guide or the rules therein. Anecdotal evidence suggests that business lawyers negotiating on behalf of borrowers resist arbitration clauses as one-sided, favoring lenders. Counsel for lenders regards the use and benefit of these techniques as unproven. Most business lawyers tell horror stories of arbitration proceedings run amok, and there is a wide perception that the process involves arbitrators who are not familiar with the law or practices in the commercial finance area and who, consequently, make inconsistent or “split the baby” decisions. Their common

¹ Mr. Welsh is also the Chair of the DRS Subcommittee on ADR in Commercial Finance Transactions.

theme is that significant changes would have to be made to the customary arbitration process and the benefits of ADR techniques must be demonstrated before the commercial finance community will adopt them or devote resources to negotiating them into their agreements.

In 2007, the Board of Regents of the American College of Commercial Finance Lawyers decided to revisit this topic. Attorney Thomas Welsh, a Regent of the College, was charged with the task of preparing a colloquium between the Sections of Business Law and Dispute Resolution on these topics. The College of Commercial Arbitrators and the Arbitration Committee of the ABA Section of Dispute Resolution (“**DRS**”) were solicited for their support, and the DRS Subcommittee was formed to assist in this process. A small panel of experts in dispute resolution and business finance was asked to discuss ADR techniques and benefits at the ABA 2009 Spring Meeting of the Business Law Section, held in Dallas, Texas in April of 2008, which colloquium closed at the spring meeting of the Section of Dispute Resolution in New York City in April of 2009. This panel was chaired by Michael Greco, former President of the ABA, acting as the chairperson of the panel and colloquium, and consisted of the former general counsel of a major money center bank, leading academics in the ADR field, an officer of the American Arbitration Association and the Chair of the Task Force. The leadership of the College and sponsoring BLS and DRS committees enthusiastically received this colloquium panel presentation, and, as a consequence, the Task Force was formed on this topic and the Chair of the Task Force was also asked to chair the DRS Subcommittee to coordinate their activities.

II. The Current Credit Crisis and the Current Activities of the Task Force and DRS Subcommittee

Since the appointment of the Task Force and the DRS Subcommittee the credit crisis has gripped the world financial community, and major financial institutions have failed or been absorbed by other institutions. In particular, the collapse and bankruptcy of Lehman Brothers, Inc. illustrates the uncertainty of the dispute resolution clauses (usually involving resort to courts) involving derivative transactions (such as interest rate and credit risk swaps) across national boundaries.² Consequently, the Task Force and DRS Subcommittee have jointly met several times by telephone conference and in person in New York City and redrafted the Discussion Draft of the Supplementary Arbitration Rules for Commercial Finance Transactions (the “**Model Supplementary Rules**”) that

² Many of these situations involve the calculation of breakage fees and similar damage amounts – which is an obvious area where arbitration proceedings would not only result in a faster and more informed determination by an expert arbitrator, but arbitration awards would also have better enforceability across national boundaries (under the widely adopted 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards) than a judgment of a court. The signature, on January 19, 2009, by the United States of the 2005 Hague Conference on Private International Law Convention on Choice of Court Agreements heralds the future day when judgments of courts selected by the parties in their agreements may be more widely recognized and enforced. However, to date only the United States has signed it (Mexico is the only other party currently), and we are years, if not decades, away from this convention entering into force.

was presented at the 2008 and 2008 BLS and DRS spring meetings, to include a wider range of potential commercial finance-related transactions. The Task Force and DRS Committee have posted their work on a web site sponsored by the BLS and adopted a simple address to access the site, as follows:

<http://ABA-Finance-Arb.org>

The red-lined versions of the successive drafts of the revised version of the Model Supplementary Rules are available on this site, together with Commentary and Committee Notes discussing changes to the text resulting from the Task Force meetings and comments received.

The Model Supplementary Rules now expressly include, in addition to borrower-lender disputes under commercial loans, disputes under commercial loan intercreditor agreements, participations and syndications as well as credit and interest rate swap agreements and other derivatives, as well as transactions and disputes (other than consumer disputes) that are specified by the parties. The latest Model Supplementary Rules are directly applicable to the disputes relating to the current credit crisis – they may be adopted by parties opting in after a dispute has arisen or initially as part of adoption in the initial transaction documentation.

The Model Supplementary Rules take a somewhat different approach to arbitration of disputes than the earlier AAA Guide. The Model Supplementary Rules are not intended to be a complete set of rules for all aspects of the arbitration – they are intended to be supplementary to a set of base arbitration rules specified by the parties and to be administered by a service provider selected by the parties – so they are not limited to a single provider or a single set of base arbitration rules. Although an in-depth analysis of the specific differences between the Model Supplementary Rules and current arbitration approaches is beyond the scope of this report, most of these changes result from the need for adherence to applicable law (such as the Uniform Commercial Code), the selection of an expert arbitrator, the ability to opt into a limited appeal process prior to an award being final, and other changes desired by the commercial finance community or necessitated by the nature of these transactions. As a guiding principle, however, the Model Supplementary Rules and the associated model arbitration clauses may be freely modified and fashioned to suit the particular desires and requirements agreed upon by the parties.

III. Planned Activities of the Task Force and the DRS Subcommittee

The Task Force and the DRS Subcommittee have now held a series of joint meetings of members of the Task Force and the DRS Subcommittee, including invited experts and other knowledgeable guests (such as representatives of the College of Commercial Finance Lawyers and College of Commercial Arbitrators), to discuss these topics. The last joint meeting was held on June 17, 2009, where the initial review and revision of the Model Supplementary Rules was completed. The Task Force and the DRS Subcommittee intend for this draft of the Model Supplementary Rules to be an

exposure draft for discussion and comment before the final text is completed and settled upon for use. A preliminary joint report of the Task Force and Subcommittee is now being prepared and will be reviewed and approved for distribution by the end of the summer of 2009.

The Task Force and DRS Subcommittee meetings resulted in the consensus that the preliminary report and exposure draft of the Model Supplementary Rules should be widely distributed to affected industry groups, ADR and commercial finance practitioners, and ADR service providers (who will have to administer arbitrations under these Rules) before a final draft is completed and a final report prepared. Additional informational meetings and input sessions in several regions in the United States will be considered, with final completion anticipated before the summer of 2010.

Finally, we anticipate that the final joint report of the Task Force and DRS Subcommittee and additional colloquium papers on this topic will be submitted to the ABA Press for publication as a product of the joint committees and the College of Commercial Finance Lawyers.

ABA Business Law Section

SUMMER 2009

JOINT TASK FORCE ON FILING OFFICE OPERATIONS AND SEARCH LOGIC

Paul Hodnefield and Jim Prendergast, Co-Chairs

The Joint Task Force on Filing Office Operations and Search Logic – which operates under the joint auspices of the UCC Committee and the Commercial Finance Committee of the Business Law Section – had two significant accomplishments since the last edition of the Commercial Law Newsletter.

- The Task Force presented a program at the Spring Meeting in Vancouver on Canadian filing office issues and procedures as well as comments on certain U.S. matters, such as the situation at the filing office in Washington D.C. The panel was composed of Max Mendelsohn, Chair of the Board of Partners of McMillan, Montreal office, on Quebec issues; Paul Bradley of Lawson Lundell LLP, Vancouver office, on PPSA issues; and Paul Hodnefield of CSA and co-chair of the Task Force, on the U.S. related issues. Among the issues covered by the panel were general filing procedures and certain significant differences from the “assumed” UCC approach to filing financing statements, such as what is and is not covered as to collateral types, required information for an effective filing, filing office variance, and similar mechanics of filing. The Task Force wants to take this opportunity to thank Paul and Max for their generous commitment of time and a job very well done.
- The Task Force also completed and submitted, through its establishing ABA Business Law Committees, to the ALI/ULC Joint Review Committee on revisions to Article 9 its “FOOSL Report on Debtor Name Indexing: Special Characters and Field Lengths”, dated March 26, 2009. The Report was a significant effort of the entire Task Force and the co-chairs want to take this opportunity to thank all the members of the Task Force for their efforts in the development and completion of the Report. Copies of the Report are available on the [Task Force website](#).

ABA Business Law Section

SUMMER 2009

**[SECURED LENDING SUBCOMMITTEE \(COMFIN\)](#)
AND
[SECURED TRANSACTIONS SUBCOMMITTEE \(UCC\)](#)**

Katherine Allen, Chair of Secured Lending Subcommittee
Wansun Song, Vice Chair of Secured Lending Subcommittee

Pauline Stevens, Chair of Secured Transactions Subcommittee
Thomas Plank, Vice Chair of Secured Transactions Subcommittee

The next joint meeting of the Secured Lending Subcommittee of the Commercial Finance Committee and the Secured Transactions Subcommittee of the UCC Committee will be held at the ABA 2009 Annual Meeting in Chicago, on Sunday, August 2, from 10:30 a.m. to 12:00 p.m. We are looking forward to the program, “Just-in-Time or Just Outside the UCC?” to be presented by a panel of experts chaired by James Prendergast of First American Title Insurance Company, with Richard Goldfarb of Stoel Rives and Richard Brown of Winston & Strawn. The panel will explore the mysteries of consignments, bailments and other title manipulation arrangements. What is the real nature of a consignment agreement between a supplier of raw materials and its manufacturing customer for just-in-time inventory supply? Or a consignment agreement between a manufacturer and its distributors? Do these agreements constitute Article 9 secured transactions? Or Article 2 sales transactions? Or common law bailments? Or something else altogether? Can you still have a “true” consignment? Come and listen, or participate in, this sure-to-be-spirited discussion!

Please contact the chairs and vice-chairs listed above if you have any ideas or suggestions for programs or projects. We look forward to seeing you there.

Useful Links and Websites

Compiled by Carol Nulty Doody, Uniform Commercial Code Committee Editor

Please find below a list of electronic links that our members may 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>.
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>.
5. The International Association of Commercial Administrators (IACA) maintains links to state model administrative rules (MARS) and contact information for state level UCC administrators. That information can be accessed at <http://www.iaca.org>.
6. The Uniform Law Commissioners maintains information regarding legislative reports and information regarding upcoming meetings, including Joint Review Committee for Uniform Commercial Code Article 9. You can access this information at <http://www.nccusl.org/Update/>.

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 Committee Editor.

UNIFORM COMMERCIAL CODE COMMITTEE

Section of Business Law
American Bar Association

LEADERSHIP ROSTER

June 2009



UNIFORM COMMERCIAL CODE COMMITTEE LEADERSHIP ROSTER

UCC Committee

Position	Contact Information	Term Expires¹
Chair	Stephen L. Sepinuck Professor, Gonzaga University School of Law PO Box 3528 721 N Cincinnati Street Spokane, WA 99220-3528 Direct: 509.313.6379 Email: ssepinuck@lawschool.gonzaga.edu	2009
Vice Chair	Penelope Christophorou Cleary Gottlieb Steen & Hamilton LLP One Liberty Plaza New York, NY 10006 Direct: 212.225.2516 Fax: 212.225.3999 Email: pchristophorou@cgsh.com	2009
Vice Chair	Mario J. Ippolito Paul, Hastings, Janofsky & Walker LLP Park Avenue Tower 75 E. 55th Street First Floor New York, NY 10022 Direct: 212.318.6420 Fax: 212.230.7848 Email: marioippolito@paulhastings.com	2009

Subcommittees

General Provisions & Relations to Other Law

Position	Contact Information	Term Expires
Co-Chair	Kristen Adams Stetson University College of Law 1401 61 st Street South Gulfport, FL 33707 Direct: 727-562-7870	2009

¹ Terms expire following Annual Meeting in the indicated year.
780738.03-New York Server 4A

	Email : adamska@att.net Email: adams@law.stetson.edu	
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Co-Chair	Thomas Buiteweg Hudson Cook LLP 7250 Parkway Drive Floor 5 Hanover, MD 21076 Direct: 410-684-3200 Fax: 410-684-2001 Email: tbuiteweg@hudco.com	2012
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International Commercial Law

Position	Contact Information	Term Expires
Chair	Kate Sawyer Cleary Gottlieb Steen & Hamilton LLP One Liberty Plaza New York, NY 10006 Direct: 212-225-2634 Fax: 212-225-3999 Email: ksawyer@cgsh.com	2011

Investment Securities

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 Direct: 310.203.7953 Fax: 310.556.5393 Email: MJackson@irell.com	2010
Co-Chair	Howard Darmstadter Citigroup Inc. 425 Park Avenue New York, NY 10043 Direct: 212-793-7392 Fax: 646-291-1432	2010

	Email: darmstadterh@citigroup.com	
Vice Chair	Bradley Gibson First American Title 5 First American Way Santa Ana, CA 92707 Direct: 714-250-8647 Fax: 714-481-4661 Email: brgibson@firstam.com	2011

Leasing

Position	Contact Information	Term Expires
Chair	Teresa Davidson Volvo Financial Services North America P.O. Box 26131 Greensboro, NC 27402 Direct: 336-931-3806 Fax: 336-931-8606 E-mail: teresa.davidson@vfsc.com	2011
Vice Chair	Ruthanne C. Hammett Thompson Coburn LLP One US Bank Plaza 505 N. 7 th Street, Suite 3500 St. Louis, MO 63101-1611 Direct: 314.552.6155 Cell: 314.602.6155 Fax: 314.552.7155 Email: rhammett@thompsoncoburn.com	2011

Letters of Credit

Position	Contact Information	Term Expires
Chair	George A. Hisert Bingham McCutchen LLP Three Embarcadero Center San Francisco, CA 94111 Direct: 415.393.2577 Fax: 415.393.2286 Email: george.hisert@bingham.com	2009

Vice Chair	Anthony R. Callobre Bingham McCutchen LLP 335 South Grand Avenue, Suite 4400 Los Angeles, CA 90071-3106 Direct: 213.680.6686 Fax: 213.830.8606 Main Fax: 213.680.6499 Email: Anthony.callobre@bingham.com	2011
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Payments

Position	Contact Information	Term Expires
Chair	Sarah H. Jenkins UALR William H. Bowen School of Law 1201 McMath Blvd. Little Rock, Arkansas 72202 Direct: 501.324.9937 Fax: 501-324-9992 Email: shjenkins@ualr.edu	2010
Vice Chair	Greg Cavanagh Federal Reserve Bank of New York 33 Liberty Street New York, NY 10045 Direct: 212-720-5437 Fax: 212-720-7797 Email: greg.cavanagh@ny.frb.org	2009

Sale of Goods

Position	Contact Information	Term Expires
Co-chair	David K. Daggett K&L Gates LLP 618 West Riverside Avenue Suite 300 Spokane, WA 99201-0602 Direct: 509.241.1510 Fax: 509.444.7864 Fax: 208.666.9868 Email: david.daggett@klgates.com	2010

Co-chair	Candace Zierdt Stetson University College of Law 1401 61st Street South Gulfport, FL 33707 Direct: 727.562.7349 Fax: 701-777-2217 Email: czierdt@law.stetson.edu	2011

Secured Transactions

Position	Contact Information	Term Expires
Chair	Pauline Stevens Morrison & Foerster LLP 555 West Fifth Street Suite 3500 Los Angeles, California 90013-1024 Direct: 213.892.5406 Fax: 213.892.5454 Email: pstevens@mfo.com	2011
Vice Chair	Thomas E. Plank McKee Nelson LLP 1919 M Street NW Suite 200 Washington, DC 20036 Direct: 202.327.2081 Fax: 202.775.8586 Email: tplank@mckeenelson.com	2011

Article 7

Position	Contact Information	Term Expires
Chair	Anthony Schutz University of Nebraska College of Law 103 Ross McCollum Hall P.O. Box 830902 Lincoln, NE 68583-0902 Direct: 402.472.1248 Fax: 402-472-5185 E-Mail: aschutz2@unl.edu	2011

Editors

Annual Survey

Position	Contact Information	Term Expires
	Russell A. Hakes Widener University School of Law 4601 Concord Pike P.O. Box 7474 Wilmington, DE 19803 Direct: 302.477.2192 Fax: 302.477.2255 E-mail: rahakes@widener.edu	N/A
	Robyn Meadows Widener University School of Law 3800 Vartan Way Harrisburg, PA 17106 Direct: 717.541.3964 Fax: 717-541-3966 E-mail: rlmeadows@widener.edu	N/A
	Stephen L. Sepinuck Professor, Gonzaga University School of Law PO Box 3528 721 N Cincinnati Street Spokane, WA 99220-3528 Direct: 509.313.6379 Email: ssepinuck@lawschool.gonzaga.edu	N/A

Commercial Law Newsletter

Position	Contact Information	Term Expires
	Carol Nulty Doody Skadden, Arps, Slate, Meagher & Flom LLP 4 Times Square New York, New York 10036 Direct: 212.735.2595 Fax: 917.777.2595 Email: Carol.NultyDoody@skadden.com	2011

Developments Reporter

Position	Contact Information	Term Expires
	Keith A. Rowley William S. Boyd School of Law University of Nevada Las Vegas 4505 Maryland Parkway Box 451003 Las Vegas, NV 89154 Direct: 702.895.4993 Fax: 702.895.2482 Email: keith.rowley@unlv.edu	2011

Task Forces

Filing Office Operations & Search Logic (Joint Taskforce with ComFin Committee)

Position	Contact Information	Term Expires
Co-chair (UCC)	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 Email: phodnefi@cscinfo.com	2011
Co-chair (ComFin)	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 Email: jprendergast@firstam.com	2011

Liaisons

Consumer Fellows

Position	Contact Information	Term Expires
	Gail Hillebrand Consumers Union of US Inc. 1535 Mission Street San Francisco, CA 94103 Direct: 415-431-6747 Fax: 415-431-0906 Email: hillga@consumer.org	N/A
	Yvonne Rosmarin Law Office of Yvonne W. Rosmarin 58 Medford Street Arlington, MA 02474 Direct: 781.648.4040 Fax: 781.643.6164 Email: yrosmarin@yourconsumerlaw.com	N/A
	Alan White Valparaiso University School of Law 656 S. Greenwich Street Valparaiso, IN 46383 Direct: 219-465-7842 Fax: 219-465-7872 Email: Alan.White@valpo.edu	N/A

Diversity Committee

Position	Contact Information	Term Expires

Pro Bono Committee

Position	Contact Information	Term Expires
	Michael Ferry Gateway Legal Services, Inc. Suite 950 200 N. Broadway St. Louis, MO 63102 Direct: 314-534-7200 x1123	2011

	Fax: 314-652-8308 Email: mferry@gatewaylegal.org	
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Publications Board

Position	Contact Information	Term Expires
	Carl Bjerre University of Oregon School of Law 1221 University of Oregon Eugene, OR 9740 Direct: 541-346-3981 Fax: 541-346-1564 Email: cbjerre@uoregon.edu	2010

Regional Coordinators*Northeast Region*

Position	Contact Information	Term Expires
	Paul M. McAleer One Logan Square, Ste. 2000 Philadelphia, PA 19103- Direct: 215-988-3351 Fax: 215-988-2757 Email: Paul.McAleer@dbr.com	2012

Southeast Region

Position	Contact Information	Term Expires
	Jeremy S. Friedberg Leitess, Leitess, Friedberg & Fedder PC 10451 Mill Run Circle Suite 1000 Baltimore, MD 21117 Direct: 410-581-7403 Fax: 410-581-7410 Email: Jeremy.Friedberg@llff.com	2010

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Midwest Region

Position	Contact Information	Term Expires
	Darrell W. Pierce Dykema Gossett PLLC 2723 S. State Street Suite 400 Ann Arbor, MI 48104 Direct: 734-214-7634 Fax: 731-214-7696 Email: dpierce@dykema.com	2010

South Central Region

Position	Contact Information	Term Expires
	Ruthanne C. Hammett Thompson Coburn LLP One US Bank Plaza 505 N. 7 th Street, Suite 3500 St. Louis, MO 63101-1611 Direct: 314.552.6155 Cell: 314.602.6155 Fax: 314.552.7155 Email: rhammett@thompsoncoburn.com	2010

Western Region

Position	Contact Information	Term Expires
	John Beckstead Holland & Hart LLP 60 E. South Temple Suite 2000 Salt Lake City, UT 84111 Direct: 801-799-5823 Fax: 800-840-4956 Email: jbeckstead@hollandhart.com	2010



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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

Section of Business Law
American Bar Association

LEADERSHIP ROSTER

JUNE 2009

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 c/o Smith, Gambrell & Russell, LLP Promenade II, Suite 3100 1230 Peachtree Street, NE Atlanta, GA 30309-3952 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 <i>{DO NOT ADD TO ANY EMAIL LISTS}</i>	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	2011

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. Heileson 1925 Miln House Road Williamsburg, VA 23185-7699 Phone: 757.220.9321 E-mail: heileson@earthlink.net	N/A
Co-chair	John D. Pickering Balch & Bingham LLP 1901 Sixth Avenue North, Suite 1500 Birmingham, AL 35203-4642 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 21202-1612 Direct: 410.986.0832 Fax: 410.986.0833 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
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 Bradley Arant Boult Cummings LLP 1600 Division Street, Suite 700 Nashville, TN 37203 Direct: 615.252.2359 Fax: 615.252.6359 Main Fax: 615.252.6380 E-mail: jmurdock@ba-boult.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
Co-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
Co-Chair	Scott Lessne SVP and General Counsel CapitalSource Bank 4445 Willard Ave. 12th Floor Chevy Chase, MD 20815 Direct: 301.634.6748 Email: slessne@capitalsourcebank.com	2011
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

Position	Contact Information	Term Expires
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
Vice Chair	Mark J. Buhler Buhler Law Firm P.A. 555 Winderley Place, Suite 300 Maitland, FL 32751 Direct: 407-618-7000 Fax: 407-681-7500 E-mail: mark.buhler@earthlink.net	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

Position	Contact Information	Term Expires
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
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
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@ycst.com	2010

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

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
Vice Chair	Christine Gould Hamm Husch Blackwell Sanders LLP 4801 Main Street, Suite 1000 Kansas City, MO 64112 Direct: 816.283.4626 Fax: 816.983-8080 E-mail: christine.hamm@huschblackwell.com	N/A
Young Lawyers Liaison	Stacey Walker PO Box 750340 Forest Hills, NY 11375-0340 Direct: 646-242-5487 E-mail: swcounsel@gmail.com	2010
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
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
Chair	Brian D. Hulse Davis Wright Tremaine LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101 Direct: 206-757-8261 Fax: 206-757-7261 E-mail: brianhulse@dwt.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@lfff.com	N/A

Position	Contact Information	Term Expires
Co-Chair	James H. Prior Porter Wright Morris & Arthur, LLP 41 South High Street, Suites 2800-3200 Columbus, OH 43215-6194 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 4801 Main Street, Suite 1000 Kansas City, MO 64112 Direct: 816.283.4626 Fax: 816.983-8080 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 4801 Main Street, Suite 1000 Kansas City, MO 64112 Direct: 816.283.4626 Fax: 816.983-8080 E-mail: christine.hamm@huschblackwell.com	N/A
Co-Chair	Scott Lessne CapitalSource Finance LLC 4445 Willard Ave. 12th Floor Chevy Chase, MD 20815 Direct: 301.634.6748 Email: slessne@capitalsourcebank.com	N/A

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@lfff.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@lff.com	2010

Meetings

Position	Contact Information	Term Expires
Liaison	Christopher J. Rockers Husch Blackwell Sanders LLP 4801 Main Street, Suite 1000 Kansas City, MO 64112 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@yest.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
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



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Alyson Allen



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Daryl E. Clark



Jonathan M. Cooper



Robert L. Cunningham



Jeremy S. Friedberg



Michael S. Greco



R. Marshall Grodner



Christine Gould Hamm

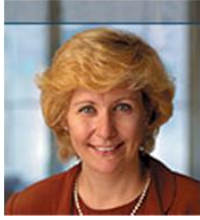


R. Lawrence Harris

Marvin D. Heilesen



Paul Hodnefield



Kathleen J. Hopkins



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Oliver I. Ireland



Meredith Jackson



Matthew W. Kavanaugh



Jeffrey W. Kelley

Randall Klein



Neal J. Kling



Scott Lessne



Edgel C. Lester, Jr.



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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



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Cheryl Stacey



Jane Summers



Drew K. Theophilus



Susan M. Tyler



Michael K. Vernier



Stacey Walker



Lauren E. Wallace



Thomas J. Welsh



David McI. Williams

2009 ANNUAL MEETING SCHEDULE

TIME	ComFin		UCC
Friday July 31			
2-5:30 pm	Subcommittee – Aircraft Financing (Part 1) (2 – 5:30)		
7 – 10 pm	<i>Dinner: Aircraft Subcommittee</i>		
Saturday August 1			
8 – 8:30 am			Subcommittee – General Provisions and Relations to Other Laws (8-9)
8:30-9 am			Subcommittee – General Provisions (cont'd)
9-9:30 am	Subcommittee – Aircraft (Part 2) (9-12:30)	Subcommittee – Creditor's Rights (9-10:30)	Taskforce – Filing Office Operations and Search Logic (FOOSL) (Joint Task Force, UCC and ComFin) (9:00-10:30)
9:30-10 am	Subcommittee – Aircraft (2) (cont'd)	Subcommittee – Creditor's Rights (cont'd)	Taskforce – FOOSL (cont'd)
10-10:30 am	Subcommittee – Aircraft (2) (cont'd)	Subcommittee – Creditor's Rights (cont'd)	Taskforce – FOOSL (cont'd)
10:30-11 am	Subcommittee – Aircraft (cont'd)	PROGRAM: Anatomy of a Workout (10:30-12:30) (ComFin program, UCC co-sponsor)	
11-11:30 am	Subcommittee – Aircraft (cont'd)	PROGRAM: Anatomy of a Workout (cont'd)	
11:30 am-12 pm	Subcommittee – Aircraft (cont'd)	PROGRAM: Anatomy of a Workout (cont'd)	
12-12:30 pm	Subcommittee – Aircraft Financing (2) (cont'd)	PROGRAM: Anatomy of a Workout (cont'd)	
12:30-1 pm			
1-1:30 pm	Subcommittee – Loan Documentation (1:00-2:30)		
1:30-2pm	Subcommittee – Loan Documentation (cont'd)		

As of 6/22/2009 – Please Check Program Book for Meeting Rooms and Changes in Schedule

CLE Programs highlighted in yellow

TIME	ComFin		UCC
2-2:30 pm	Subcommittee – Loan Documentation (cont'd)		
2:30-3 pm	Joint Committee Meeting ComFin/UCC (2:30-4:30)		
3-3:30 pm	Joint Meeting ComFin/UCC (cont'd)		
3:30-4 pm	Joint Meeting ComFin/UCC (cont'd)		
4-4:30 pm	Joint Meeting ComFin/UCC (cont'd)		
4:30-5 pm	ComFin Committee Leadership Meeting (4:30 – 5:30)		UCC Committee Leadership Meeting (4:30 - 5:30)
5-5:30 pm	ComFin Committee Leadership Meeting (cont'd)		UCC Committee Leadership Meeting (cont'd)
6:30-10 PM	UCC AND COMFIN JOINT COMMITTEE DINNER (Ticketed Event)		
Sunday – August 2			
8-8:30 am			PROGRAM: Seeking Perfection: The Proposed Revisions to UCC Article 9 (8-10) (UCC program, ComFin co-sponsor)
8:30-9 am	It Seemed Like a Good Idea at the Time: Current Issues with Alternative Financing Vehicles (8:30 – 10 am) – CLE Program of the RPTE Section, co-sponsored by ComFin		PROGRAM: Seeking Perfection (cont'd)
9-9:30 am	RPTE Program (cont'd)		PROGRAM: Seeking Perfection (cont'd)
9:30-10 am	RPTE Program (cont'd)		PROGRAM: Seeking Perfection (cont'd)
10-10:30 am			
10:30-11 am	Joint Subcommittee – Secured Lending (ComFin) and Secured Transactions (UCC) (10:30 – 12)		
11-11:30 am	Joint Subcommittee – Secured Lending/Secured Transactions (cont'd)		
11:30-12 noon	Joint Subcommittee – Secured Lending/Secured Transactions (cont'd)		
12-12:30 pm			
12:30-1:00pm			Subcommittee – Sales of Goods (12:30-1:30)
1:00-1:30pm	Subcommittee – Intellectual Property Financing (1 – 2:30 pm)	Subcommittee – Maritime Financing (1 – 2:30 pm)	Subcommittee – Sales of Goods (cont'd)
1:30-2:00pm	Subcommittee – IP Financing	Subcommittee – Maritime	Subcommittee – Letters of Credit (1:30-2:30)

As of 6/22/2009 – Please Check Program Book for Meeting Rooms and Changes in Schedule

CLE Programs highlighted in yellow

TIME	ComFin		UCC
	(cont'd)	Financing (cont'd)	
2:00-2:30pm	Subcommittee – IP Financing (cont'd)	Subcommittee – Maritime Financing (cont'd)	Subcommittee – Letters of Credit (cont'd)
2:30-3 pm	Program: Ethics in a World of Change – Consolidating Clients, Disappearing Firms and Other Ethical Issues in the Transactional Context (2:30-4:30)		
3-3:30 pm	Program: Ethics (cont'd)		
3:30-4 pm	Program: Ethics (cont'd)		
4-4:30 pm	Program: Ethics (cont'd)		
4:30-5 pm			
5-5:30 pm			
Monday - August 3			
8-8:30 am			
8:30-9 am			
9-9:30 am			
9:30-10 am			
10-10:30 am	Subcommittee – Syndications and Lender Relations (10 – 11) – <i>Joint with Business Financing Syndicated Bank Financing Subcommittee</i>		
10:30-11 am	Subcommittee – Syndications and Lender Relations (cont'd)		
11-11:30 am	Taskforce – Model Intercreditor Agreement (MICA) (11 – 12:30)		Subcommittee – Payments (11-12:30) – <i>Joint with Cyberspace Electronic Payments Subcommittee</i>
11:30 am-12 pm	Taskforce – MICA (cont'd)		Subcommittee – Payments (cont'd)
12 pm-12:30 pm	Taskforce – MICA (cont'd)		Subcommittee – Payments (cont'd)



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

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Young Lawyers Liaison – Stacey Walker swcounsel@gmail.com

Newsletter Editor - Lauren E. Wallace LEWallace@Veanble.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@mhslaw.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@sandp.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@ba-boult.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@capitalsourcebank.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 McI. Williams DMWilliams@GandWlaw.com

Vice Chair – Mark J. Buhler mark.buhler@earthlink.net

<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 B.G. Allen alyson.allen@ropesgray.com
Vice Chair – R. 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
Vice Chair – Randall Klein randall.klein@goldbergkohn.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 brianhulse@dwt.com

Co-Chair – Jeremy S. Friedberg jeremy.friedberg@llff.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@capitalsourcebank.com

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

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