

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 Update

Secured Transactions

The Joint Review Committee for Article 9 of the Uniform Commercial Code met at the Hilton Portland and Executive Tower in Portland, Oregon on February 6-8, 2009. The meeting was open to all those interested. The Joint Review Committee will also meet March 6-8 in Chicago. For those who cannot attend the meetings, a report on the Joint Review Committee's deliberations and tentative decisions will be available on the UCC Committee's web page.

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[Committee on Commercial Finance](#)

Lynn Soukup, Chair, Pillsbury Winthrop Shaw Pittman LLP

Spring Ahead!

The Spring Meeting will be held April 16-18, 2009 in Vancouver, BC. As usual, we'll have a full schedule of CLE programs and subcommittee and task force meetings beginning on the morning of Thursday

April 16th and ending on the afternoon of Saturday April 18th. The [planned schedule is attached](#) and a final schedule will be distributed closer in time to the meeting date.

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Messages from the Chairs

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Mark Your Calendars

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- [Manhattan Federal Court Enforces 'Clear' Terms of Credit Default Swap Contract](#)
- [Warrants: Key Issues and Current Practice](#)
- [Recent Trends in Second Lien Loans](#)
- [NCCUSL Proposes Revisions to Uniform Common Interest Ownership Act](#)
- [An Update on the FATF Guidance for Legal Professionals and Development of Good Practice Guidelines](#)

New! Synergy Group Report

Committee on Uniform Commercial Code: Spotlight

Committee on Uniform Commercial Code: Subcommittee Reports and Task Force Reports

Committee on Commercial Finance: Subcommittee and Task Force Reports

Joint Subcommittee and Task Force Reports

Useful Links and Websites

[Committee Leadership Rosters](#)

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Lauren E. Wallace
Co-Editor (ComFin)
Venable LLP
410-244-7770

Mark Your Calendars

- **February 25, 2009 - Loan Restructuring: Let's Make a (New) Deal**
This program focuses on 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. Details and registration information are available [here](#).
- **March 6-8, 2009 - Joint Review Committee for Article 9 Meeting - Chicago, Illinois**
The Joint Review Committee for Article 9 of the Uniform Commercial Code's next meeting has been scheduled for March 6-8 in Chicago. Additional information will be available on the UCC Committee's [website](#).
- **March 16, 2009 - Healthcare and Government Receivables - New York, New York**
Led by moderator Ellen Levine, this evening meeting of the Association of Commercial Finance Attorneys will begin with a networking cocktail party and be followed by a CLE presentation from 5:45 pm to 7:00 pm at the 101 Club, 101 Park Avenue, New York, New York. Additional information is available [here](#).
- **March 25, 2009 - Nightmare on Main Street - What Keeps Lenders up at Night?**
Details of the CLE "Nightmare on Main Street - What Keeps Lenders up at Night?", presented by ComFin, will be available [here](#) soon.
- **April 16-18, 2009 - Section of Business Law Spring Meeting - Vancouver, British Columbia**
Please join ComFin in Vancouver for CLE programs, subcommittee and taskforce meetings and our committee dinner on Thursday April 16th. Our CLE programs will cover the syndicated loan market, cross-border insolvency laws affecting transaction planning and the annual review of commercial law developments, each with a Canadian law component. Registration and hotel information is available on the ABA Section of Business Law's 2009 Spring Meeting [website](#) and the dinner reservation form can be accessed [here](#).
- **May 4 -5, 2009 - Commercial Loan Workouts: Where Credit Meets the Law - Las Vegas, Nevada**
Former ComFin Committee Chair Bob Zadek will present a hands-on, in-depth commercial loan workout conference. Additional information is available [here](#).
- **June 10-12, 2009 - Global Business Law Forum - Hong Kong, China**
The theme for the 2nd Annual Global Business Law Forum will be "*legal developments impacting companies doing business in Asia and the Pacific Rim*." More information is available [here](#).
- **June 29-30, 2009 - Commercial Loan Workouts: Where Credit Meets the Law - Chicago, Illinois**
In case you missed this CLE in May, former ComFin Committee Chair Bob Zadek will present an encore of his hands-on, in-depth commercial loan workout conference. Additional information is available [here](#).
- **July 30, 2009 - ABA Annual Meeting - Chicago, Illinois**
The 2009 ABA Annual Meeting will be held in the "Windy City." Consistent with previous years, we expect a number of exciting CLE programs, committee and subcommittee meetings and social events. Registration and other information will be announced soon. Please contact your subcommittee or task force chairs to get involved.

Featured Articles

[Manhattan Federal Court Enforces 'Clear' Terms of Credit Default Swap Contract](#)

Rick B. Antonoff, Edward Flanders, William C.F. Kurz, David M. Lindley and James G. Wheaton, Pillsbury Winthrop Shaw Pittman LLP

On November 5, 2008, Judge Barbara Jones of the Southern District of New York issued an important decision in a case involving a credit default swap (CDS), finding that Citibank N.A. (Citibank)—the credit protection buyer under the CDS—was entitled to certain payments from the credit protection seller, VCG Special Opportunities Master Fund Limited (VCG), and granting Citibank judgment on the pleadings. The decision in VCG Special Opportunities Fund v. Citibank, N.A., Docket No. 08-CV-01563, reinforces the likelihood that courts will strictly construe CDS agreements and uphold them as a matter of law.

[More...](#)

[Warrants: Key Issues and Current Practice](#)

Michael D. Schiffer and Robert S. Fraley, Venable LLP

Due to senior lenders tightening the credit market over the past year, junior capital is playing an increasing role in the capital structure. With the increased need for junior capital and the increased risk to be borne by junior lenders, warrants are again becoming a common component of mezzanine financing transactions. We, therefore, thought this to be an appropriate time to review some of the key issues related to warrants - namely dilution protection and put rights, change of control rights and the original issue discount.

[More...](#)

[Recent Trends in Second Lien Loans](#)

Dana S. Armagno, Marie H. Godush, Kathryn L. Stevens and Michael M. Eidelman, Vedder Price P.C.

Over the past several years, lenders have offered borrowers many alternative financing vehicles as options for financing their acquisitions, corporate restructurings or operations. The creative and complex financing structures that resulted gave rise to many different classes and types of lien priorities. As senior debt became more affordable due to a prolonged period of low interest rates and as traditional banks and other nontraditional investors, such as private equity sponsors, hedge funds, and distressed debt funds, competed to provide these various layers of structured financing, the result was a marked increase in junior debt secured by a second lien.

[More...](#)

[NCCUSL Proposes Revisions to Uniform Common Interest Ownership Act](#)

Kathleen J. Hopkins, Real Property Law Group, PLLC

At the February 16, 2009 meeting of the ABA House of Delegates NCCUSL is presenting Resolution 102D - which seeks to revise the Uniform Common Interest Ownership Act. (UCIOA). NCCUSL resolutions are up/down votes and amendments are not made on the floor of the house. This article discusses the resolution and identifies an area where there would be an impact on real estate finance lawyers and their clients. Many of the changes proposed by NCCUSL to UCIOA address aspects of owner association governance, including the association's relationship with individual members, foreclosures, election and recall of officers and treatment of records.

[More...](#)

[An Update on the FATF Guidance for Legal Professionals and Development of Good Practice Guidelines](#)

Kathleen J. Hopkins, Real Property Law Group, PLLC

In 1989 the G-7 ministers issued an Economic Declaration covering numerous issues concerning international monetary developments. In connection with this declaration, the leaders agreed to the creation of the Financial Action Task Force on Money Laundering ("FATF") which was tasked with coordinating efforts to prevent money laundering in both domestic and international arenas. The FATF has 34 members: 32 countries and territories and 2 regional organizations. At the 1999 meeting of the G-8 finance ministers, they coined the term "gatekeeper" in their communiqué calling for countries to consider various means to address money laundering through the efforts of professional gatekeepers of the international financial system, including lawyers, accountants, company formation agents, notaries and others.

[More...](#)

Committee on Uniform Commercial Code: Subcommittee Reports and Task Force Reports

- [Subcommittee on General Provisions and Relation to Other Law](#)
- [Subcommittee on Letters of Credit](#)
- [Subcommittee on Payments](#)
- [Subcommittee on Secured Transactions](#)
- [Developments Reporter](#)

Committee on Commercial Finance: Subcommittee and Task Force Reports

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

Joint Subcommittee and Task Force Reports

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

Committee Leadership Rosters

- [Committee on Commercial Finance](#)
(as of January 2009)
- [Committee on Uniform Commercial Code](#)
(as of December 2008)

CHAIR'S COLUMN

January 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 Update

Secured Transactions

The Joint Review Committee for Article 9 of the Uniform Commercial Code will be meeting at the Hilton Portland and Executive Tower in Portland, Oregon on February 6-8, 2009. The meeting will be open to all those interested. Reservations can be made by contacting the hotel at (503) 266-1611. The Joint Review Committee will also meet March 6-8 in Chicago. For those who cannot attend these meetings, a report on the Joint Review Committee's deliberations and tentative decisions will be available on the UCC Committee's [web page](#).

The UCC Committee of the State Bar of California is in the process of completing a lengthy report on several proposed changes to Article 9. As soon as that report is completed, and assuming appropriate permission is obtained, that report too will be posted on the UCC Committee's [web page](#).

Permanent Editorial Board

The PEB met in Denver on November 15, 2008 to discuss a variety of matters. [Teresa W. Harmon](#), a partner in the Chicago office of Sidley Austin LLP, serves as the ABA Liaison to the Permanent Editorial Board of the UCC and attended that meeting. A copy of the meeting agenda along with two documents prepared by Teresa – a [report](#) on the deliberations and some [reflections](#) of a PEB neophyte – appear at the end of this column.

Payments

The Uniform Law Commission's new Study Committee on Regulation of Financial Institutions and Payment Systems met by phone on December 10, 2008. Fred Miller, the chair of the Committee, reports that despite the Committee's name, it has no intent to regulate either financial institutions or payment systems. At most it seeks to provide "a statutory background that will serve to the extent private rule sets and agreements do not, much like UCC Article 4 and Article 4A do." Indeed, because its name connotes more than the Committee was designed to do, the Committee

decided to recommended to the ULC's Executive Committee that its name be changed to something like the Study Committee on Payments Issues.

In connection with that more narrow scope, the Committee discussed the need to seek candid input from and build trust with various constituencies. Specifically, the Committee discussed the need to meet with:

- (i) congressional staff and Federal Reserve Board representatives to discuss matters of systemic risk, consumer protection, harmonization of rules, and the proper division of legislation and regulation;
- (ii) representatives of the banking industry to discuss a uniform law for debit transactions; and
- (iii) appropriate persons to discuss issues that might arise when checks are converted to electronics outside of an ECP relationship.

After the meeting, Fred Miller emphasized that “[t]his will be a cooperative effort at every stage,” which focuses on “practical problems of significance.” If there is a consensus to move on to a drafting phase, the drafting committee’s authority will be limited to issues identified.

People Update

Professor Kristen Adams, the chair of the Subcommittee on General Provisions and Relations to Other Law and a co-author of the *Spotlight* column, married her long-time friend Jeff Smith shortly after the new year. Congratulations to Kristen. I am sure the whole Committee joins with me in wishing the two of you many years of happiness together.

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

**Meeting of the Permanent Editorial Board for the Uniform Commercial Code
Saturday, November 15, 2008
9:00 a.m. to 3:00 p.m.**

**Crowne Plaza Denver
1450 Glenarm Place
Denver, Colorado
Phone: 303-573-1450**

AGENDA
(as of November 3)

Note: Action items are in **bold**, discussion items are in regular font, and informational items are in *italics*.

1. **Approval of minutes of PEB Executive Subcommittee meeting held on April 21, 2008 (Annex A) – Sebert**
2. Remembrance of Richard Speidel – Rusch
3. *Report on status of UCC enactments (Annex B) – Sebert*
4. Discussion of possibility of withdrawal of 2003 amendments to UCC Articles 2 and 2A – Cohen
5. Report on Joint Committee on UCC Article 9 and discussion of the Committee's recommendation to revise the comments to UCC §§ 3-302 and 3-303 (Annex C) – Smith
6. Consideration of PEB Commentaries:
 - (a) **UCC § 4A-502 (Annex D) – Miller**
 - (b) **Highland Capital (Annex E) – Cohen**
 - (c) *Commercial Money Center – Cohen*
 - (d) *Impact of UCC §§ 9-406 and 9-408 on anti-assignment provisions relating to interests in unincorporated business organizations – Smith*
7. *Report on PEB payments group and ULC Study Committee on Financial Institutions and Payments Systems (Annex F) – Heller, Miller, & Rusch*
8. *Report on Committee for Implementation of the UN Convention on Independent Guarantees and Stand-by Letters of Credit (Annexes G-1 and G-2) – Smith*

9. *Report on Convention on Assignment of Receivables in International Trade – Smith*
10. Report on UNCITRAL Draft Convention on the Carriage of Goods Wholly or Partly by Sea and UCC Article 7 (Annex H) – Sebert
11. Consideration of development of PEB Commentaries concerning the impact of international conventions on UCC Articles – Sebert
12. Report on proposal on security interests in manufactured housing (Annex I) – Auerbach, Cohen, & Henning
13. *Report on federal tax lien registration legislation – Henning*
14. *Report on status of project to assemble a definitive official text of the UCC – Cohen & Weise*
15. **Financial report and budget amendment (Annex J) – Dissinger**
16. Discussion of possibly creating a group to consider how the PEB might react more quickly when necessary – Boss & Rusch
17. Other business
18. *Next meeting – Sebert*

**Report on the Meeting of the
Permanent Editorial Board for the Uniform Commercial Code
November 15, 2008**

Teresa Wilton Harmon, ABA Liaison

The Permanent Editorial Board for the Uniform Commercial Code met in Denver on Saturday, November 15, 2008. Key points of discussion are summarized as follows:

1. Status of 2003 Amendments to UCC Articles 2 and 2A: Although these amendments have not been enacted in any jurisdiction, they will not at this point be withdrawn.
2. Revised Article 9 Drafting Project: Ed Smith provided an update on the recent meeting in Chicago emphasizing filing issues and timeline. Some attention was given to ensuring that the appropriate stakeholders were at the table. Attention was also paid to some possible cleanup changes to Articles 3-302 and 3-303 related to Article 9.
3. PEB Commentaries:
 - (a) § 4A-502: A proposed commentary relating to Section 4A-502 and its overlap with admiralty law – as discussed in several cases including Winter Storm – was discussed. The draft comment will undergo one more round of revisions and, after email PEB approval, will be available for public comment.
 - (b) Highland Capital: A proposed commentary rejecting the Highland Capital decision and stating that “may be recorded” means that books have been established, will go through one more round of revisions and, after email PEB approval, will be available for public comment.

Other possible comments covering Commercial Money Center and the anti-assignment provisions of § 9-406 and § 9-408 have been referred to the Revised Article 9 drafting project.
4. Payment Systems: The meeting included significant discussion of gaps/discrepancies in laws relating to payments. The decision was made to sunset an earlier PEB group studying this area in light of a separate UCC study committee’s work.
5. Letter of Credit Treaty: Ed Smith reported on the status of implementation of the UN Convention on Independent Guarantees and Standby Letters of Credit. The Convention applies, generally speaking, to standby L/Cs with at least one party outside of the U.S. It is consistent in nearly all respects with Article 5 of the UCC but its wording is different. Implementation issues – which are interconnected with State Department issues and recent Supreme Court precedent questioning practices for implementing treaties – include:
 - (a) whether to have the treaty self-executed as federal law using the words of the Convention (pre-empting Article 5 for qualifying L/Cs);

- (b) whether to pre-implement the treaty via Article 5 as adopted in the 50 states; or
- (c) some compromise.

No resolution was reached.

6. Proposal on Security Interests in Manufactured Housing: This proposal to harmonize real property and personal property laws in this area to create uniformity and predictability continues. Various interest groups are being contacted.

7. Federal Tax Lien Registration Legislation: This project, originated to respond to the *Spearing Tool* decision, now involves pending legislation making little progress on the Hill to create a federal registration system for federal tax liens or at least a pilot program.

The PEB Executive Subcommittee will meet next Spring and the full PEB will meet again next Fall. In the interim, various projects will move forward by email communication or List Serv and by conference call if necessary.

Reflections of a PEB Neophyte
Teresa Wilton Harmon
November 2008

As I digest the events of my first PEB meeting, I'm inundated with several flashbacks – my Elements of the Law class as a first year law student; the huge portraits of Karl Llewellyn and Soia Mentschikoff that hung in the classroom wing of The Law School; the moment I was able to sit on the floor of the Illinois Senate as the legislature debated a UCC amendment; the solemn splendor of the State Capitol rotunda at night, when the reflections, shadows, deep hues and architectural details bring one closer to the best spirits of our legislative process. The law is awesome and resilient and worthy of respect.

Be it known that the PEB meeting was not glamorous. There were no paparazzi, no limos, no keynote speakers or black tie dinners. Instead, less than two dozen devoted servants and protectors of the law gathered to discuss and develop commercial law as it is adopted in our 50 states and beyond. Their work reflects a continuation of the noble goal that uniform legal principles crafted by a broad range of nationally recognized thinkers, and then further vetted and enacted by each of our state legislatures, will lead us to the best commercial law results - while giving deference to federalism, custom and history.

The following are some more focused observations, all of which transcend the specific agenda topics that were before us.

1. The “Whose Law Is It Anyway” Debate is Alive and Well. Several of the discussions at the PEB meeting were territorial in nature. Can legal issues be resolved by changes to the official comments, without further legislative action? What is the PEB's role with respect to a Federal Appeals Court decision interpreting both admiralty (federal) law and the UCC? When commenting on the Highland Capital decision, should the PEB say it agrees with the dissent or stand more strongly on its own? How should an international treaty with consistent – but different – terms than the UCC be implemented – state law versus federal law, our words versus theirs?
2. Commercial Law Is Still and Should Be a Unified Body of Law. Increased specialization has led to a wide gap among commercial lawyers – there are Article 2 lawyers, Article 4 lawyers and Article 9 lawyers for example. But time and again during the PEB meeting, I was struck by the way the various legal areas intertwined and I noticed that analogies and general trends in one area impact another. The payments debate was especially interesting in this regard – even where the focus is on private law, payments law doesn't make sense in a vacuum.
3. Interpersonal Relationships and Personal Reputations Matter. The PEB participants know each other. Their opinions and contributions are evaluated in the context of a more complete understanding of their value and perspective. Theirs are not household names, but they are celebrities in our small universe. Action on some points will not proceed until a key (absent) member's perspective is obtained. A particular project should proceed more quickly so that its leader can continue an active role. Individuals are assigned to a broad range of projects based not solely on their area of legal specialty but on their individual strengths.

4. The Closed Nature of the PEB – While One of Its Key Strengths – Also Leads to an “Inside Baseball” Risk. Where PEB participants are intimately involved in all the delightful intricacies of the Code, there is a risk that they will either make the Code so magically precise that mere mortals cannot understand its beauty or that they will miss out on key developments and practitioner issues, thus taking the Code in the wrong direction. That risk is currently addressed by the presence of ABA liaisons, by the public comment procedure, and through individual participant efforts to expand input. At several points in the meeting, reference was made to efforts to contact interested parties (manufactured homes, revised Article 9 drafting project) and whether laws were “fair” to those who might not be at the table (payments). I hope the PEB will continue to remember to bring the outside in.

5. We Often Do Our Best Thinking When We Are Calm. Two groups were meeting the same week to determine laws relating to our financial marketplace. The contrast between contemporaneous discussions in Washington - influenced by crisis, fear, and infinite politics – and the calm reasoned mood of the PEB meeting is stark. Law must be made both ways. It is comforting to know, however, that the calmer method prevails, at least in some circles.

ComFin Chair's Column February 2009 Commercial Law Newsletter

Spring Ahead!

The Spring Meeting will be held April 16-18, 2009 in Vancouver, BC. As usual, we'll have a full schedule of CLE programs and subcommittee and taskforce meetings beginning on the morning of Thursday April 16th and ending on the afternoon of Saturday April 18th. The [planned schedule is attached](#) and a final schedule will be distributed closer in time to the meeting date.

Our CLE program topics will be:

- An update on the syndicated lending market in the US and Canada
- A comparison of US, Canadian and Mexican insolvency laws, with a focus on transaction planning
- The annual commercial law developments program

Our joint dinner with the UCC Committee will be held Thursday evening.

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

Join the Section – See the World?

The Business Law Section recognizes that business law is increasingly a global matter – so, in addition to seeing more content from ComFin on cross-border issues (including updates on developments on the UNCITRAL Secured Transactions Guide application to intellectual property), the Section will again host a Global Business Law Forum in 2009.

This year's Forum will be held June 10-12, 2009 in Hong Kong. Sixteen in-depth presentations over two days will highlight key legal developments that are impacting companies doing business in Asia and the Pacific Rim. Planned topics of interest to ComFin members include Islamic finance, insolvency, distressed companies and cross-border legal opinions. Registration and program information is available [here](#).

Fall Back

The materials from the ComFin 2008 Fall Meeting are posted to the Committee website under the heading [Materials](#). Thanks to all our panelists, and to Norm Powell and Neal Kling for organizing and chairing the meeting.

Reach Out

Membership in ComFin is open to all interested Section members. So if you have a colleague or contact who would be interested in the materials, information and updates available to ComFin members, please invite them to become a member. The ComFin webpage provides a link to [Join Our Committee](#) and a description of ComFin and its subcommittees and taskforces is [available here](#).

We've arranged for this issue of the Commercial Law Newsletter to be accessible for non-ComFin members, so please forward it to anyone (colleague, client, students, library and professional development or CLE coordinator) with an interest.

All the News That's Fit to Print ...

...will be coming in future newsletters and emails – please let me know if there are areas of interest that we should be covering and if you have suggestions for future programs, projects (including model agreements) or publications.

See you in Vancouver!

Lynn

ComFin Committee Chair
lynn.soukup@pillsburylaw.com

Manhattan Federal Court Enforces ‘Clear’ Terms of Credit Default Swap Contract

By

Rick B. Antonoff, Edward Flanders, William C.F. Kurz, David M. Lindley and James G. Wheaton
Pillsbury Winthrop Shaw Pittman LLP

On November 5, 2008, Judge Barbara Jones of the Southern District of New York issued an important decision in a case involving a credit default swap (CDS), finding that Citibank N.A. (Citibank)—the credit protection buyer under the CDS—was entitled to certain payments from the credit protection seller, VCG Special Opportunities Master Fund Limited (VCG), and granting Citibank judgment on the pleadings. The decision in VCG Special Opportunities Fund v. Citibank, N.A., Docket No. 08-CV-01563, reinforces the likelihood that courts will strictly construe CDS agreements and uphold them as a matter of law.

CDS contracts are derivative instruments by which financial institutions and other businesses manage their exposure to credit risk. In a CDS contract, a credit protection seller agrees with a credit protection buyer to assume certain specified default risks in respect of a particular “reference obligation”. The risks specified in the CDS are taken by the protection seller in exchange for periodic payments from the protection buyer. If a defined “credit event” occurs, the protection seller becomes obligated to make a payment or payments to the protection buyer. CDS contracts frequently require the protection seller to post collateral upon the occurrence of designated events, and may also require the protection buyer to post collateral in certain circumstances.

In 2006 Citibank and VCG entered into a CDS contract under which Citibank purchased protection on reference obligations consisting of Class B Notes issued by Millstone III CDO Ltd. III-A (the “Millstone CDO”). Citibank agreed to make periodic fixed payments of 5.50% per annum on the initial face amount of the Class B Notes. VCG, in turn, agreed to pay Citibank an amount designated as the “Floating Payment Amount” upon the occurrence of certain specified events, referred to among CDS parties as “credit events.” The CDS contract also included provisions under which Citibank was entitled to demand additional collateral from VCG in the event of a downward movement in the daily mark-to-market value of the Millstone CDO. According to the complaint,¹ Citibank began making margin calls in August 2007 and made a total of four margin calls, all met by VCG. In total, VCG provided \$9,960,277.78 in collateral on a credit risk of \$10,000,000.

On January 9, 2008, Citibank informed VCG that a credit event—defined in the CDS contract as an “Implied Writedown”—had occurred, giving rise to VCG’s obligation to pay Citibank the Floating Payment Amount as calculated by Citibank. VCG denied that such an event had occurred and refused to pay the Floating Payment Amount. Citibank subsequently issued a Notice of Default and Early Termination stating that Citibank intended to close out the CDS transaction based upon VCG’s failure to pay the Floating Payment Amount. VCG then commenced the lawsuit against Citibank seeking, among other relief, a declaratory judgment that the margin calls were inconsistent with the CDS contract and that a credit event had not occurred. In addition, VCG sought rescission of the contract and return of the collateral, arguing

that VCG did not knowingly assume the risk that it would be subject to requests for collateral. VCG also alleged that Citibank had breached the contract and an implied covenant of good faith and fair dealing both by requesting excessive collateral and by prematurely demanding the Floating Payment Amount.² Citibank counterclaimed and moved for judgment on the pleadings, arguing that it was entitled to the Floating Payment Amount.

The court ruled in favor of Citibank on all grounds. The court first examined whether a credit event had occurred. Citibank argued that one of the defined credit events—an “Implied Writedown”—had occurred in respect of the reference obligations (the Class B Notes) because securities owned by the Millstone CDO (which had been pledged to secure the Class B Notes) had decreased in value. In a strained reading of the CDS contract, VCG argued that a provision relating to “Written-Down Securities” referred to the Class B Notes rather than the securities owned by the Millstone CDO and thus prevented Citibank’s determination of an Implied Writedown. After analyzing the CDS contract and the indenture for the Millstone CDO, the court concluded that the Implied Writedown provision referred to collateralized assets *held by* the CDO and not to the notes *issued by* the CDO. Accordingly, the court found that Citibank’s determination that a credit event in the form of an Implied Writedown had occurred was proper and that Citibank was entitled to judgment on the pleadings on that issue.

The court also determined that Citibank’s requests for collateral were appropriate. VCG had argued that the collateral demands (which were based upon provisions in a part of the CDS contract called the Credit Support Annex) were inconsistent with another part of the CDS contract, a Confirmation Letter, which did not specifically require collateral payments based on changes in the mark-to-market value of the reference obligations. The court rejected this argument, finding that the Confirmation Letter clearly stated that the “Transaction shall be subject to the Credit Support Annex.”

In opposing Citibank’s motion for judgment on the pleadings, VCG also argued that Citibank’s calculation of the Floating Payment Amount was not conducted in a commercially reasonable manner. The court rejected VCG’s argument on the grounds that, while VCG’s complaint alleged that Citibank failed to calculate *collateral demands* in a commercially reasonable manner, VCG did not challenge Citibank’s calculation of the *Floating Payment Amount* until VCG filed its opposition to Citibank’s motion. The court held that raising an argument for the first time in motion papers is an improper method to allege facts not included in the complaint.

Significantly, the court also found that VCG had waived its argument that Citigroup’s allegedly improper collateral demands breached the contract because VCG had repeatedly posted the requested collateral and had also continued to accept Citibank’s periodic contractual payments. The court noted that the Credit Support Annex contained a dispute resolution provision for disagreements with respect to required collateral, and suggested that VCG should have pursued those dispute resolution procedures prior to bringing an action against Citibank. The court’s reasoning suggests that if VCG had wanted to challenge the collateral requests, it should have done so before delivering collateral and should have exhausted the dispute resolution procedures in the contract.

The court rejected VCG’s claim for rescission, which was based on VCG’s assertion that it did not know it would be required to post collateral based on the mark-to-market value of the

reference obligations. Noting that a contract could only be rescinded for a unilateral mistake where enforcement of the contract would be unconscionable and the mistake was material and made despite the exercise of ordinary care, the court found that rescission was not appropriate in this case where the mistake was due to VCG's negligence. The court found that the collateral requirements were "clear" in the contract, and that VCG had acted negligently. The "instant case presents a circumstance where VCG, a sophisticated hedge fund, simply failed to review the terms of the parties' agreement."

The court dismissed VCG's remaining claims as well. The court found that the claim for breach of an implied covenant of good faith and fair dealing—based on an allegation that Citibank had abused its discretion by making unjustified collateral demands and improper calculations—had been waived because VCG had posted the requested collateral, had relied on Citibank's calculation of the Floating Payment Amount in VCG's own papers, and had not made any specific allegations adducing "arbitrary or irrational" conduct in Citibank's performance of its duties as the Calculation Agent. The court also dismissed VCG's unjust enrichment and conversion claims, finding they were duplicative of the breach of contract claim.

The *VCG v. Citibank* decision is an important decision for the derivatives market generally, and for CDS parties in particular, as it demonstrates important lessons:

First, courts are willing to enforce CDS contracts based on the terms of the contracts themselves without looking outside the documents to determine the party's intent, knowledge at the time of formation, or hedging strategies. This is consistent with the Second Circuit Court of Appeals' decision in *Aon Corporation v. Société Générale*, 476 F.3d 90 (2d Cir. 2007).

Second, to the extent that a CDS contract contains dispute resolution procedures, a party that objects to the other party's calculation but does not invoke the contractual procedures prior to commencing legal action may risk waiving the objection.

Third, the decision reinforces the courts' general aversion to granting rescission based on "unilateral mistake" where a sophisticated party enters into a CDS contract, which means parties must carefully review and fully understand their CDS contracts before executing them.

¹ Complaint in *VCG Special Opportunities Fund v. Citibank, N.A.*, Docket No. 08-CV-01563 (BSJ) (S.D.N.Y. February 14, 2008).

² VCG also brought claims for unjust enrichment and conversion.

**WARRANTS:
Key Issues and Current Practice**

By

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Due to senior lenders tightening the credit market over the past year, junior capital is playing an increasing role in the capital structure. With the increased need for junior capital and the increased risk to be borne by junior lenders, warrants are again becoming a common component of mezzanine financing transactions. We, therefore, thought this to be an appropriate time to review some of the key issues related to warrants - namely dilution protection and put rights, change of control rights and the original issue discount. Warrantholders, of course, also need to consider various other rights as putative equity holders, such as tag along and voting rights, though we will address those considerations in a future article.

Dilution of Warrant Value

A warrant generally permits its holder to purchase a percentage of a borrower's outstanding ownership interest as of the date of the loan transaction. This percentage generally assumes conversion of all current outstanding options or rights to purchase shares (including an agreed-upon management option pool). There are several ways in which a warrant, or the equity interests into which it is convertible, may be diluted. The three primary dilutive transactions are: (1) share splits; (2) the sale of additional equity interests; and (3) distributions of cash or property.

1. *What happens upon a share split or dividend?* A split of the outstanding equity interests of a borrower into a greater number of outstanding interests (*i.e.*, a stock split) or a dividend of additional shares to existing equity holders (*i.e.*, a stock dividend) decreases the value of a warrant by increasing the number of outstanding equity interests without a corresponding increase in the value of the borrower. On the other hand, a combination of outstanding equity interests of a borrower into a lesser number of outstanding interests (*i.e.*, a reverse split) artificially inflates the value of the warrant by decreasing the outstanding equity interests without a corresponding decrease in the value of the borrower. Because a warrant is generally exercisable for a specific number of shares or based on a set percentage of the outstanding equity interests of the borrower on the date of issuance of the warrant (rather than on the date of exercise), the warrant or other related documents must provide that, in the case of stock splits, stock dividends, reverse splits or similar recapitalization events, the number of equity interests into which the warrant is convertible upon exercise is increased (or decreased) in proportion to all such recapitalization events. This type of provision is included in all warrants and should not be controversial.

2. *What if the borrower subsequently issues additional equity after the issuance of the warrant?* Future issuances of shares at a price below the price of the shares on the date of issuance of the warrant dilute the value of the warrant because such future issuances reduce the overall per share value of any share issued at a higher price.

In addition, issuances of additional shares, whether at a higher or lower per share price at the time of the issuance of the warrant, dilute the percentage of ownership of the borrower that the warrant entitles the holder to purchase. A warrant should address each of these types of dilution.

(a) How should you address dilution resulting from future issuances below the price of the shares on the date of issuance of the warrant? Assume that a borrower was valued at \$100 and that, as of the date of the issuance of a warrant for 10% of the borrower, 100 shares of equity interest were deemed outstanding (75 shares outstanding, 15 shares reserved for a management option pool and 10 shares reserved for issuance upon exercise of the warrant). The per share value upon issuance of the warrant is \$1 and the initial value of the warrant is \$10. If on the next day, the borrower sells an additional 100 shares for \$0.50 per share, the value of the borrower is now \$150. With 200 shares outstanding, the value per share is now \$0.75 and the value of the warrant has been reduced to \$7.50. A warrant should protect against this issue by providing for an adjustment based upon either the “weighted average anti-dilution” or the “full ratchet” method.

The “weighted average anti-dilution” method increases the number of shares into which the warrant is convertible by taking into account the average equity value of all shares, including the subsequently issued shares. One version of the formula would be to multiply the original number of warrant shares by a fraction, (a) the numerator of which is the sum of the number of shares outstanding immediately prior to the date of issuance of the additional shares and the number of additional shares issued and (b) the denominator of which is the sum of the number of shares outstanding immediately prior to the date of issuance of the additional shares and the number of additional shares that the aggregate consideration for the total number of additional shares would have purchased at the original per share price. Keeping with our example above and based on the above formula, you would multiply 10 by the quotient obtained by dividing 200 by 150. Thus, the warrant would now entitle its holder to receive approximately 13.33 shares. That number of warrant shares times the new per share price of \$0.75 would result in a current warrant value of approximately \$10, thereby maintaining the correct value of the warrant. Naturally, doing so will dilute the value of the outstanding shares and the management option pool. However, this mechanism is generally viewed as appropriately balancing the rights of the various parties involved.

Another more aggressive, albeit simpler, option, is the “full-ratchet” formula. Rather than adjusting for the average post additional offering equity value, it adjusts the number of shares to be issued upon conversion of the warrant based solely on the price at which the additional equity was sold. Basically, it lets the warrant holder take advantage of the lowest price paid by the purchasers of the additional shares. In our example, the warrant with a value of \$10 could now purchase 20 shares, as the conversion price would be reduced from one dollar to \$0.50. This adjustment mechanism substantially dilutes the holders of outstanding shares in favor of the warrant holder and is generally used only in specifically negotiated circumstances.

(b) Should a warrant provide for preemptive rights? Although issuances of additional shares above the per share price at the time of the issuance of the warrant do not dilute the value of the warrant, such an issuance, as with any future issuance of shares, will dilute the percentage of ownership of the borrower that the warrant entitles the holder to purchase. Preemptive rights permit an equity holder to purchase a number of equity interests in a subsequent offering to maintain the percentage of equity interests such holder held prior to the subsequent offering. As discussed above, a warrant that provides for weighted average anti-dilution or a full ratchet adjustment protects the warrant holder from diminution in the value of the warrant based on an issuance of additional equity interests. However, the weighted average anti-dilution adjustment mechanism does not provide a mechanism for the lender to maintain its proportionate ownership interest in the borrower. Moreover, even a full ratchet adjustment may not assure a warrant holder that it will maintain its proportionate interest in the company (*i.e.*, an issuance of preferred stock excluded from the adjustment mechanism). Continuing our example above and assuming the weighted average anti-dilution adjustment, the warrant holder's original warrant value was maintained at \$10, but, rather than holding a warrant to purchase 10% of the borrower, it only holds a warrant to purchase approximately 6.66% (*i.e.*, 13.33 of 200 rather than 10 of 100). If it is important to the lender to protect its full upside, the warrant or other equity-related documents should provide the holder with preemptive rights to purchase its pro rata amount of the shares issued in any future offering. In considering the importance of preemptive rights, careful thought must be given to whether any decisions were made with respect to voting thresholds for major corporate decisions of the borrower based on the percentage of ownership reflected in the warrant. Preemptive rights are commonly provided for, and generally not objected to, by borrowers. However, some borrowers will seek to avoid limitations on future issuances caused by preemptive rights. Such rights can cause delays for future investments because of the notice and exercise periods provided to the holder and may discourage future potential investors who wish to acquire an entire class of equity interests.

3. *What if the borrower distributes cash or other property prior to exercise?* There are three main alternatives for protecting a warrant holder against the dilution inherent in distributions of cash or property. First, the warrant could simply prohibit distributions. However, this may overly restrict a borrower during the term of the warrant, which tends to be significantly longer than the term of the loan.

Second, the holder could be entitled to receive all dividends and other distributions on a real-time basis as, and when, they are made. Finally, the warrant could provide that dividends and distributions accrue on an ongoing basis, and that, when the holder exercises the warrant, such amounts become due and payable as if the holder had held the underlying equity interests since the date of issuance. Either of these second two options is a reasonable alternative, with the former favoring the lender at the expense of the borrower because the borrower would have to make distributions to the warrant holder rather than retaining the additional cash for corporate growth. Particular care should be paid to any tax distributions made by a pass-through entity, such as a limited liability company, while the warrants are outstanding. Tax distributions are generally treated as

an advance on future distributions (rather than the payment of an actual distribution), and therefore, a borrower will assert that a warrant holder should not receive a distribution based on a tax distribution. In such a case, warrant holders risk being excluded from significant distributions that could be stripping value from the borrower. The organizational document of the borrower must be drafted carefully to properly address all distribution issues.

Put Rights

Any lender holding a warrant desires certainty that its equity interest in the borrower be liquid. Without the power to force a liquidation of the warrant, a lender may find it difficult to model its expected rate of return. Moreover, many lenders have limited duration funds and need to be reasonably assured that they can cash out their investments in a timely manner in order to distribute returns to their investors. While this could be done in any number of ways, a common mechanism is to provide that the warrant holder may, rather than exercising its warrant for the agreed-upon ownership interest in the borrower, require the borrower to redeem the warrant at a particular time and for a price based on a predetermined formula.

1. *When should a warrant holder be permitted to require the borrower to redeem the warrant for cash?* A determination of when the warrant holder should be permitted to require the borrower to redeem the warrant is a factual matter and should be based upon the lender's investment objectives, the borrower's projected growth targets and the term of the loan. In general, a lender will want to be able to exercise its put rights at any time after the loan has matured because that is the initial time horizon for the intended investment. Moreover, after debt obligations are paid in full, a lender may lose most of its control and informational rights over a borrower, leaving the lender, as with any other minority equity holder, in a precarious position.

For the same reason, consideration should also be given to whether prepayment of the loan, whether mandatory, optional or as the result of an acceleration of the loan, should trigger the put right. The inclusion of these provisions is based on a variety of investment-specific decisions.

Additionally, lenders should consider whether certain major events, such as a change of control transaction, should result in the right of the warrant holder to immediately put the warrant to the borrower. Similarly, a lender should carefully consider whether the transfer of all of a particular owner's interest or group of owners' interest (even if such transfer would not result in a change of control) should also accelerate the put right. For example, in an equity sponsored deal, the transfer by a key member of management or all of management (even if substantially less than a majority of the overall ownership of the borrower) may be an appropriate triggering event because the people on whom the lender is relying to run the business no longer have a direct financial incentive for performance.

2. *What price should the borrower pay to redeem the warrant?* Obviously, exact pricing details are deal specific. However, there are a few commonly used methodologies for determining the price to be paid to redeem the warrant. A multiple of EBITDA, based on a trailing twelve-month period or a multiple twelve-month period, is a common pricing formula. Also, a default alternative of fair market value determined by an independent appraiser should be provided. This alternative provides certainty that the warrant holder receives the true value for its warrant in the event that a current or averaging EBITDA methodology is not reflective of value.

Other Issues

1 *What happens upon a change of control, sale of substantially all assets or liquidation?* As noted above, often a change of control transaction will trigger the put right. However, a warrant should also provide for the right of a warrant holder to receive the consideration to be received by other equity holders of the borrower in the event of a change of control, sale of substantially all assets or liquidation transaction. If a holder has not exercised a warrant prior to such a transaction, the equity interests of the borrower may be of little or no value or may not be exercisable at all. The most common way to address this concern is to provide that the warrant holder be treated as having exercised the warrant immediately prior to such event or for the warrant to automatically convert into shares effective immediately prior to such event. Thus, the holder would be entitled to receive its pro rata amount of the consideration received by the equity holders in the transaction. Such a provision is common in warrants and the borrower should not object to it.

2. *What is original issue discount and how does it relate to a debt transaction involving a warrant?* The Internal Revenue Code requires the lender to ratably include the original issue discount of any debt instrument held by the lender in its taxable income. Original issue discount is the excess of the redemption price of a debt instrument over its purchase price. In a transaction involving a debt instrument and a warrant, the Internal Revenue Code requires that the issue price be allocated between the debt instrument and the warrant based upon the relative fair market value of each. Because valuing a warrant in a private company is difficult and because both the borrower and the lender must report the issue price to the IRS, the documentation of the transaction to which the warrant relates should allocate the value of the overall transaction between the debt instrument and the warrant.

* * *

The aforementioned issues, as well as other issues that are relevant to the holder of a warrant (and potential equity holder), must be considered and negotiated and care must be given to ensure that these and the other rights are properly reflected in the warrant, related transaction documents and the borrower's underlying organizational documents.

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RECENT TRENDS IN SECOND LIEN LOANS

Over the past several years, lenders have offered borrowers many alternative financing vehicles as options for financing their acquisitions, corporate restructurings or operations. The creative and complex financing structures that resulted gave rise to many different classes and types of lien priorities. As senior debt became more affordable due to a prolonged period of low interest rates and as traditional banks and other nontraditional investors, such as private equity sponsors, hedge funds, and distressed debt funds, competed to provide these various layers of structured financing, the result was a marked increase in junior debt secured by a second lien.

Financing involving a second lien loan offers advantages for borrowers and lenders alike. Second lien loans provide borrowers with an additional source of capital and access to interest rates that are typically lower than those found in more traditional subordinated or mezzanine debt. For the lenders, the first lien lender (“First Lien Lender”) reduces its own credit exposure with respect to the borrower while enhancing the borrower’s overall capital structure. The second lien lender (“Second Lien Lender”) gains critical secured creditor rights that are unavailable to unsecured creditors (especially in the event of any insolvency or bankruptcy proceeding involving the borrower), most prominently a position ahead of general trade creditors.

Early-stage second lien loans were designed to provide temporary incremental liquidity for a specific purpose. They were funded by a small group of institutional investors focused on making loans to underperforming companies with sufficient collateral to cover both the first lien obligations and the second lien obligations. As a result, these early investors were comfortable making the investments with an understanding that they would have few, if any, rights with respect to the collateral securing their loans (i.e., their liens would be “silent” liens).

Beginning in 2003, the rate of growth within the second lien loan market increased significantly and rapidly. According to Standard & Poor’s Leveraged Commentary and Data (“LCD”) quarterly reviews, between 2003 and 2005, second lien loan volume spiked from \$3.1 billion to \$16.3 billion. By 2006, LCD reported that the volume increased to \$28.3 billion; in 2007, the volume grew to nearly \$30 billion, with more than 90% of the loans funded during the first three quarters of the year. Notwithstanding the rapid growth over a relatively short period of time, this loan product continued to evolve and its interplay within more traditional capital structures remained unclear. As a result, the terms of the intercreditor agreement—a critical document from the perspectives of both the First Lien Lender and the Second Lien Lender—varied, sometimes significantly, among transactions.

During this period, documentation for very large, widely syndicated second lien loans remained relatively uniform among transactions. Most other second lien loans (particularly middle-market “club” deals) were characterized by a lack of uniformity. Particularly during 2006 and the early part of 2007, Second Lien Lenders began to participate in transactions that were less clearly overcollateralized. Further, the relatively few borrower defaults and bankruptcies provided fewer opportunities for testing the terms of intercreditor agreements. The result was a decline in confidence that loans made by Second Lien Lenders were relatively low-risk but would provide high returns. The Second Lien Lenders began to demand additional collateral rights and a greater level of involvement in enforcement actions. At the same time, because the Second Lien Lender often was providing a layer of capital that was unavailable elsewhere, the First Lien Lender at times experienced significant pressure from its own borrower to accommodate the requests of the Second Lien Lender wherever possible. It was not unusual to see the basic terms of the intercreditor agreement outlined in the first lien financing term sheet or commitment letter. The fully deferential second lien structure that was the norm in early-stage second lien loans began to change and the liens that were held by Second Lien Lenders could be characterized more accurately as “muffled” rather than “silent.”

The second lien loan market experienced a significant drop in late 2007 and much of 2008 due to a variety of factors, most notably capital issues affecting the largest participants in the second lien debt market—hedge funds. When the second lien and subordinated debt markets again picked up in 2009, recent transactions involving second lien debt suggest that where second liens are permitted, they are allowed based on an understanding that the Second Lien Lender should expect to enter into an intercreditor agreement on terms more akin to mezzanine terms and the earlier transactions than those that closed as recently as 2007 (or, at the very least, a hybrid of the two generations of documents) as highlighted in this article.

THE INTERCREDITOR AGREEMENT

When a borrower's debt structure includes a second lien loan, the intercreditor agreement that will be entered into between the First Lien Lender and the Second Lien Lender should take center stage and be the focus of early-stage negotiations. The intercreditor agreement must act as a shield for the First Lien Lender against the actions of a Second Lien Lender when a borrower's financial situation or condition deteriorates by limiting the rights of the Second Lien Lender in a variety of subsequent actions or bankruptcy proceedings. Initially, it is important to focus on why the financing structure includes a second lien loan, as opposed to unsecured mezzanine loans. Developing this strategy early with respect to the role a Second Lien Lender will play in the capital structure and the impact of that role on various provisions of the intercreditor agreement is critical, as many of the key provisions of an intercreditor agreement can be drafted in significantly different ways depending on the relative strength of the Second Lien Lender's bargaining power. For example, a Second Lien Lender that is providing capital that the First Lien Lender is unwilling—or unable—to provide may have more negotiating power. Conversely, a Second Lien Lender that also is the borrower's equity sponsor has a weaker basis on which to demand more rights, often because the equity sponsor is acting as a lender of last resort. No matter what the role of the Second Lien Lender in the borrower's capital structure, a First Lien Lender must recognize and evaluate the potential risks of delay or interference with its ability to exercise rights and remedies with respect to the borrower and the collateral that may result from accommodating a Second Lien Lender's requests for rights beyond merely having a second lien position.

PAYMENT SUBORDINATION

As recently as the third quarter of 2007, it was widely accepted that Second Lien Lenders should not be expected to agree to payment subordination (also referred to as debt subordination) as a condition to receiving liens. A Second Lien Lender typically did not have to make the argument that it should not be required to subordinate its right to payment to the prior payment right of the First Lien Lender. A similar position championed by Second Lien Lenders was that they should be permitted to receive regularly scheduled payments on their debt irrespective of whether a payment default existed under the first lien loan documents, and initial drafts of intercreditor agreements were prepared without including payment subordination or payment blockage concepts. However, more recently, payment subordination and, particularly, payment blockages are reappearing in second lien intercreditor agreements. Even when a Second Lien Lender generally agrees that its payments will be subordinated and blocked, considerable time is spent negotiating “when” these blocks will occur and for “how long” they will last. A First Lien Lender will want to consider blocking scheduled payments in the event of any default under the first lien loan documents. A Second Lien Lender (particularly one with significant leverage) will argue for no payment block or, at least, to limit any payment blockage to certain material defaults under the first lien documents (“Material Defaults”), such as the following: (1) the existence of any payment default; and (2) the existence of any financial covenant default. A First Lien Lender should evaluate a request to limit the

scope of Material Defaults very carefully to ensure that the First Lien Lender retains the right to block payments in all circumstances where leakage to the Second Lien Lender may be detrimental to the First Lien Lender. For example, if a borrower is delinquent in meeting its financial reporting requirements, thus preventing the First Lien Lender from accurately measuring the borrower's financial performance, payments to the Second Lien Lender should be blocked. In any event, a First Lien Lender should insist upon a blockage right, and a Second Lien Lender should expect to be blocked, at any time when the First Lien Lender is enforcing its rights and remedies with respect to the collateral against the borrower, as well as after the commencement of any type of insolvency or bankruptcy proceeding involving the borrower.

A Second Lien Lender will want certain payment blockages to expire after a period of time. Another common request is for the intercreditor agreement to prohibit back-to-back payment blocks that have the effect of preventing payments to the Second Lien Lender indefinitely. Most often, a Second Lien Lender will argue that it should be entitled to at least one interest payment every 360 days. While these requests may seem reasonable, a First Lien Lender should remain cognizant of the fact that an impending payment block expiration could cause the First Lien Lender to take more aggressive action than necessary, or advisable, to prevent payments to the Second Lien Lender. The First Lien Lender may be left with premature acceleration as the only available option to block the payment to the Second Lien Lender, which itself could have significant ramifications, such as diminution in enterprise value and a reduction in credit terms from the borrower's trade creditors. In transactions in which a Second Lien Lender's requests for periodic payments during a default are accommodated (for example, where the interest payments are neither sizable nor frequent), an indefinite payment blockage should be in effect when the borrower is in payment default and/or financial covenant default under the first lien loan documents.

In the event that payments are blocked, the Second Lien Lender will seek to accrue and later recapture any missed payments in the event that such default is cured or waived. So long as the payment is not otherwise blocked under the intercreditor agreement, and provided the catch-up payment itself would not result in another default under the first lien loan documents, such a request is typically accommodated.

LIEN SUBORDINATION/ENFORCEMENT RIGHTS

Where second liens are permitted, the concept of lien subordination provides that the Second Lien Lender will contractually subordinate its lien to the lien held by the First Lien Lender. Equally as important, the Second Lien Lender should agree not to contest the priority of the lien held by the First Lien Lender or to join the attempt of any other third party to challenge such liens.

As discussed briefly above, First Lien Lenders have become more successful in conditioning their consent to subordinate liens on the basis that such liens must be "silent" in certain important respects. In general, a "silent" second lien is one in which the holder of the lien agrees to refrain from initiating (or joining in) any enforcement action against the borrower or the collateral and waive certain secured creditor rights during an insolvency or bankruptcy proceeding. But just how silent should a Second Lien Lender expect to be? The answer is constantly evolving and varies based on the economics of the transaction, the financial strength of the borrower and the general economic climate. From a First Lien Lender's perspective, a Second Lien Lender should be silent when it comes to exercising creditor's rights, whether pre-bankruptcy or following the commencement of an insolvency proceeding. Most Second Lien Lenders, however, will expect to retain certain rights during the pre-bankruptcy standstill period and will strongly resist agreeing to intercreditor provisions in which they abandon all their rights in bankruptcy—particularly those afforded unsecured creditors. We discuss the remedy standstill periods and unsecured creditors rights below, and certain other bankruptcy provisions are addressed in more detail later.

Remedy Standstill Periods

Just as a Second Lien Lender often will negotiate an expiration of a payment blockage period, another highly negotiated issue in intercreditor agreements is the duration of the enforcement remedy standstill period. Although most Second Lien Lenders enter negotiations with an understanding that they will refrain from exercising certain remedies with respect to pending defaults, it is very rare that both parties start the process with a common understanding of what remedies should be the subject of a standstill period and how long this period should extend. The standstill period is critical to the First Lien Lender's ability to work with the borrower and/or determine exit strategies after a default occurs under the first lien loan documents without any interference or pressure from the Second Lien Lender; therefore, the First Lien Lender will attempt to extend the standstill period for as long as possible. The Second Lien Lender, however, does not want to forgo its remedies for too long, as it wants to have a voice in a workout. If a Second Lien Lender must wait silently for too long, it may lose an opportunity to intervene on its own behalf before the value of the collateral diminishes to a level that is incapable of supporting both the first lien loan and the second lien loan.

Depending on the nature of the deal, Second Lien Lenders typically agree to a standstill period that falls somewhere between 120 and 180 days. As an indicator of the rapid evolution of terms, at the beginning of the third quarter of 2007, it was not uncommon to see remedy standstill periods as short as 90 days, which was just barely long enough for the First Lien Lender to react to a financial covenant default, much less develop and implement a sale process. Recently, intercreditor agreements (particularly those involving a Second Lien Lender that is an equity holder) have begun to impose upon Second Lien Lenders indefinite standstill periods, with only a limited right in favor of the Second Lien Lender to accelerate its obligations (but do nothing further) if the First Lien Lender has done the same.

The date on which a remedy standstill period expires should be measured from the date the Second Lien Lender provides notice to the First Lien Lender of a default under the second lien documents, not from the date the default occurred. In other words, a standstill period cannot commence without the First Lien Lender's knowledge. No matter how long the standstill period extends, it should also continue beyond the negotiated period if the First Lien Lender is diligently pursuing its rights and remedies against the borrower or a material portion of the collateral (whether such remedies are underway at the expiration of the standstill period or are later commenced by the First Lien Lender). Recently, there has been pushback against the concept that a Second Lien Lender must abandon an enforcement proceeding if the First Lien Lender later decides to commence a similar action. A Second Lien Lender typically argues that if it has invested the time, effort and expense in pursuing the action, it should be able to continue such action throughout the process. While a First Lien Lender may be inclined to accommodate this request and permit the Second Lien Lender to manage the enforcement action (with prior notice to the First Lien Lender), any proceeds of the action received by the Second Lien Lender prior to payment in full of the first lien obligations should be turned over to the First Lien Lender.

Unsecured Creditor's Rights

While it is typical for a Second Lien Lender to be prohibited from pursuing its rights as a secured creditor during the standstill period and in bankruptcy, intercreditor agreements usually allow a Second Lien Lender to pursue certain unsecured creditor rights that comply with the terms and conditions of the intercreditor agreement itself. This is an element of intercreditor agreements that has remained largely unchanged in recent months. A Second Lien Lender will argue that it should not be expected to give up any rights it would have as an unsecured mezzanine lender by virtue of receiving liens to secure its collateral. Examples of such actions include the right to request dismissal or conversion of the borrower's bankruptcy case, the right to vote against and object to plan confirmation or the right to propose a

creditor's plan in bankruptcy. When evaluating these requests, a First Lien Lender should consider what rights would be limited if it was negotiating an intercreditor agreement with an unsecured mezzanine lender. For example, it is not uncommon for an intercreditor agreement with an unsecured lender to impose upon that lender a standstill period with respect to exercising rights available to it under contract or at law.

When evaluating a request to preserve unsecured creditor rights, a First Lien Lender should be wary that allowing a Second Lien Lender to retain certain unsecured creditor rights may result in a Second Lien Lender's ultimate ability to circumvent the standstill period and other provisions of the intercreditor agreement. In particular, a Second Lien Lender that maintains its unsecured creditor rights under the intercreditor agreement could join with other unsecured creditors and file an involuntary petition against the borrower, pushing the borrower into bankruptcy and effectively halting any enforcement action that the First Lien Lender has commenced. Similarly, a Second Lien Lender that retains a right to file motions and make objections as an unsecured creditor in bankruptcy may be able to circumvent the pre-negotiated agreement that the First Lien Lender will control the process in bankruptcy. Thus, it is important to evaluate the various unsecured creditor rights a Second Lien Lender seeks to retain in light of the terms of the intercreditor agreement. Instead of granting a Second Lien Lender's request for unfettered unsecured creditor rights, those rights that are left intact should be subject to the terms and conditions negotiated in the intercreditor agreement and, in particular, the standstill period.

Release of Collateral

In order to afford the First Lien Lender the greatest flexibility in managing the borrower and the collateral, the intercreditor agreement should identify certain pre-established "release events" where a Second Lien Lender's lien on shared collateral is released without its consent. Such "release events" typically include

- (1) prior to an insolvency proceeding,
 - (a) a release that is permitted by the terms of the first lien documents;
 - (b) a release that is consented to by the First Lien Lender following the occurrence of an event of default under the first lien loan documents; and
 - (c) a release that occurs in connection with the First Lien Lender's exercise of rights and remedies against collateral; and
- (2) after an insolvency proceeding, a release in accordance with
 - (a) a sale pursuant to a confirmed plan of reorganization or liquidation;
 - (b) a sale in a bankruptcy proceeding of one or more assets, free and clear of all liens, claims and encumbrances (commonly referred to as a "Section 363 Sale"); and
 - (c) an order by the bankruptcy court to vacate the automatic stay under Section 362 of the Bankruptcy Code to allow the First Lien Lender to exercise its enforcement rights against the collateral.

A common request of Second Lien Lenders is to expand the pre-consent to dispositions that are permitted under the first lien documents to require that such dispositions also be permitted under the second lien loan documents. A First Lien Lender should be aware that this request creates a disguised consent right in favor of the Second Lien Lender that could interfere with the First Lien Lender's exercise of rights and remedies against the collateral. Similarly, a request by a Second Lien Lender to pre-consent only to dispositions that are made when an event of default under the second lien loan documents does not exist effectively forecloses the First Lien Lender's ability to realize on its collateral during an event of default. Any concerns a Second Lien Lender has about providing a "blanket" consent to dispositions

outside of bankruptcy or an event of default under the first lien loan documents can be satisfactorily addressed by limiting the disposition terms under the first lien loan documents to those in effect on the effective date of the intercreditor agreement.

To further protect a First Lien Lender's exercise of rights and remedies with respect to a borrower and thwart any possible interference by a Second Lien Lender, the intercreditor agreement should provide for an irrevocable power of attorney allowing the First Lien Lender to file any releases in the event that the Second Lien Lender refuses to abide by the terms of the intercreditor agreement.

MODIFICATIONS TO CREDIT AGREEMENTS

Given that the terms of an intercreditor agreement are negotiated based on the "closing day" terms of the first lien loan documents and second lien loan documents, and the rights of each lender thereunder, both parties will seek to restrict the other party from subsequently amending its loan documents to circumvent the restrictions set forth in the intercreditor agreement.

Most Second Lien Lenders will desire to limit the total outstanding indebtedness to the First Lien Lender, since the First Lien Lender enjoys the benefit of both lien and payment priority (commonly referred to as the "Senior Debt Cap"). The Senior Debt Cap typically is the sum of (a) the maximum amount of first lien revolving and term loan credit facilities *plus* (b) a "cushion" of approximately 10-15% above that total amount prior to any insolvency or bankruptcy proceeding involving the borrower *plus* (c) an additional "cushion" of approximately 10% to provide debtor-in-possession ("DIP") financing after any insolvency or bankruptcy proceeding involving the borrower *plus* (d) indebtedness related to hedging agreements, cash management or other related obligations *plus* (e) interest, fees, costs, charges, expenses, indemnities and other amounts payable pursuant to the terms of the first lien documents, including protective advances in bankruptcy. A First Lien Lender will often accommodate the request of a Second Lien Lender to reduce the Senior Debt Cap by any permanent reductions of revolving loan commitments and principal payments on term loan debt, which prevents the "reloading" of any credit facilities.

Whether the First Lien Lender will suffer consequences if it exceeds the Senior Debt Cap amount depends on the nature of the deal. A Second Lien Lender may request that the First Lien Lender agree that any outstanding indebtedness in excess of the Senior Debt Cap will be subordinate to, and paid out after, the second lien obligations. If a First Lien Lender agrees to this restriction, it must carefully evaluate two elements of the restriction. First, the Senior Debt Cap must be large enough to accommodate the future of the credit facility. For example, if the borrower has acquisitions planned that will require an increase in senior loans, that increase should be taken into account, in addition to the general 10-15% cushion for additional debt. Second, the First Lien Lender must restrict the amount of the Second Lien Lender's obligations to that contemplated on the date of the intercreditor agreement and not simply rely on the total leverage covenant in the first lien loan documents as a debt governor. This planning is essential to make sure that any first lien obligations in excess of the Senior Debt Cap are not subordinate to an undefined amount of second lien obligations.

Typically, the parties to an intercreditor agreement agree to mutually limit increases to interest rates under the first and second lien loan documents. The range agreed to is usually between 200 to 300 basis points. Given the recent events in the interest rate markets, a First Lien Lender should ensure that it maintains the right to impose an interest rate "floor" without requiring the Second Lien Lender's consent, whether that floor is applied to the applicable margin of interest or to the underlying rate indices. Since the most recent second lien loans typically bear interest at a fixed rate, flexibility for the Second Lien Lender to similarly impose a floor usually is not required (but should be granted if the second lien obligations do not have a fixed interest rate). It is also customary for the Second Lien Lenders and the First Lien Lenders to agree in the intercreditor agreement not to amend the loan documents by changing

the repayment obligations of the borrower in a way that would accelerate the scheduled dates of permitted principal payments on the second lien loans, or extend the maturity date of the first lien loan.

The First Lien Lender should maintain its ability to amend the first lien loan documents in order to (1) shorten the final maturity; (2) accelerate or change the amount of payments (in a non-default situation); (3) release or implement reserves; (4) change the borrowing base or eligibility criteria which constitute the borrowing base (if the first lien loan documents include a borrowing base); (5) increase or add fees; and (6) waive a payment default. The First Lien Lender must maintain this flexibility with respect to its loan documents to protect itself from future changes or events that impact the collateral or the borrower's performance under the credit facility. On the other hand, Second Lien Lenders are usually prohibited from modifying their loan documents in any manner adverse to the First Lien Lenders or in any respect that makes the provisions more restrictive or more burdensome on the borrower.

RIGHTS IN BANKRUPTCY

As noted above, the bankruptcy provisions of the intercreditor agreement are likely to be highly negotiated, particularly when dealing with a Second Lien Lender with bargaining power. Giving a Second Lien Lender greater rights in bankruptcy, and thus the opportunity to be "less silent," is an accommodation the First Lien Lender should carefully scrutinize. In a bankruptcy context, accommodations that seemed reasonable at the outset of a lending relationship can suddenly turn destructive. In an insolvency or bankruptcy proceeding, the First Lien Lender will expect the Second Lien Lender to allow it to work with the borrower to restructure the debt free from any interference in an attempt to maximize repayment of the borrower's obligations to the First Lien Lender. The Second Lien Lender, however, has a competing interest in maximizing repayment of the borrower's subordinated obligations to it. While the enforceability of certain pre-bankruptcy waivers is not entirely clear because few reported decisions have addressed subordination issues (and those that do exist tend to have contradictory results), the First Lien Lender typically will require in the intercreditor agreement that the Second Lien Lender waive and consent to certain bankruptcy provisions including, at a minimum, the following: (1) debtor-in-possession financing ("DIP Financing"); (2) use of cash collateral; (3) adequate protection; and (4) sales of collateral.¹

DIP Financing; Use of Cash Collateral

Once in bankruptcy and attempting to reorganize, a borrower often will need additional financing to continue its operations. The cash to fill this gap will come in the form of a DIP Financing. The lenders providing the DIP Financing receive a super priority lien, which will prime the liens held by both the First Lien Lenders and the Second Lien Lenders. The First Lien Lender often desires to provide the DIP Financing and will require that the Second Lien Lender

- (1) consent in advance (and not object) to any such DIP Financing, or the use of cash collateral that has been consented to by the First Lien Lender, and
- (2) agree to subordinate its liens to the prior liens securing the DIP Financing (and any cash collateral or "carve outs" approved by the court), in any case so long as certain conditions are met:
 - (a) the First Lien Lender must retain its pre-petition lien priority status (subordinated to the DIP lender);
 - (b) the Second Lien Lender must receive a replacement lien on post-petition assets to the same extent as, but junior to, the liens of the DIP lender;

- (c) the aggregate principal amount of loans and letter-of-credit obligations, together with the outstanding pre-petition First Lien Lender debt, does not exceed the negotiated Senior Debt Cap; and
- (d) the terms of the DIP Financing are subject to the intercreditor agreement.

The Second Lien Lender may require that the DIP Financing be on “commercially reasonable terms” as a condition to consenting in advance. A First Lien Lender should instead consider adding a condition that requires that the bankruptcy court find the DIP Financing to have been “negotiated at arms’ length and in good faith.” This language is found in most court orders approving DIP Financing. A court does not use a “commercially reasonable” standard when evaluating a proposal for DIP Financing, nor is there a readily available market against which to judge the commercial reasonableness of the DIP Financing. The “commercially reasonable” merely provides the Second Lien Lender with an opportunity to object to DIP Financing.

Another common request by the Second Lien Lender is to include the amount of any “carve outs” in the calculation of whether the Senior Debt Cap has been exceeded. Depending on the size of the borrower and the state it is in when entering bankruptcy, the carve out for professional fees could be significant, and including such fees in the Senior Debt Cap calculation could consume the entire post-bankruptcy “cushion” intended for principal increases. Often, the best solution is to allow the Second Lien Lender to preserve its objection right with respect to this discrete issue and address it in the context of the bankruptcy court.

A Second Lien Lender may seek to add, as an additional consent to the pre-negotiated conditions, a requirement that the order approving the DIP Financing not describe or require a plan of reorganization. This prevents a First Lien Lender from forcing the Second Lien Lender to give up rights otherwise available to it in the intercreditor agreement by coupling DIP Financing and a plan of reorganization together. Depending on what rights the Second Lien Lender has elsewhere in the intercreditor agreement regarding a plan of reorganization, a First Lien Lender may agree to this request. In any event, however, the First Lien Lender should seek to limit the Second Lien Lender’s rights to only the right to object to the DIP Financing on the basis that it also includes a plan of reorganization.

Adequate Protection

Secured creditors generally desire to obtain adequate protection by requesting additional or substitute collateral to protect against declines in the value of the collateral after the commencement of an insolvency or bankruptcy proceeding. A Second Lien Lender should expect to waive any right to dispute actions taken by First Lien Lenders to seek adequate protection with respect to the collateral securing the First Lien Lender obligations. In return for waiving this right, the Second Lien Lender may ask to retain the right to request and receive adequate protection with respect to its own obligations in connection with any DIP Financing or use of cash collateral. A First Lien Lender often will accommodate this request so long as certain conditions are met, including the following: (1) any such adequate protection is limited to the Second Lien Lender receiving a replacement lien on additional or replacement post-petition collateral; (2) the First Lien Lenders must also receive a replacement lien on the same collateral securing either the First Lien Lender debt or any DIP Financing provided by the First Lien Lenders that is senior to the lien granted to the Second Lien Lender; and (3) the replacement lien granted to the Second Lien Lenders must be subordinate to all liens securing the First Lien Lender debt or any DIP Financing as reflected in the intercreditor agreement.

A Second Lien Lender additionally may request the right to receive adequate protection payments in cash. However, the First Lien Lender could be disadvantaged, as allowing additional cash payments in bankruptcy will affect the borrower’s liquidity. If the First Lien Lender agrees to this request, two aspects

of the intercreditor agreement must be modified accordingly. First, the Senior Debt Cap should increase by an amount equal to all adequate protection payments paid to the Second Lien Lender. Second, the intercreditor agreement must include a “clawback” provision providing that, if the borrower exits bankruptcy without paying the First Lien Lender’s obligations in full, any adequate protection payments received by the Second Lien Lender must be paid over to the First Lien Lender, to the extent of the shortfall.

Sale of Collateral (§363 Sale)

It is typical for the First Lien Lender to require that the Second Lien Lender waive any rights to object to a Section 363 Sale. This waiver is rarely objectionable to a Second Lien Lender because additional protections with respect to the reasonableness of any Section 363 Sale are automatically built into the bankruptcy process, including oversight from a creditors’ committee and required approval from both the U.S. Trustee and the bankruptcy court itself. However, it should be noted that the recent decision by the Ninth Circuit Bankruptcy Appellate Panel in *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, No. 07-1176 (Bankr. 9th Cir. July 18, 2008), makes it necessary for the Second Lien Lender to refrain from objecting to such sale and expressly provide advance consent to any such disposition free and clear of any liens or other claims under Section 363 of the Bankruptcy Code or any other similar bankruptcy law. *Clear Channel* held that Section 363(f) of the Bankruptcy Code does not permit a senior secured creditor to credit bid its debt and purchase estate property free and clear of valid, nonconsenting junior liens on the collateral, notwithstanding a prior agreement from the junior creditor to refrain from objecting to such sale. A First Lien Lender should ensure that its “Section 363 Sale” waiver clause also includes a consent (or deemed consent) by the Second Lien Lender to such sale.

The X-Clause

A provision that has been appearing more frequently in intercreditor agreements addresses the Second Lien Lender’s rights to receive and retain debt or equity securities issued pursuant to a plan of reorganization by the borrower. This has become known as the “X-Clause” because it constitutes an exception to the general rule of lien subordination that requires that any and all First Lien Lender debt must be paid in full, in cash, before anything of value is distributed to the Second Lien Lender with respect to the second lien obligations. Where a Second Lien Lender is more aggressive or has more leverage, it may be able to negotiate permission to receive debt securities issued under a plan of reorganization or similar restructuring plan secured by liens on certain collateral as long as (1) the First Lien Lender also receives such debt securities secured by liens on the same collateral and (2) the liens received by the Second Lien Lender constitute liens that are subordinated to those held by the First Lien Lender on the same terms as provided in the intercreditor agreement. However, the concept of debt subordination should continue to apply with respect to the receipt by a Second Lien Lender of equity securities under a reorganization plan, requiring that any such equity securities be turned over to the First Lien Lender until all the First Lien Lender debt is paid in full.

CONCLUSION

The evolution of “market” terms will continue for second lien loans, particularly in light of the rapidly changing financial markets. Second lien loans continue to be attractive options for recapitalizations, DIP Financings, exit financings and restructurings. As mezzanine financing becomes more costly, whether due to tightening of liquidity in the market or by virtue of pure supply-and-demand economics, second lien loans may again return to their former position as the prominent subordinated loan product. For

transactions in which second liens are part of the capital structure, the tables appear to be turning in favor of the First Lien Lenders on terms.

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**NCCUSL Proposes Revisions to
UNIFORM COMMON INTEREST OWNERSHIP ACT**

Kathleen J. Hopkins

Chair, ComFin Real Estate Financing Subcommittee

At the February 16, 2009 meeting of the ABA House of Delegates NCCUSL is presenting Resolution 102D - which seeks to revise the Uniform Common Interest Ownership Act (UCIOA). NCCUSL resolutions are up/down votes and amendments are not made on the floor of the house. This article discusses the resolution and identifies an area where there would be an impact on real estate finance lawyers and their clients. Many of the changes proposed by NCCUSL to UCIOA address aspects of owner association governance, including the association's relationship with individual members, foreclosures, election and recall of officers and treatment of records. There are also a significant number of changes, stylistic and substantive, to clarify and modernize the operation and governance of common interest associations. As a companion to the UCIOA is a new Common Interest Owners Bill of Rights Act. Resolution 102D is being co-sponsored by the ABA Real Property Trusts and Estates Section, and members from that section and the ComFin Committee's Real Estate Financing Subcommittee participated as observers and in other capacities in the drafting process.

It should be noted that very few states have adopted UCIOA in its full form, but UCIOA is often consulted by the states and is quite influential during the state's drafting of its own laws on this topic.

For real estate lenders, one critical clause in UCIOA is the super lien priority status granted to the owners association's lien for up to 6 months of assessments, which is defined to include attorney's fees and costs and any other sums owed to the association as a result of administrative, arbitration, mediation or judicial decisions (see UCIOA § 3-116). According to the UCIOA reporter and commissioner, William Breetz, this section, in some form, has been around since the initial drafting of UCIOA when it was proposed by Fannie Mae and Freddie Mac in 1978. Drafters point out that it is necessary to permit the association to maintain the common property and fulfill other obligations during the pendency of a foreclosure: when the borrower has no incentive to keep paying and the lender would otherwise be able to wipe out the lien with the foreclosure. The ABA RPTE Section Observer to the UCIOA Drafting Committee noted that lenders' lawyers in her state addressed the superpriority issue by requiring an escrow of assessments - at least for the 6 month superpriority status. There are other provisions of UCIOA you may wish to review, for example 2-118(k) [lender's rights on termination]; 2-119 [rights of secured lenders]; 3-104(c) [lender succession to development rights] and (e)(f) [the deep freeze for lender transfer of development rights]. The entire proposed revised act can be accessed at: http://www.law.upenn.edu/bll/archives/ulc/ucioa/2008am_approved.pdf.

The balance of this article discusses the history of the UCIOA and summarizes the amendments. This summary was provided by NCCUSL and incorporated in the report provided to the ABA House of Delegates.

The original version of the Uniform Common Interest Ownership Act was promulgated by the Uniform Laws Commission (ULC) in 1982 and succeeded and subsumed several older ULC acts, including the Uniform Condominium Act (1977 and 1980 versions), the Uniform Planned Community Act, and the Model Real Estate Cooperative Act. UCIOA is a comprehensive act that governs the formation, management, and termination of common interest communities, whether that community is a condominium, planned community, or real estate cooperative.

In 1994, the ULC promulgated a series of amendments to UCIOA. The 1994 amendments did not change the general structure or format of the original act, but were designed to reflect the experience of those states that had adopted UCIOA (or one or more of its predecessor acts), and scholarly commentary and analyses surrounding the act. Issues addressed by the 1994 act included: increasing declarant responsibility for large and non-residential projects; allowing subdivision and expansion of projects; improving procedures for addressing use and occupancy restrictions in units; easing the process for projects begun in states prior to the adoption of UCIOA to opt in to the act; empowering the association to deal with tenants in rented units; and clarifying the standard of care that applied to association directors.

In 2004, the ULC approved a new drafting committee to consider and promulgate further amendments to UCIOA. The primary purpose of the proposed amendments was to address a growing demand in the states for a legislative solution for growing tensions between the elected directors of unit owners' associations and dissident individual unit owners within those associations. In keeping with the aims of the 1982 and 1994 versions of the act, the new amendments also reflect a comprehensive review of states' experience with UCIOA and its predecessor acts over the last 30 years.

The ULC approved these amendments at its Annual Meeting in 2008. They incorporate non-substantive, style changes to update the act and harmonize it with state legislative developments and terminology changes. The 2008 UCIOA amendments also incorporate a considerable number of substantive amendments, including the following highlights:

- Among new general provisions, the definition of “common interest community” is revised to confirm that unit owners' mutual obligations to share the costs of services provided by the association is sufficient, without more, to create a common interest community. However, by reference to sections 1-209 and 1-210, the definition confirms that cost-sharing agreements between two associations, or an association and a separate owner of real estate, do not require creation of a separate common interest community. The term “special declarant right” adds new rights granted to a declarant. Several new definitions are added, including treatment of the term “record” as a noun for e-signature purposes, and the new act includes standard language on interaction with the federal Electronic Signatures in Global and National Commerce Act (ESIGN).
- Selected 2008 amendments are made retroactive to all residential common interest communities created before adoption of UCIOA in a particular state; these include sections 1-206 (governing instruments for older projects), 2-102 (unit boundaries), 2-117(h) and (i) (amendment to declaration), 2-124 (termination following catastrophe), 3-103 (executive board members and officers), 3-108 (meetings) and 3-124 (litigation involving the declarant). The amendments also grant greater flexibility to nonresidential projects by allowing the declaration to

provide that only Articles 1 and 2 of UCIOA (definitions and general provisions, development flexibility, and title safeguards) apply.

- The 2008 amendments revise UCIOA's treatment of the creation, alteration, and termination of common interest communities. Declarations are now required to authorize a process for association administration of any design criteria and building approval process, or for the enforcement of aesthetic standards; those that fail to do so will not have the authority to enforce such requirements. Also, the declaration may restrict unit owners' use of common elements, in addition to existing restrictions on limited common elements, and common elements may now be restricted to use for "the purposes for which they were intended."
- Residential projects may now benefit from increased flexibility in the percentage of unit owners required to amend the declaration. Now, consent may be presumed from lenders, where lender consent is necessary for amendment, with proper notice and 60 days of silence. The amendments also clarify that special declarant rights reserved in the declaration may not be amended without consent of the beneficiary.
- The 2008 amendments expand UCIOA's treatment of association bylaws, rulemaking, operation and governance, notice methods, meetings, meeting and voting procedures, and the adoption of budgets and special assessments. The Act adopts important 'open meeting' requirements for both unit owner and executive board meetings, and greatly limits the use of executive sessions. The changes made by the 2008 amendments mandate that each unit owners association have an executive board, and expand the forms that unit owners associations may organize as, to include limited liability companies or any other form permitted by state law. The declaration may provide for direct election of the association's executive board officers by unit owners, and also allows the declaration to provide for a limited number of independent outside directors, apart from those elected by unit owners or appointed by the declarant.
- Mandatory and discretionary association actions are clarified, as are certain rules regarding investment and borrowing practice, and an association's right to suspend a unit owner's privileges (within limitations) is confirmed. The executive board of a unit owners association is given flexibility in determining whether to enforce the letter of each provision of its declaration, bylaws, or rules, or decline to enforce or compromise them. The association is given greater flexibility to seek payment of the costs for damage resulting from willful misconduct or gross negligence directly from a unit owner instead of filing a claim with the association's insurer. The status of an association's statutory lien for all sums due from unit owners is clarified, and the right of an association to proceed in foreclosure on a lien against a unit owner is significantly limited.
- Record keeping requirements and guidance are provided in greater detail, and are drawn from FOIA requirements and other sources.
- Liability is expanded for declarants for false or misleading statements made in public offering statements, and increased financial disclosures are required. Minor changes are made with regard to express warranties of quality, allowing a model or description to clearly state that it is only "proposed" or "subject to change."

In addition to the 2008 amendments to UCIOA, a new **Uniform Common Interest Owners Bill Of Rights Act (UCIOBORA)** was also drafted that draws together a number of the existing provisions of UCIOA as well as many of the 2008 amendments that, together, provide significant rights to unit owners in all common interest communities. UCIOBORA can be enacted by states as a stand-alone act when it is deemed not feasible to adopt all of UCIOA. The UCIOBORA would then supplement existing state law with many of the most important updates and protections of the 2008 act.

The 2008 UCIOA amendments seek to address critical aspects of association governance, with particular focus on the relationship between the association and its individual members, foreclosures, election and recall of officers, and treatment of records. There are a significant number of other amendments, style and substantive, to clarify and modernize the operation, and governance of common interest associations. Taken as a whole, the aggregate of these amendments is a stronger UCIOA that better serves those governed by the act's provisions. It should be considered in every jurisdiction that has not already adopted it in the United States.

An Update on the FATF Guidance for Legal Professionals and Development of Good Practice Guidelines¹

Creation of FATF: In 1989 the G-7 ministers issued an Economic Declaration covering numerous issues concerning international monetary developments. In connection with this declaration, the leaders agreed to the creation of the Financial Action Task Force on Money Laundering (“**FATF**”) which was tasked with coordinating efforts to prevent money laundering in both domestic and international arenas. The FATF has 34 members: 32 countries and territories and 2 regional organizations. At the 1999 meeting of the G-8 finance ministers, they coined the term “gatekeeper” in their communiqué calling for countries to consider various means to address money laundering through the efforts of professional gatekeepers of the international financial system, including lawyers, accountants, company formation agents, notaries and others (aka the “**Gatekeeper Initiative**”).

FATF Recommendations: In 1990, the FATF issued the “Forty Recommendations” to provide a set of counter-measures against money laundering. The recommendations covered a wide range of topics, including an effective criminal justice system, structure for a country’s regulation of its financing system and international cooperation. These recommendations are intentionally general, so as to provide a country with flexibility to enact regulations consistent with its particular circumstances. The recommendations are not a binding international convention, but many countries (including the United States) have committed to implementing them to combat money laundering. After September 11, 2001, FATF expanded its focus to include anti-terrorism financing provisions – which are the subject of an additional “Nine Special Recommendations.” Collectively, all 49 recommendations are referred to in this article as the “FATF Recommendations.”

Of particular interest to transactional lawyers are Recommendations 33 and 34, which address the exploitation of “*legal persons*” (i.e. legal entities such as trusts, LLCs, corporations, partnerships and the like) and legal arrangements by money launderers. In addition, legal professionals should be aware of Recommendations 13 through 16 which deal with suspicious transaction reporting (“STR”) and the no tipping off rule (“NTO”). The latter set of recommendations is applied to financial institutions and the application of the STR and NTO recommendations to the legal profession is controversial and is subject to continued discussion.

¹ Kathleen J. Hopkins, chair of the ABA-BLS ComFin Real Estate Financing Subcommittee, prepared this article. For ease in reading, the author is not providing footnotes for the information contained in this article; all the information contained herein is derived from the following sources: (1) the July 17, 2008 Memorandum by Martin E. Lybecker to the Council and Officers of the Section of Business Law captioned “Report on the ABA Task Force on the Gatekeeper Regulation and the Profession,” (2) the article by Kevin L. Shepherd entitled “Guardians at the Gate - The Gatekeeper Initiative and the Risk Based Approach for Transaction Lawyers,” which will appear in the *Real Property, Trust & Estate Journal*, Vol. No. 43, Issue No. 3 (Winter 2009); and (3) the report accompanying ABA Resolution 300, which the ABA House of Delegates passed at its August 2008 session.

The FATF also issued guidance on the FATF Recommendations, including its recommendation to apply anti-money laundering regulations to non-financial businesses and professions, such as lawyers. In 2002, an FATF Consultation Paper outlined various options for strengthening national anti-money laundering measures and sought comment. That paper proposed that certain anti-money laundering measures be extended to lawyers including (1) increased regulation and supervision of the profession, (2) increased due diligence requirements on clients, (3) new internal compliance and record keeping requirements for lawyers and firms, and (4) new STR requirements mandating that lawyers report to a government enforcement agency or a self regulatory organization information that triggers a “suspicion” of money laundering relating to client activities. It also recommended enforcement through criminal, administrative or other sanctions. The ABA Task Force on Gatekeeper Regulations and the Legal Profession (the “ABA Gatekeeper Task Force”) provided formal comments to this paper, including criticism about the absence of input from the legal profession on the roles and work of the legal profession. In addition, in February 2003 the ABA House of Delegates passed a resolution opposing any mandatory STR obligation that would compromise the confidentiality of client information or adversely affect the attorney-client relationship in the U.S. justice system.

FATF Evaluation of United States: In 2006 the FATF conducted an evaluation of the United States’ compliance with the FATF Recommendations and found the United States non-compliant with Recommendation 33 and gave the U.S. until July 2008 to make progress toward compliance. Its conclusions included: (a) there were no measures in place to ensure adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be accessed in a timely fashion by competent authorities; (b) there were no measures taken by those jurisdictions which permit the issue of bearer shares to ensure bearer shares are not misused for money laundering; and (c) a general criticism of the U.S.’s lack of available information of private companies registered within its borders.

Proposed Federal Legislation: In 2007 Senators Levin, Coleman and Obama proposed S. 681 (Stop Tax Haven Abuse Act) that proposed subjecting persons involved in formation of companies to the anti-money laundering requirements of the Bank Secrecy Act. The definition of those covered by the proposed legislation was broad enough to include lawyers and others involved in the process. In response, the ABA and other groups began to work with the U.S. Departments of Justice and Treasury to, hopefully, resolve law enforcement’s information gathering concerns other than through federal legislation. Although many believed progress was being made, in May 2008 Senators Levin, Coleman and Obama introduced an updated version of S.681: S. 2956, which similarly sought to impress federal regulation on this issue. In response, the ABA House of Delegates, at its August 2008 meeting, passed a resolution which, *inter alia*, urged Congress to refrain from enacting legislation that would regulate lawyers in the formation of business entities and defer to the states as they consider amendments to their various entity formation laws (“ABA Resolution 300”).

FATF Guidance for Legal Professionals:² The FATF Recommendations encourage countries to develop a risk-based approach to anti-money laundering and to combating terrorism financing. This approach envisions that limited resources will be employed to address the greatest risks. The FATF in 2007 issued the Financial Institution Guidance and in October, 2008 issued its Guidance for Legal Professionals (the “Lawyer Guidance”).

The Lawyer Guidance addresses both the private sector and public authorities, outlines the risk factors lawyers need to consider in developing a risk-based system and identifies issues specific to legal professionals.

The Lawyer Guidance only covers lawyers when they prepare for or carry out transactions for their clients concerning: (a) buying and selling of real estate, (b) managing client money, securities or other assets, (c) management of bank, savings or securities accounts, (d) organization of contributions for the creation, operation or management of companies, and (e) creation, operation or management of legal persons or arrangements, and the buying and selling of business entities. Under the Lawyer Guidance, it is envisioned that the listed activities should trigger certain activities designed to respond to the corresponding level of risk – including client due diligence, internal controls, and the oversight and monitoring of legal professionals.

For client due diligence, the most commonly used risk criteria are country and geographic risk, client risk, and risk associated with the particular service provided. At present, the parties have not agreed on a definition of which countries or geographic areas represent higher risk. For client risk, the Lawyer Guidance identifies 12 situations where the client’s activities may indicate higher risk. For risks associated with specific services, the Lawyer Guidance identifies 18 factors that a lawyer should take into account for assessing the risk involved in providing the services listed in the immediately prior paragraph. Where the lawyer’s risk assessment indicates a higher risk client, the Lawyer Guidance lists measures and controls the FATF deems appropriate to mitigate the potential for money laundering or terrorism financing.

Implementing the Lawyer Guidance for U.S. Transactional Lawyers: Like the FATF Recommendations, the Lawyer Guidance is a 50,000 foot level approach – providing a broad framework for implementing a risk-based approach and leaving the specifics to be worked out by each country, in a manner consistent with its own particular realities. The ABA already adopted a policy consistent with the Lawyer Guidance’s emphasis on development of good practice in the design and implementation of an effective risk-based approach: ABA Resolution 300 included a provision urging state and local bar associations, and other constituencies, to develop risk-based guidance for legal professionals, with the assistance of the ABA’s Gatekeeper Task Force.

² This article is intended as a summary update, for detailed information see the Kevin L. Shepherd article cited in footnote 1 and the Lawyer Guidance which is available at <http://www.fatf-gafi.org/dataoecd/5/58/41584211.pdf>.

The development of good practices guidance for U.S. transactional lawyers is the next step. Some specialty bars, such as the American College of Trust and Estate Counsel already have a set of good practices for its fellows. Representatives from the ABA Gatekeeper Task Force along with numerous other legal professional groups recently formed a working group on the development of the good practices guidance.³ It is hoped this collaborative approach will produce a uniform set of good practices that can be implemented at the national, state and local levels in lieu of federal regulation and legislation.

³ The working group includes 3 members identified as representing the ABA Section of Business Law: Jamie Boucher, Kathleen Hopkins and Christopher Rockers (although numerous other members of the working group are ABA BLS members and active in its leadership).

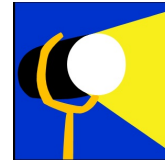
Synergy Group Report

The Commercial Finance Committee, acting on behalf of the Section of Business Law, has joined the “Synergy Group,” a collection of various professional groups in the finance and real estate disciplines. Neal Kling, one of ComFin’s Vice Chairs, and Kathleen Hopkins, Chair of ComFin’s Real Estate Financing Subcommittee, are the ComFin representatives of the Group. The Group recently met in San Francisco, California on Wednesday, October 22, 2008. The next meeting will be held in Chicago, Illinois, in conjunction with the 2009 ABA Annual Meeting.

The Group is presently working to develop good practices guidance for transactional lawyers as a follow-up to the lawyer guidance recently issued by the Financial Action Task Force (FATF). Kathleen Hopkins is leading ComFin’s efforts with respect to this project.

SPOTLIGHT

January 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.

Bank of Dawson v. Worth Gin Co., **2008 WL 5049950 (Ga. Ct. App. 2008)**

The case involved a dispute between Bank of Dawson, which made a loan to a cotton farmer secured by the farmer's crop, and Worth Gin Company, which purchased the crop. Worth Gin made its check for the crop payable jointly to both the debtor and the Bank, but in doing so it deducted amounts that the debtor owed to both Worth Gin and a separate farm supply company controlled by the same person. The Bank sued Worth Gin in conversion for the amount deducted.

Worth Gin claimed that the Bank's security interest was unperfected because the Bank's financing statement failed to comply with § 9-502(b)(4). That provision requires a financing statement covering as-extracted collateral or timber to be cut to identify the record owner of the real estate if, as was true here, the debtor does not have an interest in it. Georgia's non-uniform version of this provision extends the rule to "growing crops."

The Bank responded in several ways. First, it claimed that the omission of the name of the record owner of the real estate was a minor error that did not render its filing seriously misleading. Thus, it was perfected under § 9-506(a) despite the error. Second, it claimed that because Worth Gin had received from the Bank a letter notifying it of the Bank's interest in the farmer's crop, Worth Gin could not take free under § 9-317 even if the Bank's interest was unperfected. As the court noted, the Bank also could have argued that since the crops had already been harvested at the time the controversy arose, the special rule regarding "growing crops" in § 9-502(b)(4) did not apply. While no Georgia appellate court has considered this last point, other courts have accepted it. The court did not reach the first or third arguments because it concluded that Worth Gin did indeed have knowledge of the Bank's security interest, and thus could not take free of it under § 9-317(b). Indeed, Worth Gin's knowledge of the security interest was ably demonstrated by the fact that it had made its check payable jointly to the debtor and the Bank. Thus far, the court's analysis is sound.

Unfortunately, at this point the court simply declared that "[because Worth] Gin withheld proceeds of the cotton crop, it was liable to the Bank on its conversion claim." While that result is correct, the analysis conflates two different things: the crop and the buyer's payment obligation.

Worth Gin wore two hats in this transaction: (i) a buyer of collateral; and (ii) an account debtor (someone who owes payment to the debtor for goods sold). Similarly, the Bank had a security

interest both in the crop (as the original collateral, because Worth Gin did not take free of the Bank's security interest) and in the debtor's account receivable from Worth Gin (as proceeds of the crop). As an account debtor, Worth Gin was permitted to set off even against a secured party amounts that the debtor owed it on transactions arising before it received notification of the Bank's security interest in the account. § 9-404(a). This would not permit Worth Gin to set off amounts the debtor owed to an affiliate unless that right was expressly granted in a contract with the debtor, but it does mean that Worth Gin was probably entitled to set off amounts the debtor owed to it. The court did not discuss or even cite to § 9-404.

In short, Worth Gin could have converted the *crop*, but it could not have converted the *unpaid portion of the purchase price*. Moreover, its liability for converting the crop would be for the value of the crop, not merely the amount withheld. Presumably, the Bank could at least argue that it is entitled to retain the amounts paid as proceeds plus get the crop or its value back. Whether Worth Gin would be entitled to a partial defense or claim in restitution for the amount paid is an interesting question – one likely to be discussed at a program entitled *What Every Commercial Lawyer Needs to Know about the Restatement (Third) of Restitution and Unjust Enrichment*, scheduled for Saturday April 18, 2009 at 1:00pm during the Spring meeting of the ABA Business Law Section – but it is a separate issue. In any event, because the Bank was apparently seeking nothing more than the amount Worth Gin had withheld, the court's ultimate conclusion was correct.

In re Baker,
2008 WL 2358592 (Bankr. D. Del. 2008)

This case involved the efficacy of a default-on-bankruptcy clause in a consumer loan contract. With very little analysis, the court invalidated the *ipso facto* clause in this case and stated that such clauses are generally unenforceable. In the process, it cast such clauses into question in all loan agreements, commercial as well as consumer.

The debtors had a four-year car loan from Ford Motor Credit Company ("FMCC"). They were current on their loan payments when they filed for Chapter 7 bankruptcy relief. They then sought to reaffirm the debt but the bankruptcy court declined to approve the reaffirmation agreement. After the debtors received their discharge and the bankruptcy case was closed, FMCC repossessed the car. The debtors sought sanctions for violation of the discharge injunction.

There was some question whether FMCC's actions were based on the failure of the court to approve the reaffirmation agreement or an *ipso facto* clause in the security agreement, but the court seemed to assume that FMCC was in fact relying on the latter. The court then stated – without discussion or citation to any authority – that such clauses "are generally unenforceable against debtors," subject to some limited exceptions. The court then analyzed § 521(d), which was part of the BAPCPA amendments to the Bankruptcy Code. Section 521(d) provides that, if the debtor fails to comply with § 521(a)(6), nothing in the Bankruptcy Code shall prevent or limit the application of an *ipso facto* clause.

The court seized on this limitation and concluded that, since the debtors had met their obligations under § 521(a)(6):

the Court need not determine whether an *ipso facto* clause is enforceable under Delaware law because the exception in section 521(d) allowing for limited enforcement of such clauses is not met in this case. In short, [FMCC] had no right under state law to repossess the vehicle.

This analysis is extremely confusing. The court seems at first to be concluding that the *ipso facto* clause is unenforceable as a matter of bankruptcy law. Yet it then states that the clause is unenforceable under state law. Either way, the court's analysis is flawed

The Bankruptcy Code says very little about *ipso facto* clauses. It does provide that an *ipso facto* clause will not prevent property from coming into the bankruptcy estate. § 541(c)(1). It also provides that such a clause will not impair the ability of the trustee or debtor in possession to assume and assign an executory contract or unexpired lease. § 365(e)(1). Other than that, however, the Bankruptcy Code was silent about *ipso facto* clauses until the 2005 amendments.

The court in this case relied on § 521(d). But, as the court itself noted, that provision never invalidates *ipso facto* clauses, it merely provides that nothing in the Bankruptcy Code interferes with them if the debtor fails to comply with § 521(a)(6). The court seemed to rely on a negative inference and concluded that, because the debtors had complied with § 521(a)(6), the Bankruptcy Code invalidated the *ipso facto* clause. Yet the last sentence of § 521(d) belies that negative inference. It provides that “[n]othing in this subsection shall be deemed to justify limiting such a provision in any other circumstance.” Thus, the court did not have an adequate basis for concluding that federal law invalidates these clauses.

Admittedly, a number of courts have shown hostility to *ipso facto* clauses. Before enactment of § 521(2) in 1984, the two circuit courts that had ruled were divided on the issue. *In re Bell*, 700 F.2d 1053, 1058 (6th Cir. 1983), ruled that an *ipso facto* clause did create a default on a contract once the trustee had abandoned the collateral to the debtor. *Riggs Nat'l Bank v. Perry*, 729 F.2d 982, 984-85 (4th Cir. 1984), held that an *ipso facto* clause was unenforceable as contrary to the fresh start policy of the Code. Since enactment of § 521, courts have had little to say on this issue. The Second Circuit suggested in a footnote that such clauses are unenforceable, *In re Boodrow*, 126 F.3d 43, 49 & n.6 (2d Cir. 1997) (referring to a default on bankruptcy as a “technical” default); the First Circuit BAP suggested the opposite. *In re Burr*, 218 B.R. 267, 272 & n.5 (1st Cir. BAP), *rev'd on other grounds*, 160 F.3d 843 (1st Cir. 1998). *See also In re Sokolowski*, 227 B.R. 16, 18-20 (Bankr. D. Conn. 1998) (canvassing the cases on the issue and concluding such clauses are unenforceable). If the Bankruptcy Court for the District of Delaware was going to weigh in on this issue, it should have canvassed the law and analyzed the prior decisions.

Certainly, state law might render *ipso facto* clauses unenforceable, particularly in a consumer contract. *See, e.g., In re Rowe*, 342 B.R. 341, 350 (Bankr. D. Kan. 2006) (ruling that an *ipso facto* clause was unenforceable because, under the Kansas version of Uniform Consumer Credit Code

§ 5.109, default may consist only of failure to pay or significant impairment of the prospect for payment); *In re Riggs*, 2006 WL 2990218 at *3, 4 (Bankr. W.D. Mo. 2006) (suggesting that an *ipso facto* clause may not be enforceable under Mo. Stat. § 408.552). However, it is not at all clear that the Bankruptcy Court needed to resolve this question. *Cf. In re Dumont*, 383 B.R. 481, 490 (9th Cir. BAP 2008) (refusing to exercise jurisdiction to determine whether *ipso facto* clause is enforceable under state law). However, the court in this case cited to no such law. Moreover, in another decision from two years earlier, the same court had ruled that such clauses are enforceable in Delaware. *In re Anderson*, 348 B.R. 652, 659-60 (Bankr. D. Del. 2006). While the earlier case involved a debtor who had not complied with § 521(a)(6), that factual distinction should not be relevant to the separate question of how *ipso facto* clauses are treated under Delaware state law. The court in *Baker* cited to the earlier decision but offered no clear explanation as to why it was wrong.

Harrington v. Asset Acceptance, LLC
2008 WL 4531376 (Ky. App. 2008)

This case arose from a Fifth Third Bank truck loan to Todd Harrington. When Harrington failed to maintain liability insurance on the vehicle, Fifth Third repossessed the truck and sold it, leaving a deficiency due of more than \$18,000. At some later point, Fifth Third Bank sold the receivable from Harrington to Asset Acceptance, LLC.

When Asset Acceptance sued Harrington for the deficiency, Harrington responded with a motion for judgment on the pleadings. The basis of Harrington's motion was his contention that Asset Acceptance, based on the language of the complaint had purchased only his "account" from Fifth Third Bank, not the right to enforce his promissory note to Fifth Third Bank. Relying on the Article 9 definitions of "account" and "instrument" found in § 9-102(a)(2) and (47), respectively, Harrington contended that Asset Acceptance lacked any grounds upon which to seek recovery from him, since Article 9's definition of "account" excludes any "right[] to payment evidenced by . . . an instrument," such as a promissory note. Harrington contended that Asset Acceptance had failed to allege or prove that the promissory note had been either assigned or negotiated to it, and thus had no right to enforce the note.

The lower court denied Harrington's motion and granted summary judgment for Asset Acceptance. The Kentucky Court of Appeals reversed on both, finding Harrington's argument to be persuasive. In doing so, the court erroneously applied UCC definitions to interpret Asset Acceptance's complaint and, based on these definitions, found no genuine issues of material fact precluding summary judgment.

The definitions found in the Uniform Commercial Code, including Article 9, exist for one main purpose: to explain the terms used in the Code itself. Section 9-102(a), in introducing the lengthy list of definitions that follow, begins with three simple, but important words: "*In this article.*" To apply the Code's definitions to pleadings is inappropriate and unwarranted by the Code's own language.

Admittedly, the Code expressly treats a description of collateral using the Article 9 classifications as adequate in a security agreement. § 9-108(b)(3). Such descriptions are therefore commonly used, resulting in a sort of usage of trade. *See also* § 1-303 (authorizing courts to consider usage of trade in construing agreements). Beyond that, financing statements also frequently use the Code’s classifications, and in that context - where the filer is communicating with persons unknown - we must infer the Code’s meaning of the terms; the filer and the searcher must be using the same lexicon. Because the financing statement and security agreement are typically prepared at the same time, it is not a big leap to assume they are speaking in the same language. Not surprisingly, therefore, courts frequently give significant weight to the Article 9 definition of terms used in a security agreement. *See, e.g., In re Estate of Silver*, 50 UCC Rep. Serv. 2d 1199 (Mich. Ct. App. 2003) (“equipment” in security agreement includes paintings hung in model homes, condos, and company offices because never hung in the debtor’s personal office or home); *In re E-Z Service Convenience Stores, Inc.*, 299 B.R. 126 (Bankr. M.D.N.C. 2003) (“general intangibles” in security agreement covers client’s interest in the unearned portion of a retainer paid to its attorney); *In re Brown*, 2007 WL 2029498 (Bankr. D. Kan. 2007) (hospital patient’s grant of security interest in “health care insurance receivables” to hospital did not cover patient’s right to receive payment from automobile insurer for injuries sustained in accident because that is not a health-care insurance receivable under § 9-102).

But outside of this context, using the Code’s definitions to interpret a contract is suspect. As the Pennsylvania Superior Court noted in the case of *J.W.S. Delavau, Inc. v. Eastern America Transport & Warehousing, Inc.*, 810 A.2d 672, 682 (Pa. Super. Ct. 2002), “where an unambiguous term is not being used in the context of the UCC, it is most appropriate to apply the plain and ordinary meaning of the term, regardless of whether the term is also defined in the UCC.” Based on this holding, the court went on to conclude that there was no reason to apply the UCC definition of “signed,” the term on which the parties’ dispute centered in that case, as opposed to the common dictionary definition. In citing the *J.W.S. Delavau* case approvingly, *Lawrence’s Anderson on the Uniform Commercial Code* notes that the phrase in question was “written by the drafter of the contract and was not a statutory term.” LARRY LAWRENCE, LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 1-201:320 [Rev.] (3d ed.).

But while it may be a small step to impute Article 9 definitions into a security agreement, it is a huge leap to impute them into a complaint. In the *Harrington* case, the court appears simply to have assumed, without any evidence or analysis of the point, that Asset Acceptance’s complaint had used the term “account” *as used in the UCC*. It seems most likely that Asset Acceptance’s attorney used the term “account” in the complaint to mean that Asset Acceptance had purchased Harrington’s debt to Fifth Third Bank, in the very sense of having the promissory note in question either assigned or negotiated to it. For the court not only to have applied Article 9’s more restrictive definition, but also to have made such definition dispositive of the parties’ claims, without more, was unwarranted.

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

Kristen David Adams, Chairperson

What Notice Does – and Doesn't – Mean

At the upcoming Spring 2009 Business Law Section Annual Meeting in Vancouver, the General Provisions and Relation to Other Law Subcommittee and the Sale of Goods Subcommittee will meet jointly, for the purpose of exploring the concept of notice. This brief article is meant as something of a preview of this discussion.

The recent case of *Rib Roof Metal Systems, Inc. v. National Storage Centers of Redford, Inc.*, 2008 WL 4104348 (E.D. Mich. 2008), serves as a useful reminder of what Article 1's definition of notice does – and does not – mean, as applied in the context of Article 3's definition of a holder in due course.

Plaintiff Rib Roof Metal Systems, Inc. filed suit seeking a declaratory judgment that it could keep almost \$140,000 that had been paid to it by check. The defendant and drawer of the check, National Storage Centers of Redford, Inc., had no relationship with Plaintiff but issued the check at the direction of a third party, Gary Gerrits ("Gerrits"). Gerrits accomplished this by fabricating an agreement under which Plaintiff, Defendant, and Gerrits were ostensibly all in a business relationship together. The sole purpose of the fabricated agreement was to fraudulently induce Defendant to issue the check in question to Plaintiff in payment of Gerrits' previous debt to Plaintiff in an entirely separate business enterprise. Plaintiff had no knowledge of Gerrits' deceit but was surprised to receive the check, as (1) Plaintiff did not believe Gerrits had the resources to repay the debt, and (2) Plaintiff had no business relationship with Defendant. Even so, Plaintiff deposited the check and filed the declaratory judgment action in question, seeking to establish its rights in the check as a holder in due course.

Plaintiff sought summary judgment on this claim, among others. Defendant responded with its own motion for summary judgment, seeking to establish, among other things, that Plaintiff could not satisfy the "notice" requirement of 3-302 (a) (2). To qualify as a holder in due course, this subsection requires that a holder give value and take an instrument in good faith "without notice" of the following:

(iii) . . . that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series; (iv) . . . that the instrument contains an unauthorized signature or has been altered; (v) . . . of any claim to the instrument described in Section 3-306, and (v) . . . that any party has a defense or claim in recoupment described in Section 3-305 (a).

The question in the case at bar was whether Plaintiff had notice of Defendant's conversion and unjust enrichment claims under Section 3-306. In considering the issue, and in denying Plaintiff's motion for summary judgment on this count, the court applied Section 1-202 (a)'s definition of "notice":

Subject to subsection (f) [regarding notice to an organization], a person has "notice" of a fact if the person:

- (1) has actual knowledge of it;
- (2) has received a notice or notification of it; or
- (3) from all the facts and circumstances known to the person at the time in question, has reason to know that it exists.

Since the court found no evidence that Plaintiff had any actual knowledge of Gerrits' deception of Defendant and there was no indication that Defendant contended Plaintiff had received a notice or notification of Gerrits' conduct, its opinion centered on whether Plaintiff "had reason to know" of Gerrits' deception, "from all the facts and circumstances known to [Plaintiff] at the time in question." Specifically, Defendant contended that (1) Plaintiff knew Defendant had no involvement with the project giving rise to Gerrits' debt to Plaintiff and thus should have been suspicious of receiving payment from Defendant, (2) because Plaintiff knew of Gerrits' previous financial problems, Plaintiff had reason to be suspicious of the fact that he suddenly was able to repay the debt, and (3) along the same lines, Plaintiff knew Gerrits had not yet been paid on his transaction with Defendant.

In agreeing with Defendant that these facts precluded summary judgment for Plaintiff on its holder-in-due-course claim, the court distinguished cases such as *Grand Rapids Auto Sales, Inc. v. MBNA America Bank*, 227 F. Supp.2d 721 (W.D. Mich. 2002), involving an employee who wrongfully drew checks on her employer's account to pay her husband's credit card bills. Under facts like those presented in *Grand Rapids*, courts have routinely allowed banks who are the payees of such checks to retain the funds under a holder-in-due-course theory, finding that (1) there are many legitimate reasons why an employer might pay an individual's credit-card debt (as in the case of moving expenses, for example), and (2) automated processing of checks written for payment of credit-card bills is a commercially reasonable practice that precludes individual examination of each check. In the case at bar, by contrast, the facts showed that Plaintiff received and processed no more than one check per day. In addition, Plaintiff had failed to show any legitimate reason why Defendant might be paying Gerrits' debt. For these reasons, the court denied Plaintiff's motion for summary judgment on this count.

I see this case as a reminder that payees cannot ignore suspicious circumstances surrounding checks they receive and cannot rely on the fact that the face of the check itself shows no particular irregularity, other than the mysterious fact of its being issued by a party with no relationship to the payee. I also see this case as a warning that opinions like *Grand Rapids* may be limited to the specific circumstances of (1) automated check

processing and (2) employers' payment of employees' personal debts. Thus, payees must not assume that they can adopt a general strategy of refusing to follow-up on suspicious circumstances and relying on the holder-in-due-course doctrine to protect their interests.

I hope this article has provided some insight into how notice has been applied in the Article 3 context, and specifically the difference between notice and knowledge. At the Vancouver meeting, we will further explore the concept of notice, looking at the way in which the concept has been treated in different Articles of the UCC.

If there are particular cases (or articles) discussing the contours of notice that you would like us to incorporate into the April discussions in Vancouver, please send them my way at adams@law.stetson.edu. I hope to see many of you there.

ABA UCC/COMFIN NEWSLETTER
LETTERS OF CREDIT SUBCOMMITTEE

January 2009

This quarter's report focuses on three recent letter of credit cases.

1. Letter of credit in lieu of surety bond. In *Jaimie Shipping, Inc. v. Oman Insurance Company*, 2008 U.S. Dist. Lexis 67765 (September 8, 2008), plaintiffs were various companies who were suing the defendant insurance company for the defendant's failure to pay on an insurance policy. The primary proceedings were in London. However, plaintiffs obtained a writ of attachment against accounts of the defendant in New York. The defendant requested that the New York court issue an order compelling the plaintiffs to release the funds that they had attached and to accept as substitute security an irrevocable letter of credit from Mashreq Bank, a bank of the United Arab Emirates, which had offices in London and New York. Plaintiffs refused to accept the Mashreq Bank letter of credit as substitute security.

The court held that under the local rules of the U.S. District Courts for the Southern and Eastern Districts of New York, absent the plaintiffs' consent the proposed letter of credit was not acceptable, notwithstanding the reliability of letters of credit in general and the credit standing of Mashreq Bank. The local rules required an undertaking of "a corporate surety holding a certificate of authority from the Secretary of the Treasury." Because Mashreq Bank was not an approved surety within the meaning of the local rule, the proposed letter of credit failed to comply with the requirements for substitute security absent the plaintiffs' consent. The court emphasized that, notwithstanding the acceptability of Mashreq Bank's letter of credit generally in other contexts, the court's hands are bound by the requirements of the local rule.

The case emphasizes that the Letters of Credit Subcommittee's supersedeas bond project has a number of technical hurdles to overcome. No matter how well drafted the letter of credit is and no matter how creditworthy the issuing bank is, the letter of credit and the issuing bank must nevertheless comply with whatever the local rules are in the particular court. Many of those rules were drafted without letters of credit in mind and therefore would not permit the use of a letter of credit in lieu of a surety bond.

2. Inability to issue letter of credit because of failure to have appropriate credit rating. In *Associated Warehousing, Inc. v. Banterra Corp.*, 2008 U.S. Dist. Lexis 68586 (September 8, 2008), Associated Warehousing, Inc. ("AWI") negotiated with Banterra Corp. ("Banterra") for financing for a construction project. Banterra delivered a Term Letter covering three components, a non-revolving construction loan, a real estate term loan and a letter of credit to support an eventual bond issue for the permanent financing of the first two components. The Term Letter was not signed by either party. However, the non-revolving construction loan and the real estate term loan were made by Banterra. At some point in the discussions about the letter of credit, it was discovered that, in order to issue the letter of credit to support the bond offering, Banterra must be a rated bank, which it was not.

Banterra attempted to solve the problem by seeking a wrap-around letter of credit by a rated bank. However, those attempts ultimately failed. Banterra then informed AWI that it would issue the letter of credit without the assistance of a rated bank. AWI declined to accept the unrated letter of credit, claiming that to do so would be outside the Term Letter. AWI then sued Banterra for breach of the Term Letter.

Banterra should have known whether or not it was a rated bank and if it could issue the letter of credit for a bond offering. Banterra also failed to make a full disclosure of its status as a non-rated bank, a status that was material to the use of the letter of credit. Banterra's failure to disclose allegedly injured AWI. The court also found that Banterra was subject to promissory estoppel. Accordingly, the court held that AWI had pled facts sufficient to overcome Banterra's motion to dismiss various counts of the Complaint.

3. Description and quantity of goods. In a four paragraph opinion in *Imptex International Corp. v. HSBC Bank USA, N.A.*, 52 A.D.3d 215, 859 N.Y.S.2d 147 (June 3, 2008), the New York appellate division addressed an appeal in a suit by the applicant for wrongful honor of a letter of credit on three different drawings. The court held that the first two presentations on the letter of credit strictly complied with the terms of the letter of credit although, in addition to stating that the merchandise was "on rolls," as required by the letter of credit, the presented documents described merchandise as packaged in "bales," a term not specified in the letter of credit. However, the court found that the additional reference did not under the circumstances create a discrepancy or inconsistency. Accordingly, the court upheld the motion for summary judgment granted by the trial court to the defendant issuer as to those two presentations. However, with regard to the third presentation, the court found that there was a discrepancy because the quantity of goods listed in the presentment documents exceeded the quantities listed in the letter of credit by more than 5%, in violation of Article 39(b) of UCP 500.

[Subcommittee on Payments](#)
by Sarah Howard Jenkins, Chair

Part A

Dinosaur: one that is impractically large, out-of-date, or obsolete . . . a check

The UCC subcommittees are asked to provide a brief column on an interesting legal development – some new case, statute, or regulation – that affects practice in their substantive area. Patricia Allowise, Sarah Jane Hughes, and Stephen T. Middlebrook in their recent article, *Developments in the Laws Affecting Electronic Payments and Stored-Value Products: A Year of Stored-Value Bankruptcies, Significant Legislative Proposals, and Federal Enforcement Actions*, 64 *The Business Lawyer* 219 (2008), cover the waterfront on cases, statutes, and regulations impacting the practice of payments law in 2008. My updating research unearthed only one significant piece of information as an addition to their thorough research.¹ If you have not read their article, download it immediately and review its contents. If your time is limited, at least read their conclusion.

Migration to electronic payment systems is increasing at a robust rate with new models that challenge existing legal regimes and diverse rules that may hinder solid representation of client interests. *Community Banker*, an industry magazine published by the American Bankers Association, reported in December that “two-thirds of all banks and 40 percent of all U.S. financial institutions will have adopted remote deposit capture” by the end of 2008 and most mid-size and community banks by the end of 2009.² Remote deposit capture permits businesses to scan checks received from their customers and to transmit the digitized images to their banks for collection.³ *American Banker* reports that e-commerce transactions for those without credit cards – yes, your teenage daughter – will be greatly facilitated by a mobile payments service offered by Paymo, Inc., a payments network for digital goods, to AT&T and Verizon Wireless customers. The service permits the charging of the purchase price to the customer’s cell phone bill.⁴ Allowise, Hughes, and Middlebrook conclude that the proliferation of innovative electronic payment mechanisms such as these necessitate for all players the development of harmonizing rules to govern regulated and non-regulated payment devices and services. Further, they suggest as a model the envisioned European Union Single Euro Payments Area (“SEPA”) that was implemented by the EU 2007 Payment Services Directive. On Thursday, April 16, 2009, at the Vancouver Spring Meeting, the UCC Subcommittee on Payments, the Electronic Banking Subcommittee, and the Electronic Financial Services Subcommittee of the Cyberspace Law Committee will jointly host a meeting organized by Hughes and Middlebrook, co-chairs of the Electronic Financial Services Subcommittee, on SEPA, followed on Friday, April 17, 2009, by a jointly

¹ See Part B, *infra*.

² *Robust Adoption of Remote Deposit Capture Continues*, *Community Banker* 18.12 (Dec. 2008).

³ See, generally, 10A Hawklund, Part 1. Non-U.C.C. Payment Methods Chapter 2, Other Payment Methods and Systems: ECCHO, Stored Value, PayPal, Home Banking, Mobile Financial Services § 2:19. *ECCHO check presentment* (last viewed 1/09/09); Walt Young, *Metavante Regulatory Services: Hot Issues, Remote Deposit Capture for Retail Customers -- Why Everyone Is Talking About It But Not Many Are Doing It - Yet!* (June 4, 2008).

⁴ Wolfe, Daniel, *Mobile Micropayments To Target U.S. Teenagers*, *American Banker* 6-7 (Dec. 22, 2008).

hosted presentation by Fred Miller, Chair, and Linda Rusch, Reporter, of the recently appointed NCCUSL-ALI Study Committee on Payments. Miller and Rusch will discuss the Committee's charge, its issues, its past, and its future activities.

PART B

FDIC to Insure Open-loop Stored Value Cards

On November 13, 2008, the Federal Deposit Insurance Corporation ("FDIC") issued notice of a new General Counsel's Opinion No. 8.⁵ Therein, the Legal Division of the FDIC clarified that funds underlying stored value products and "other nontraditional access mechanisms" that provide access to money at insured depository institutions will be insured up to the insurance limits. These open-loop cards may be distributed by the insured depository institution or a third party such as an employer issuing payroll cards. Of concern is whether the insurance accrues to the benefit of the holder of the card or to the distributor of the card. The Opinion clarifies that, as with other types of deposits, pass-through insurance coverage will be available if: 1) the account records of the insured depository institution disclose an agency or custodial relationship; 2) the records of the institution or those maintained by the custodian disclose the identities of the actual owners and the amount owned by each; and 3) the funds in the account are owned pursuant to agreement between the parties by the owners and not by the custodian or another party. Although not required, the FDIC encourages that information on the FDIC insurance coverage should be displayed on the stored value cards.

⁵ 73 Fed. Reg. 67,155 (Nov. 13, 2008).

ABA Business Law Section
Uniform Commercial Code Committee
Secured Transactions Subcommittee

Pauline Stevens, Chair
Thomas E. Plank, Vice Chair

Assignee Beware.

A recent case from Texas reminds us that state certificate of title laws governing perfection of security interests in vehicles is anything but uniform and raises a red flag for motor vehicle securitization programs in general.

According to the decision *In re Clark Contracting Services, Inc. v. Wells Fargo Equipment Finance*, 2008 WL 5459818 (Bankr. W.D. Tex. 2008), Clark Contracting Services, Inc. (the “Debtor”) executed notes in favor of CIT Group/Equipment Financing, Inc. (“CIT”) secured by motor vehicles. CIT’s security interest was perfected by obtaining certificates of title listing CIT’s liens in accordance with the requirements of Section 3.11(a) of the Texas Uniform Commercial Code (“UCC”) and the Texas Transportation Code (the “Certificate of Title Act”). A few months later, Wells Fargo Equipment Finance (“Wells Fargo”) purchased the notes payable to CIT but did not record the assignments to it in accordance with the Certificate of Title Act. Thereafter, the Debtor commenced a Chapter 11 case under the United States Bankruptcy Code.

The Debtor challenged Wells Fargo’s security interests claiming that the “strong-arm” power accorded to a trustee in bankruptcy (and a debtor in possession) under Section 544(a) of the Bankruptcy Code permitted avoidance of Wells Fargo’s security interests by reason of the fact that a hypothetical lien creditor would prevail over the unrecorded interests of Wells Fargo. In response, Wells Fargo argued that recordation of the assignment to it was permitted, but not required, by the Certificate of Title Act and that a contrary rule would conflict with Section 9.310 of the UCC.

The court was not persuaded by Wells Fargo’s arguments, finding, instead, that, because UCC Section 9.311(a) required a security interest in motor vehicles to be perfected in accordance with the Certificate of Title Act, the perfection of and maintenance of a security interest in motor vehicles is subject to a perfection scheme that differs from the UCC. “Rather than relying on a generally searchable database [as does the UCC], the perfection [of the Certificate of Title Act] scheme relies on physical notation of security interests on the very document required to legally transfer a motor vehicle.” *Id.* The court found that “the basic principles that underlay the scheme of perfection (and thereby notice to third parties) in the special context of motor vehicles points strongly to the conclusion that assignments too must be notated on the certificate of title if the lienholder’s claim is to be effective against . . . judgment creditors.” *Id.* In particular, the court concluded that the language of the Texas Certificate of Title Act, unlike certificate of title acts of other states, required that a lienholder could assign a lien only by complying with the procedures set forth in the Texas Certificate of Title Act, which included application by the

assignor, signature by the assignee, and the issuance of a new certificate of title showing the assignee as the lienholder.

While one could argue with the conclusion of the court, this case emphasizes that, when non-uniform state laws such as the Certificate of Title Act affect perfection questions, creditors should beware of assuming that the principles of the Uniform Commercial Code will prevail. This case can be expected to encourage additional levels of legal due diligence particularly in connection with assignments of financings secured by motor vehicles.

UCC Legislative Update

*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*

Happy new year to all! With the new year comes the first legislative update of 2009.

Revised Article 1

As of January 1, 2009, Revised Article 1 was in effect in thirty-four states: 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.

With only five enactments, 2008 saw the least legislative activity on Revised Article 1 since 2004, when only four states enacted it. The recent promulgation of a substitute § 1-301, a stumbling block for many state legislatures, might grease the skids for additional enactments in 2009 and beyond. On the other hand, state legislatures continue to grapple with the definition of "good faith." Of the 34 enacting states, 23 have adopted the uniform § 1-201(b)(20) definition, while 11 have retained the pre-revised definition that imposes a different good faith standard on merchants and non-merchants. And, of course, state legislators may well consider the current economic crisis a higher priority than harmonizing their commercial codes.

As of January 20 (admittedly early in the 2009 legislative season), the only bill to enact Revised Article 1 pending in any of the non-enacting states or the District of Columbia – except to the extent that Massachusetts HB 4302, which has been stuck (under several bill numbers) in legislative limbo for nearly four years, might resurface – is Washington [SB 5155](#), introduced January 15. The introduced version of SB 5155 appears to be drawn directly from the language of official Revised Article 1 circa 2001 and includes the no-longer-official version of Revised 1-301[†] (the one that all 34 enacting states have declined to adopt). The Washington Senate Judiciary Committee has scheduled SB 5155 for public hearing on January 23. Hopefully, at some point in the legislative process, someone will insist on amending SB 5155 to replace its 1-301 with the NCCUSL-and-ALI-approved substitute 1-301, or something in the same spirit.

Elsewhere, scuttlebutt has it that bills are forthcoming in Alaska, Georgia, and Oregon; but, as of January 20, there is no sign of them.

[†] In May 2008, the ALI approved a substitute choice-of-law provision, which the NCCUSL had previously approved, that effectively reinstated the pre-revised 1-105. See Lance Liebman et al., Proposal to Amend Official Text of § 1-301 (Territorial Applicability; Parties' Power to Choose Applicable Law) of Revised Article 1 of the UCC (2008), available at <http://www.ali.org/doc/uccamendment.pdf> (last visited Jan. 20, 2009).

Article 2 and 2A Amendments

As of January 20, 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 (nee NCCUSL) will withdraw its support.

Article 3 and 4 Amendments

As of January 1, 2009, the 2002 amendments to Article 3 and 4 were in effect in six states: Arkansas, Kentucky, Minnesota, Nevada, South Carolina, and Texas.

The New York legislature, the sole remaining state yet to adopt the 1990 revisions to Article 3 and 4, entertained a bill in 2007 and 2008 that would have enacted the 1990 revisions as amended by the 2002 amendments. However, that bill floundered.

The only other bill introduced as of January 20, 2009 proposing adopting the 2002 amendments to UCC Articles 3 & 4 (along with certain conforming amendments to other articles) was Oklahoma [HB 2588](#), which was introduced on February 4, 2008. [SB 1708](#) subsequently replaced HB 2588, passed the Oklahoma Senate on March 11, and passed the Oklahoma House subject to amendment on April 16. The Senate rejected the House amendment resulting in a conference committee, whose product eventually passed both chambers. Governor Brad Henry signed SB 1708 on June 3, bringing to seven the number of states to have enacted the 2002 amendments. Oklahoma SB 1708 took effect on November 1, 2008. Twenty-three days later, a majority of the Oklahoma Supreme Court struck down SB 1708 as unconstitutional because it violated the "one subject" requirement of Article 5, § 57 of the Oklahoma Constitution. *Weddington v. Henry*, [2008 OK 102](#) (Okla. Nov. 24, 2008).^{††} So, it's back to the drawing board in Oklahoma.

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.

^{††} Thanks to McAfee & Taft's Bob Luttrell for calling *Weddington v. Henry* to my attention.

As of January 20, the only bill to enact Revised Article 7 pending in any of the non-enacting states or the District of Columbia (with the same proviso as above about Massachusetts HB 4302 or its spawn) is Washington [SB 5154](#), introduced January 15. The Washington Senate Judiciary Committee has scheduled SB 5154 for public hearing on January 23.

[Subcommittee on Agricultural and Agri-Business Financing](#)

R. Lawrence Harris, Chair, Drew K. Theophilus, Vice Chair

The Agricultural and Agri-Business Financing Subcommittee held their fall subcommittee meeting in conjunction with the American Agricultural Law Association's 29th Annual Agricultural Law Symposium. The subcommittee was responsible for two presentations at the Symposium. The first consisted of a panel discussion that covered lease financing opportunities and issues for the agribusiness community, including a discussion of leasing options for alternative energy financing. The second involved a panel discussion of the dramatic impact on the pork industry caused by the organization of Triumph Foods, LLC and the construction of the first modern pork processing plant in over ten years. The panel focused on issues related to the emerging success of Triumph Foods and what the Triumph model shows for the future of integrated food production systems in the United States.

The subcommittee's presentation at the 2009 Spring Meeting will be on the use of forward contracting and other hedging strategies as a means to mitigate risk for throughput facilities and other users of agricultural commodities. The program will focus on the challenges that particular agricultural commodity users, including ethanol producers, recently encountered in dealing with uncontrolled fluctuations in commodity prices.

Hope to see you all in April!

Subcommittee on Creditors' Rights

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

We hope you can join us in Vancouver for the next ABA Section of Business Law Spring Meeting (April 16-18). Our topic will most likely focus on recent cases on cross-border insolvency issues. Since we will be "across the border" we hope to have Canadian lawyers involved in some of the recent cases as well as insights shared by our subcommittee members who are involved in some of the global restructurings.

At our last meeting on August 9, 2008, in New York, we reviewed new developments in Delaware law on breach of fiduciary duty by officers and directors and damage claims for deepening insolvency. The program focused on the current status of Delaware law following the decision of Judge Mary Walrath in *In re Brown Schools (Miller v. McCown De Leeuw & Co.)*, wherein the court refused to dismiss a Chapter 7 trustee's breach of fiduciary duty claims against the former directors of a debtor corporation in which some of the damages claimed were for the "deepening insolvency" of the debtor allegedly caused by the defendants' breaches of their duties of loyalty to the corporation and its creditors. The discussion during the meeting focused not only on the *Brown Schools* decision, but a more recent decision, *Bridgeport Holdings*, and provided an overview of the current standards under Delaware law for breach of fiduciary duty.

[Subcommittee on Cross-Border and Trade Financing](#)

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

The subcommittee will hold a meeting of its members at the ABA Spring meeting in April in Vancouver. The meeting will last an hour and brief presentations will be given on two topics of current interest in the area of cross border finance. The presentations will be followed by group discussion on the topics presented and other matters of interest to the attendees, such as ideas and topics for future meetings.

The presentation topics for the ABA Spring meeting are being finalized and will appear in the next issue of this newsletter.

[Subcommittee on Intellectual Property Financing](#)

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

The IP Financing Subcommittee is scheduled to convene a meeting at the Spring Meeting of the ABA Business Law Section, April 16-18, 2009, in Vancouver, BC. The date, time and subject matter of the meeting have not been finalized. Suggestions as to program topics would be welcomed. Please contact the Chair, Matt Kavanaugh, at mkavanaugh@buchalter.com or at (213) 891-5449. A possible program topic might be, "Enforcing Remedies in IP Collateral."

Subcommittee on Loan Workouts

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

The Loan Workouts Subcommittee of the Commercial Finance Committee, in conjunction with the Lender Liability Subcommittee, jointly presented a panel at the Business Law Section Fall Meeting in San Francisco, California entitled: ***Nightmare on Main Street - What Keeps Lenders Up at Night?*** The panel was moderated by Steven B. Soll, a Member of the Firm of Otterbourg, Steindler, Houston & Rosen, P.C., and included presentations by Cathy L. Reece, Esq., a Member of the Firm of Fennemore Craig, P.C., Harvey I. Forman, Esq., Partner, Blank Rome LLP, Mr. Howard Bailey, Senior Vice President of the Western U.S. for its Restructuring team, GE Commercial Finance, and Mr. Rocky Ho, Senior Managing Director in FTI Consulting's Corporate Finance practice. The panel addressed a number of legal issues relating to lender liability and bankruptcy that impact lenders. The issues addressed by the panel included matters pertaining to: (i) efforts by third parties to interfere with secured party remedy enforcement, (ii) possible trends toward fraudulent conveyance challenges to secured lenders' liens based upon various transaction structures, (iii) potential lender liability arising from improper disclosure of information, (iv) selected lender liability issues relating to "failure to fund" cases and the assertion of such claims as a defense to the obligations of a guarantor, (v) bankruptcy issues pertaining to "cram down", recharacterization and equitable subordination of secured claims, and (vi) the current cost and lack of capital and how it impacts credit decisions, new deals and restructuring of existing indebtedness. The panel distributed written materials in advance of the meeting. The presentation included a robust interactive discussion with attendees on the various topics.

Based upon popular demand, the panel will repeat the program as a CLE teleconference on March 25, 2009.

[Subcommittee on Real Estate Financing](#)

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

It appears that Real Estate Financing is still the most prickly of subjects and provides the most clouded image in our crystal balls. We have concluded, however, that the best topic for our Spring meeting will be **Loan Workouts**. We are planning a facilitated roundtable discussion among our members to discuss what is really going on: *what lenders and borrowers want and need*. We promise not to attribute any comments to your firms, clients or companies, but since we represent the spectrum of players in real estate financing, we can help each other sort through the issues.

Therefore, we hope you will join us in the Vancouver BC Convention Exhibition Centre on **Saturday, April 18, 2009** from 12:30PM - 2:00PM in Room 122, Level One for our meeting titled: **Real Estate Financing & Workouts in Interesting Times**.

In the meantime if you have some specific suggestions or case studies we could discuss, please send them to us at khopkins@rp-lawgroup.com and elester@carltonfields.com.

We look forward to seeing you in beautiful Vancouver!

[Subcommittee on Syndications and Lender Relations](#)

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

The subcommittee will be one of the sponsors of a program entitled "Current State of the Syndicated Loan Markets in the United States and Canada" on April 16th at the Spring Meeting in Vancouver. The program is a joint presentation with the Syndicated Bank Financing Subcommittee of the Developments in Business Financing Committee. This joint program is becoming an annual tradition and has been very well-received at previous Spring meetings. In the midst of the current financial crisis, there is likely to be a lively discussion on defaults under syndicated facilities and related issues. On other fronts, the Model Intercreditor Agreement Task Force spun off from the Subcommittee continues to be very active and now has over 180 members. A separate report from the Task Force appears in this newsletter.

[Task Force on Model Intercreditor Agreement](#)

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

The Model Intercreditor 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 interest in developing a model intercreditor agreement grew out of the tremendous growth in the second lien market over the last several years. Despite the decline in second lien financing transactions and other highly-leveraged loans during the current financial crisis, interest in the issues raised by the Task Force and the Model Agreement remains high. The Task Force has grown to over 180 members and there has been active participation by members in discussions of the evolving drafts of the Model Agreement. One of the reasons for this interest is that there are many intercreditor agreements still in place for outstanding loans and, as defaults increase, the existing agreements will be tested both inside and outside of bankruptcy. There have been relatively few bankruptcy cases dealing with intercreditor agreements in detail and those cases have produced differing holdings concerning the validity of waivers and other common provisions in intercreditor arrangements. In addition, as existing unsecured creditors push to obtain collateral in the present economic environment, many of the issues being addressed by the Task Force are coming to the forefront in new guises. Over the past several months, the Task Force has held a series of phone meetings led by various Vice Chairs of the Task Force to discuss proposed revisions to the Model Agreement. Bob Cunningham of Gibson, Dunn & Crutcher, LLP began the process with an extensive revision of the lien priority provisions, including detailed provisions for dealing with first and second lien caps and the definition of “common collateral” together with optional provisions addressing other concerns of both first lien and second lien lenders. Christian Brose with McGuire Woods LLP followed that up with a revision of the modification and amendment provisions of the Agreement. Vice Chairs Alyson Allen of Ropes & Gray LLP and Randall Klein of Goldberg Kohn then took on the difficult task of revising the bankruptcy provisions of the Model Agreement. Two phone meetings were devoted to discussing the bankruptcy provisions followed by an all-day drafting session in San Francisco at the Fall meeting led by Randall Klein. In addition to all of this activity, Gary Chamblee along with Bob Cunningham, Rick Brown and Tony Callobre participated in a panel discussion on “Negotiating Intercreditor Agreements” as part of the ALI-ABA Course of Study, Commercial Lending and Banking Law--2009, January 29-31, 2009. Information about the Task Force and the latest draft of the Model Agreement is posted on the Task Force website at <http://www.abanet.org/dch/committee.cfm?com=CL190029>.

ABA Section on Business Law

[Joint Subcommittee on Secured Lending \(ComFin\) and Secured Transactions \(UCC\)](#)

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

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 2009 Spring Meeting of the ABA Business Law Section, April 16-18, 2009, in Vancouver, BC. We are currently making plans for the program to include a brief update on the work of the Joint Review Committee for Article 9, as discussed at the Subcommittee's last meeting at the 2008 ABA Annual Meeting in New York. The program will also include a discussion of some of the risks lurking behind the provisions of Part 6 of Article 9 and the swords and shields that competing secured parties may find in their arsenals when exercising Article 9 remedies. Please let us know if you have any ideas or suggestions for programs or projects. Thank you for your interest.

ABA Section on Business Law
Joint Task Force on Filing Office Operations & Search Logic

States Ring in the New Year by Amending UCC Article 9

It's early in the year, yet some states have already started significant non-uniform Article 9 legislative initiatives. Some of the new laws and pending legislation could have an impact on how legal professionals search and file UCC records.

Michigan recently enacted significant amendments to Article 9 that expand its filing office's authority to reject UCC records and grant the office authority to terminate some active records. The new amendments to Article 9 were contained in 2008 Mich. Pub. Acts 381 and 383. These laws will take effect on March 30, 2009.

When the new Michigan laws take effect the secretary of state will have authority to terminate financing statements under certain conditions. A record terminated under the secretary of state's new authority becomes void and ineffective. In addition, the new laws grant the secretary of state broad discretion to reject a UCC record upon determination that the record is not required or authorized to be filed or is being filed for a purpose outside the scope of Article 9 or if there is reasonable cause to believe the record is materially false or fraudulent.

The Michigan Article 9 amendments also require the filing office to reject any financing statement that indicates an individual debtor is a transmitting utility. Active financing statements that indicate an individual debtor is a transmitting utility cannot be continued and will lapse five years from the file date. That provision of the law may cause some transmitting utility financing statements filed before March 30, 2004 to lapse retroactively.

Another feature of the Michigan Article 9 legislation is that it imposes a new investigative duty on its secretary of state. If a correction statement alleges the record to which it relates was wrongfully filed, the secretary of state must determine whether the contested record was, in fact, filed without authorization. To make its determination, the filing office may require the parties involved to provide additional relevant information, including an original copy of the security agreement.

All of these changes to Michigan's Article 9 were designed to address just one problem, bogus lien filing. Most legal professionals may not be aware of just how widespread the bogus UCC filing problem really has become. State-level filing offices receive thousands of bogus UCC records every year.

Bogus UCC filers generally have one of two objectives, harassment or fraud. Harassment UCC filings typically name a public official as the debtor in retaliation for some perceived injustice. Bogus UCC filings are sometimes also used in an attempt to mislead third parties as part of various fraudulent schemes.

Regardless of purpose, nearly all bogus UCC financing statements share one common characteristic. They usually indicate that the debtor is a transmitting utility. The filer makes this indication to ensure that the financing statement remains on file indefinitely. Under UCC Section 9-515(f), transmitting utility filings do not lapse.

The uniform text of Article 9 does not give filing offices the authority to reject even obviously bogus UCC records if they otherwise satisfy the filing requirements. Michigan is neither the first nor the only state to enact special laws to deal with bogus filings. In fact, the new Michigan laws include elements drawn from bogus filing measures enacted in North Carolina and Illinois. However, the Michigan legislation grants the filing office much broader power than provisions in other states.

The Michigan UCC filing office has stated its intention to exercise restraint and apply the new discretionary powers only when a UCC record is clearly bogus on its face. Nevertheless, some of the new provisions will affect legitimate records and there are still questions about how the filing office will apply the new laws to electronically filed UCC records. The filing office intends to develop and implement procedures to address any unresolved issues before the law takes effect on March 30, 2009.

There also was legislation recently proposed in Michigan that, if enacted, would place a substantial new burden on both UCC filers and the filing office. Michigan House Bill 6647, introduced on November 12, 2008, would have reestablished the debtor signature requirement. The bill made no progress in 2008 and the future of this initiative is uncertain.

Other states have Article 9 legislation pending as well. South Dakota introduced a bill on January 5, 2009 that could create significant problems for filers, searchers and the filing office. House Bill 1036 would require the filing office to reject financing statements that do not provide the "complete" name of an individual or organization debtor. It is unclear how the filing office could determine the completeness of a debtor name, especially for individuals.

Another concerning issue with HB 1036 is that it requires the filing office to apply a different standard to debtor names provided on amendments. The filing office would be required to reject an amendment that does not provide the "legal name" of an individual debtor. Again, how the filing office will determine the legal name of an individual debtor or certain types of organizations is unknown. Even the courts continue to struggle with the individual debtor name issue.

Yet another significant feature of the South Dakota bill is that the filing office must refuse to accept an amendment if the initial financing statement had been terminated. Currently, nearly all filing offices will accept subsequent related records after the filing of a termination statement. There is good reason for this practice. There are frequently circumstances where an allegedly "terminated" financing statement remains perfectly effective. For example, a termination statement filed without authorization is ineffective.

Yet, the financing statement to which it relates will appear as terminated in the filing office records.

Purportedly terminated financing statements may need to be amended, assigned or continued. Under HB 1036, the filing office must reject any subsequent amendments after a termination statement has been filed, including continuations. The result of this legislation could be a large number of hidden liens.

Michigan and South Dakota are not the only states with non-uniform Article 9 initiatives in 2009. Maryland, Virginia, North Dakota and Nebraska have also introduced legislation to amend Article 9 this year. More states are likely to follow. The Joint Task Force on Filing Office Operations & Search Logic will continue to monitor new legislation that may affect the UCC search and filing process and provide updates as warranted.

Paul Hodnefield is Co-Chair of the Joint Task Force on Filing Office Operations & Search Logic. He can be reached with questions or comments at 800-927-9801, extension 2375, or phodnefi@cscinfo.com.

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.

**ABA BUSINESS LAW SECTION
UCC COMMITTEE**

LEADERSHIP DIRECTORY

December, 2008



UCC COMMITTEE LEADERSHIP

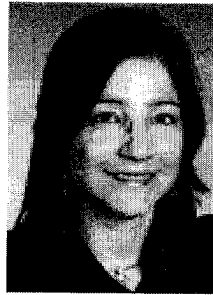
[All terms expire at the end of the ABA Annual Meeting in the year indicated]

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

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



Stephen L. Sepinuck



Penelope Christophorou



Mario J. Ippolito



Kristen Adams



Kate Sawyer



Meredith S. Jackson



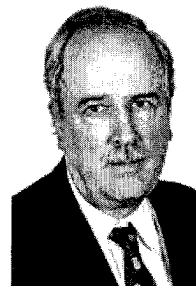
Teresa Davidson



Brad Gibson



Ruthanne C. Hammett



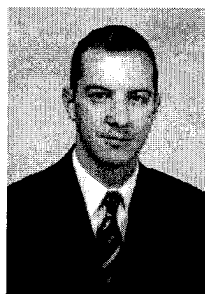
George A. Hisert



Anthony R. Callobre



Sarah H. Jenkins



Greg Cavanagh



David K. Daggett



Candace Zierdt



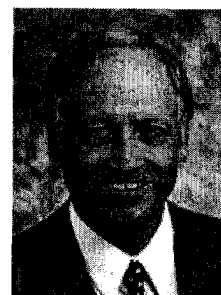
Pauline Stevens



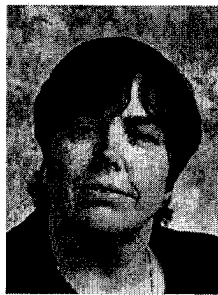
Thomas E. Plank



Anthony Schutz



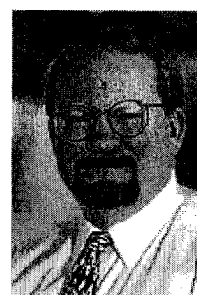
Russell A. Hakes



Robyn Meadows



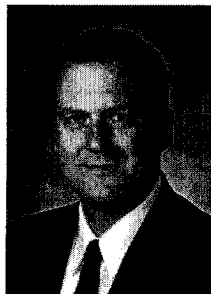
Carol Nulty



Keith A. Rowley



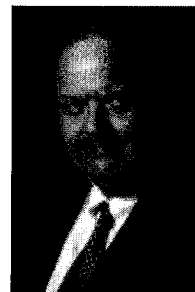
Cindy J. Chernuchin



Paul Hodnefield



Gail Hillebrand



Mike Ferry



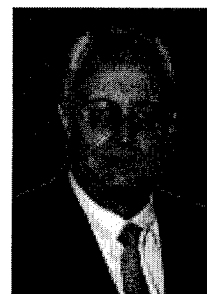
Carl Bjerre



Jeremy S. Friedberg



Darrell W. Pierce



John A. Beckstead



COMMERCIAL FINANCE COMMITTEE

Section of Business Law
American Bar Association

LEADERSHIP ROSTER

JANUARY 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 General Counsel Skybus Airlines, Inc. 4324 East 5 th Avenue Columbus, Ohio 43219 Mobile: 404-272-3952 E-mail: pete.barlow@skybus.com	2009

Colloquium on ADR in Commercial Finance Disputes(Taskforce)

Position	Contact Information	Term Expires
Chair	Thomas J. Welsh Brown & Welsh, P.C. 530 Preston Avenue, 2nd Floor Meriden, CT 06450 Direct: 203.235-1651 Fax: 203.235.9600 Email: TJWelsh@BrownWelsh.com	N/A
	<i>{DO NOT ADD TO ANY EMAIL LISTS}</i> <i>Colloquium Chair</i> Michael S. Greco K&L Gates One Lincoln Street Boston, Massachusetts 02111 Direct: 617.261.3232 Fax: 617.261.3175 Email: michael.greco@klgates.com	N/A

Commercial Finance Terms (Joint Taskforce with UCC Committee)

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

Creditors' Rights

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

Cross Border and Trade Financing

Position	Contact Information	Term Expires
Chair	Daryl E. Clark Blake, Cassels & Graydon LLP 595 Burrard Street P.O. Box 49314 Suite 2600, Three Bentall Centre Vancouver BC V7X 1L3 Canada Direct: 604.631.3357 Fax: 604.631.3309 E-mail: daryl.clark@blakes.com	2010
Vice Chair	Jonathan M. Cooper Goldberg Kohn 55 East Monroe, Suite 3300 Chicago, IL 60603 Direct: 312-201-3980 Fax: 312-863-7480 Jonathan.cooper@goldbergkohn.com	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. Heilesen 1925 Miln House Road Williamsburg, VA 23185-7699 Phone: 757.220.9321 E-mail: heilesen@earthlink.net	N/A
Co-chair	John D. Pickering Balch & Bingham LLP 1901 Sixth Avenue North, Suite 1500 Birmingham, AL 35203-4644 Direct: 205.226.8752 Fax: 205.488.5690 Main Fax: 205.226.8799 E-mail: jpickering@balch.com	N/A
Co-chair	Edwin E. Smith Bingham McCutchen LLP 1 Federal Street Boston, MA 02110-1726 Direct: 617.951.8615; 212.705.7044 Fax: 617.428.6457 ; 212.752.5378 E-mail: edwin.smith@bingham.com	N/A
Co-chair	Oliver I. Ireland Morrison & Foerster 2000 Pennsylvania Avenue, NW Suite 5500 Washington, DC 20006-1888 Direct: 202.778.1614 Fax: 202.887.0763 E-mail: oireland@mofo.com	N/A

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

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

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

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

Intellectual Property Financing

Position	Contact Information	Term Expires
Chair	Matthew W. Kavanaugh Buchalter Nemer PLC 1000 Wilshire Boulevard, Suite 1500 Los Angeles, CA 90017-2457 Direct: 213.891.5449 Fax: 213.630.5649 Main Fax: 213.896.0400 E-mail: mkavanaugh@buchalter.com	2009
Vice Chair	John E. Murdock III 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
Chair	Bobbi Acord Parker, Hudson, Rainer & Dobbs LLP 1500 Marquis Two Tower 285 Peachtree Center Avenue, N.E. Atlanta, GA 30303 Direct: 404.420.5537 Fax: 404.522.8409 Email: bacord@phrd.com	2011
Vice Chair	Scott Lessne CapitalSource Finance LLC 4445 Willard Ave. 12th Floor Chevy Chase, MD 20815 Direct: 301.634.6748 Email: slessne@capitalsourcebank.com	2011

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

Loan Workouts

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

Maritime Financing

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

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

Model Intercreditor Agreement Taskforce

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

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

*Planning and Communications*³

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

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

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

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

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

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

Real Estate Financing

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

Secured Lending

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

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

Surveys of State Commercial Laws Taskforce

Position	Contact Information	Term Expires
Co-Chair	Brian D. Hulse 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
Co-Chair	James H. Prior Porter Wright Morris & Arthur, LLP 41 South High Street Columbus, OH 43215 Direct: 614-227-2008 Fax: 614-227-2100 jprior@porterwright.com	N/A

Syndications and Lender Relations

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

Syndications Chapter for ABL Treatise Taskforce

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

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

Liaisons

Diversity

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

Meetings

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

Membership

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

Pro Bono

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

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

Website Management and Technology

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

Photo Directory



Bobbi Acord



Alyson Allen



Katherine Simpson Allen



Peter B. Barlow



Carl J. Bjerre



Elizabeth M. Bohn



Christian Brose



Richard K. Brown



Mark J. Buhler



Anthony R. Callobre



Gary D. Chamblee



Daryl E. Clark



Jonathan M. Cooper



Robert L. Cunningham



Jeremy S. Friedberg



Michael S. Greco



R. Marshall Grodner



Christine Gould Hamm

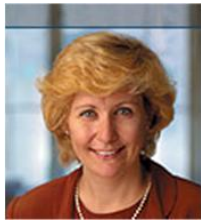


R. Lawrence Harris

Marvin D. Heilesen



Paul Hodnefield



Kathleen J. Hopkins



Brian D. Hulse



Oliver I. Ireland



Meredith Jackson



Matthew W. Kavanaugh



Jeffrey W. Kelley

Randall Klein



Neal J. Kling



Scott Lessne



Edgel C. Lester, Jr.



Malcolm C. Lindquist



Eric Marcus



John E. Murdock, III



Shannon Lowry Nagle



John D. Pickering



Leslie J. Polt



Norman M. Powell



James D. Prendergast



James H. Prior



Cathy L. Reece



Christopher J. Rockers



Mathew S. Rotenberg



James C. Schulwolf



Steven L. Schwarcz



Edwin E. Smith



Stephen B. Soll



Wansun Song



Heather Sonnenberg



Lynn A. Soukup



Cheryl Stacey



Jane Summers



Drew K. Theophilus



Susan M. Tyler



Michael K. Vernier



Stacey Walker

Lauren Wallace



Thomas J. Welsh



David McI. Williams

2009 SPRING MEETING SCHEDULE

TIME	COMFIN	UCC	Legal Opinions/PFD/SSF/BF
Thursday, April 16			
9:00-9:30am			
9:30-10:00am		Joint Subcommittee Meeting: International Commercial Law (UCC) and Cross Border and Trade Financing (ComFin) (9:30-10:30) <i>Topic:</i>	Joint Subcommittee Meeting: Leasing (UCC) and Lease Financings and Secured Transactions (BF) (9:30-10:30) <i>Topic:</i>
10:00-10:30am		Joint Subcommittee Meeting: International Commercial Law (UCC) and Cross Border and Trade Financing (ComFin) (cont'd) Subcommittee Meeting: Payments (10:00-11:00) <i>Topic: SEPA</i>	Joint Subcommittee Meeting: Leasing (UCC) and Lease Financings and Secured Transactions (BF) (cont'd) <i>Topic:</i>
10:30-11:00am	Program (10:30-12:30) <i>Topic: Current State of the Syndicated Loan Markets in the United States and Canada</i>	Subcommittee Meeting: Payments (cont'd)	PFD Program (10:30-12:30) <i>Topic: Public Private Partnerships – The Best and Worst of Times</i>
11:00-11:30am	Program (cont'd)		Program (cont'd)
11:30-12:00pm	Program (cont'd)		Program (cont'd)
12:00-12:30pm	Program (cont'd)		Program (cont'd)
12:30-1:00pm		Subcommittee Meeting: Letters of Credit (12:30 – 1:30) <i>Topic:</i>	

AS OF 01/23/2009 Please Check Program Book for Meeting Rooms and Changes in Schedule
CLE Events highlighted in YELLOW

TIME	COMFIN			UCC	Legal Opinions/PFD/SSF/BF	
1:00-1:30pm	Subcommittee Meeting: Creditors' Rights (Joint with Bankruptcy Litigation Subcommittee) (1:00- 2:30) <i>Topic:</i>		Subcommittee Meeting: Loan Documentation (1:00-2:30) <i>Topic:</i>	Subcommittee Meeting: Letters of Credit (cont'd)		
1:30-2:00pm	Subcommittee Meeting: Creditors' Rights (cont'd)		Subcommittee Meeting: Loan Documentation (cont'd)	Joint Subcommittee Meeting: General Provisions / Sales (1:30 – 2:30) <i>Topic:</i>		
2:00-2:30pm	Subcommittee Meeting: Creditors' Rights (cont'd)	Subcommittee Meeting: Loan Documentation (cont'd)	Subcommittee Meeting: Aircraft Financing (1 of 2) (2-5:30) <i>Topic:</i>	Joint Subcommittee Meeting: General Provisions / Sales (cont'd)		
2:30-3:00pm	Subcommittee Meeting: Loan Workouts (2:30 – 4:00) <i>Topic:</i>		Subcommittee Meeting: Aircraft Financing (1 of 2) (cont'd)	Program (2:30pm-4:30pm) <i>Topic: Non-uniformity: Is it the Spice of Life or a Recipe for Disaster?</i>		SSF Program (2:30pm- 4:30pm) <i>Topic: Anatomy of a Canadian/U.S. Cross-Border Securitization Transaction</i>
						PFD Committee Meeting (2:30 – 4:30) <i>Topic:</i>

AS OF 01/23/2009 Please Check Program Book for Meeting Rooms and Changes in Schedule
CLE Events highlighted in YELLOW

TIME	COMFIN		UCC	Legal Opinions/PFD/SSF/BF	
3:00-3:30pm	Subcommittee Meeting: Loan Workouts (cont'd)	Subcommittee Meeting: Aircraft Financing (1 of 2) (cont'd)	Program (cont'd)	Program (cont'd)	PFD Committee Meeting (cont'd)
3:30-4:00pm	Subcommittee Meeting: Loan Workouts (cont'd)	Subcommittee Meeting: Aircraft Financing (1 of 2) (cont'd)	Program (cont'd)	Program (cont'd)	PFD Committee Meeting (cont'd)
4:00-4:30pm	Subcommittee Meeting: Lender Liability (4:00-5:30) <i>Topic:</i>	Subcommittee Meeting: Aircraft Financing (1 of 2) (cont'd)	Program (cont'd)	Program (cont'd)	PFD Committee Meeting (cont'd)
4:30-5:00pm	Subcommittee Meeting: Lender Liability (cont'd)	Subcommittee Meeting: Aircraft Financing (1 of 2) (cont'd)			
5:00-5:30pm	Subcommittee Meeting: Lender Liability (cont'd)	Subcommittee Meeting: Aircraft Financing (1 of 2) (cont'd)			
5:30-6:00 pm					
	Subcommittee Dinner: Aircraft Financing				
7 – 10 pm JOINT UCC/ComFin Committee Dinner (Ticketed Event)					
Friday, April 17					
8:00-8:30am					
8:30-9:00am	Subcommittee Meeting: Agricultural and Agri-Business Financing (8:30 - 10) <i>Topic:</i>			Subcommittee Meeting: Investment Securities (8:30 -10)	Legal Opinions Committee Meeting (8:30 -10:30)

AS OF 01/23/2009 Please Check Program Book for Meeting Rooms and Changes in Schedule
CLE Events highlighted in YELLOW

TIME	COMFIN		UCC		Legal Opinions/PFD/SSF/BF	
				<i>Topic:</i>	<i>Topic:</i>	
9:00-9:30am	Subcommittee Meeting: Aircraft Financing (2 of 2) (9:00-12:30) <i>Topic:</i>	Subcommittee Meeting: Agricultural and Agri-Business Financing (cont'd)		Subcommittee Meeting: Investment Securities (cont'd)	Legal Opinions Committee Meeting (cont'd) <i>Topic:</i>	
9:30-10:00am	Subcommittee Meeting: Aircraft Financing (2 of 2) (cont'd)	Subcommittee Meeting: Agricultural and Agri-Business Financing (cont'd)		Subcommittee Meeting: Investment Securities (cont'd)	Legal Opinions Committee Meeting (cont'd)	SSF Committee Meeting (9:30 -10:30) <i>Topic:</i>
10:00-10:30am	Subcommittee Meeting: Aircraft Financing (2 of 2) (cont'd)					SSF Committee Meeting (cont'd)
10:30-11:00am	Program (10:30-12:30) <i>Topic:</i> Hands Across the Borders: Comparative Insolvency Regimes in the United States, Canada and Mexico	Subcommittee Meeting: Aircraft Financing (2 of 2) (cont'd)			Legal Opinions Joint Program with Securities Regulation (10:30-12:30) <i>Topic:</i> Update on Negative Assurance	SSF Program (10:30-12:30) <i>Topic: Back to the Future II: What Lies Ahead for Asset Securitization and Structured Finance</i>
11:00-11:30am	Program (cont'd)	Subcommittee Meeting: Aircraft Financing (2 of 2) (cont'd)			Program (cont'd)	Program (cont'd)
11:30am -12:00pm	Program (cont'd)	Subcommittee Meeting: Aircraft Financing (2 of 2) (cont'd)			Program (cont'd)	Program (cont'd)

AS OF 01/23/2009 Please Check Program Book for Meeting Rooms and Changes in Schedule
CLE Events highlighted in YELLOW

TIME	COMFIN		UCC	Legal Opinions/PFD/SSF/BF	
12:00-12:30pm	Program (cont'd)	Subcommittee Meeting: Aircraft Financing (2 of 2) (cont'd')		Program (cont'd)	Program (cont'd)
12:30-1:00pm	Taskforce Meeting: Model Intercreditor Agreement (12:30 – 2) <i>Topic:</i>		Subcommittee Meeting: Payments (12:30-1:30) <i>Topic: New ULC Study of Payments Law</i>		
1:00-1:30pm	Taskforce Meeting: Model Intercreditor Agreement (cont'd)		Subcommittee Meeting: Payments (cont'd)		
1:30-2:00pm	Taskforce Meeting: Model Intercreditor Agreement (cont'd)		UCC Committee Meeting (1:30 -2:30) Topic: Stump the Chumps and Presentation of UCC Award of Exceptional Service		
2:00-2:30pm			UCC Committee Meeting (cont'd))		
2:30-3:00pm			Program (2:30-4:30) Topic: How Well Do You Know Your Neighbor? What's New and What's Different about Canadian Secured Transactions	BF Program (2:30pm-4:30pm) Topic: 27th Annual Review of Developments in Business Financing	
3:00-3:30pm	Subcommittee Meeting: Intellectual Property Financing (3:00 – 4:30) <i>Topic:</i>		Program (cont'd)	Program (cont'd)	
3:30-4:00pm	Subcommittee Meeting: IP Financing (cont'd)		Program (cont'd)	Program (cont'd)	
4:00-4:30pm	Subcommittee Meeting: IP Financing (cont'd)		Program (cont'd)	Program (cont'd)	
4:30-5:00pm	ComFin Leadership Meeting (4:30 – 5:30)		UCC Committee Leadership Meeting (4:30-5:30)		

AS OF 01/23/2009 Please Check Program Book for Meeting Rooms and Changes in Schedule
CLE Events highlighted in YELLOW

TIME	COMFIN	UCC	Legal Opinions/PFD/SSF/BF
5:00-5:30pm	ComFin Leadership Meeting (cont'd)	UCC Committee Leadership Meeting (cont'd)	Legal Opinions Reception (5:00-7:00)
5:30-6:00pm			Legal Opinions Reception (cont'd)
6:00-6:30pm			Legal Opinions Reception (cont'd)
6:30-7:00pm			Legal Opinions Reception (cont'd)
Saturday, April 18			
8:00-8:30am			
8:30-9:00am	Joint Subcommittee Meeting: Secured Lending (ComFin) and Secured Transactions (UCC) (8:30-10:00) <i>Topic:</i>		
9:00-9:30am	Joint Subcommittee Meeting: Secured Lending and Secured Transactions (cont'd)		
9:30-10:00am	Joint Subcommittee Meeting: Secured Lending and Secured Transactions (cont'd)		
10:00-10:30am	Joint Taskforce Meeting: Commercial Finance Terms (10-10:30) <i>Topic:</i>		
10:30-11:00am	Program (10:30 – 12:30) <i>Topic: Commercial Law Developments</i>		
11:00-11:30am	Program (cont'd)		
11:30am-12:00pm	Program (cont'd)		
12:00-12:30pm	Program (cont'd)		
12:30-1:00pm	Subcommittee Meeting: Real Estate Financing (12:30-2:00) <i>Topic:</i>		
1:00-1:30pm	Subcommittee Meeting: Real Estate Financing (cont'd)	Taskforce Meeting: Syndications Chapter (1:00-3:00) <i>Topic:</i>	Program (1-3) <i>Topic: What Every Commercial Lawyer Needs to Know about the Restatement (Third) of Restitution and Unjust Enrichment</i>

AS OF 01/23/2009 Please Check Program Book for Meeting Rooms and Changes in Schedule
CLE Events highlighted in YELLOW

TIME	COMFIN		UCC	Legal Opinions/PFD/SSF/BF
1:30-2:00pm	Subcommittee Meeting: Real Estate Financing (cont'd)	Taskforce Meeting: Syndications Chapter (cont'd)	Program (cont'd)	
2:00-2:30pm		Taskforce Meeting: Syndications Chapter (cont'd)	Program (cont'd)	
2:30-3:00pm	Taskforce Meeting: Syndications Chapter (cont'd)		Program (cont'd)	
3:00-3:30pm	Joint Taskforce Meeting: Filing Office Operations and Search Logic (3 – 4:30) <i>Topic:</i>			
3:30-4:00pm	Joint Taskforce Meeting: FOOSL (cont'd)			
4:00-4:30pm	Joint Taskforce Meeting: FOOSL (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 S. Jackson mjackson@irell.com

Planning and Communications Vice Chair and Co-Liaison to the Website Management and Technology Committee – R. Marshall Grodner mgrodner@mcglinchey.com

Planning and Communications Vice Chair and Co-Liaison to the Membership Committee – Norman M. Powell NPowell@ycst.com

Planning and Communications Vice Chair/Co-Newsletter Editor (ComFin) – Christine Gould Hamm christine.hamm@huschblackwell.com

Planning and Communications Co-Newsletter Editor – Lauren E. Wallace (ComFin) llwallace@venable.com

Planning and Communications Assistance Newsletter Editor and Young Lawyers Liaison – Stacey Walker swcounsel@gmail.com

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

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

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

AGRICULTURAL AND AGRI-BUSINESS FINANCING

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

Chair – R. Lawrence Harris rlharris@mhsllaw.com

Vice Chair – Drew K. Theophilus dtheophilus@bairdholm.com
<http://www.abanet.org/dch/committee.cfm?com=CL190002>

AIRCRAFT FINANCING

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

Chair – Michael K. Vernier Michael.Vernier@standardandpoors.com
Vice Chair – Peter B. Barlow pete.barlow@skybus.com
<http://www.abanet.org/dch/committee.cfm?com=CL190004>

COLLOQUIUM ON ADR IN COMMERCIAL FINANCE DISPUTES TASKFORCE

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

Chair – Thomas J. Welsh TJWelsh@BrownWelsh.com
Colloquium Chair – Michael S. Greco michael.greco@klgates.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@goldbergekohn.com

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Co-chair – Paul Hodnefield phodnefi@cscinfo.com

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

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

INTELLECTUAL PROPERTY FINANCING

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

Chair – Matthew W. Kavanaugh mkavanaugh@buchalter.com

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

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

LENDER LIABILITY

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

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

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

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

LOAN DOCUMENTATION

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

Co-Chair – Bobbi Acord bacord@phrd.com

Co-Chair – Scott Lessne slessne@capitalsource.com

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

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

LOAN WORKOUTS

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

Chair – Steven B. Soll ssoll@oshr.com

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

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

MARITIME FINANCING

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

Chair – David McI. Williams DMWilliams@GandWlaw.com

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

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

MODEL INTERCREDITOR AGREEMENT TASKFORCE

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

Chair – Gary D. Chamblee gchamblee@wcsr.com

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

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

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