

IN THIS ISSUE

Joint Report from the Chairs

MARK YOUR CALENDARS

FEATURED NOTES

FEATURED ARTICLES

- **New Challenges Put FCC Collateral in Jeopardy**
By Paige K. Fronabarger
- **An Attempt to “Demystify” Quebec Secured Transactions Law (Part II)**
By Kiriakoula Hatzikiiriakos

UCC SPOTLIGHT

USEFUL LINKS AND WEBSITES

MARK YOUR CALENDARS

April 14-16, 2011 – ABA Spring Meeting – Boston, Massachusetts. Please join us in Boston for numerous CLE programs, committee, subcommittee and taskforce meetings and social networking. The Spring Meeting Brochure and registration details are available [here](#). For a complete schedule, please click [here](#).

April 14, 2011 – 7:00 to 10:00 p.m. EDT – Joint Committee Dinner – Turner Fisheries Restaurant. The dinner reservation form for the joint committee dinner is available [here](#).

As we approach our Spring Meeting in Boston from April 14-16, in the interest of efficiency and space-saving, we have decided to prepare a Joint Chair Report. We hope you will find it useful.

For those of you who have not already registered, the Spring Meeting will be held at the Copley Marriott and Westin Copley Place hotels in Boston from April 14 through 16. Both the UCC and Commercial Finance Committees have an outstanding series of programs and meetings for your education and enjoyment. Our collective programs are as follows:

1. Thursday, April 14, 8:00 a.m. to 9:30 a.m. (Marriott – Salon F, 4th Floor) - **STUMP THE CHUMPS RETURNS**, chaired by Norman Powell and Kristen Adams, with an esteemed set of panelists.
2. Thursday, April 14, 10:30 a.m. to 12:30 p.m. (Marriott Salon F, 4th Floor) - **CURRENT STATE OF THE SYNDICATED LOAN MARKETS**, chaired by Bridget Marsh.
3. Thursday, April 14, 2:30 p.m. to 4:30 p.m. (Marriott Salon F, 4th Floor) - **WHAT EVERY DEAL LAWYER SHOULD KNOW ABOUT CONSUMER REGULATION**, chaired by Thomas J. Buiteweg and Michael Ferry.
4. Friday, April 15, 10:30 a.m. to 12:30 p.m. (Marriott, Salon F, 4th Floor) - **A MIDNIGHT RIDE: A CALL TO ARMS ON THE CHALLENGES ON DOCUMENTING THE RIGHTS OF SWAP PROVIDERS IN COLLATERAL SHARED WITH LENDING SYNDICATE**, chaired by E. Perry Hicks.
5. Friday, April 15, 2:30 p.m. to 4:30 p.m. (Marriott, Salon F, 4th Floor) - **LEHMAN-MORE THAN TWO YEARS LATER: LESSONS FOR SECURED PARTIES, DERIVATIVE COUNTERPARTIES AND OWNERS OF CUSTODY FINANCIAL ASSETS**, chaired by Edwin E. Smith.
6. Saturday, April 16, 8:00 a.m. to 10:00 a.m. (Marriott Salon F, 4th Floor) - **COMMERCIAL LAW DEVELOPMENTS**, chaired by Steve Weise and Theresa Wilton Harmon.
7. Saturday, April 16, 10:30 a.m. to 12:30 p.m. (Marriott, Salon F, 4th Floor) - **DIFFICULT DEBTORS: PEOPLE AND NATIONS AND TRUSTS, OH MY!**, chaired by Sandra Rocks and Bradley Gibson.

These will be terrific programs, and we encourage all to attend. We thank the Chairs and panelists for their hard work in putting these programs together.

There are still a few tickets remaining for the UCC/ComFin joint dinner on Thursday, April 14 at Turner Fisheries in Boston. Please contact one of us (pchristophorou@cgsh.com or

June 5-9, 2011 – International Association of Commercial Administrators (“IACA”) 34th Annual Conference – Winnipeg, Manitoba. The 34th IACA Annual Conference will be at the Delta Winnipeg in Winnipeg, Manitoba, Canada. More information is available at the IACA’s [website](#).

August 5-8, 2011 – ABA Annual Meeting – Toronto, Ontario. Registration is now open for the ABA Annual Meeting! Please click [here](#) for information on registration, hotels, airfare and more. You will need your passport if you are coming from the U.S., so be sure to check that yours is current. For passport information, please click [here](#).

November 16, 2011 – 11:00 a.m. to 4:00 p.m. ET – Joint ComFin and UCC Fall Meeting – Marriott New York Marquis in New York, New York. The Joint ComFin and UCC Meeting will be held Wednesday, November 16, 2011, in New York in conjunction with the Commercial Finance Association Annual Convention. An entire day of CLE will be provided. More details will become available at the [ComFin](#) and [UCC](#) Committees’ websites.

November 16-18, 2011 – Commercial Finance Association – Annual Convention – Marriott New York Marquis in New York, New York. More information will be coming to the CFA [website](#).

[VIEW CURRENT REPORTS AND DEVELOPMENTS OF THE ...](#)

[COMFIN SUBCOMMITTEES AND TASK FORCES](#)

- [Subcommittee on Agricultural and Agri-Business Financing](#)
- [Subcommittee on Aircraft Financing](#)
- [Subcommittee on Creditors’ Rights](#)
- [Subcommittee on Cross-Border and Trade Financing](#)
- [Subcommittee on Intellectual Property Financing](#)

jschulwolf@goodwin.com) if you would like to purchase your ticket or let the ABA staff know when you pick up your registration packet.

Our Subcommittees and Task Forces continue to remain active and are always looking for new and interested volunteers. We are particularly interested in volunteers for our Revised Article 9 Enactment Task Force, which is working to ensure the enactment of the recently proposed amendments to Article 9 in the fifty states, our Task Force on Survey of the Law of Guarantees, which will produce a fifty-state summary of the law of guarantees, and our Model Intellectual Property Security Agreement Task Force, which will produce a “standard form” intellectual property security agreement. Please go to the UCC or ComFin website for more information on these Task Forces. In addition, the UCC’s International Commercial Law Subcommittee is working on an G-20 jurisdictional survey on security interests in securities, securities accounts and deposit accounts and would be delighted to have volunteers for particular jurisdictions.

We continue to seek new members, and in particular new members who would like to become active in the work of a committee. If you would like to give a speech, participate in panels, or become active in the work of a subcommittee or task force, please contact either [Penny Christophorou](#) or [Jim Schulwolf](#). There is plenty of work to be done and there are plenty of great people to meet and work with.

Upcoming Meetings. We are looking forward to our participation in the Annual and Fall meetings. The ABA Annual Meeting is in Toronto this year (get your passports ready) at the Westin Harbour Castle Hotel from August 5 through August 8. It promises to be an exciting meeting with many great CLE and other events. Our joint UCC/ComFin Fall Meeting will take place on Wednesday, November 16 at the Marriott Marquis in New York City from 11:00 a.m. to 4:00 p.m. As always, it will be full of informative educational panels.

We look forward to seeing you in Boston!

[Penny Christophorou](#)
UCC Committee Chair

[Jim Schulwolf](#)
Commercial Finance Committee Chair

Featured Notes

Questions Sought for Stump the Chumps

Kristen Adams and Norm Powell, as co-chairs of the ever popular “Stump the Chumps” program which will be held at 8:00 a.m. EDT on April 14, 2011, at the ABA Spring Meeting, are seeking interesting (and yet not merely theoretical) questions of commercial law and secured transactions for their panel of experts. You are invited to submit questions that have arisen in your practice or teaching or that just generally keep you up at night by email to [Kristen](#) or [Norm](#). Be sure to come to the meeting to see if you stumped the chumps!

Track the 2010 Amendments to UCC Article 9

Last year, the Uniform Law Commission and American Law Institute approved the first significant changes to UCC Article 9 since the 1998 revision. The 2010 amendments address a limited number of issues; however they include significant changes to the rules for debtor name sufficiency in Section 9-503 and the statutory safe harbor forms in Section 9-521.

State legislatures began consideration of the 2010 amendments last year. To follow related legislation and review each bill’s current status use the subcommittee website: “[Uniform Commercial Code: Legislative Enactment of Revised Article 9.](#)”

- [Subcommittee on Lender Liability](#)
- [Subcommittee on Loan Documentation](#)
- [Subcommittee on Loan Workouts](#)
- [Subcommittee on Maritime Financing](#)
- [Subcommittee on Real Estate Financing](#)
- [Subcommittee on Secured Lending](#)
- [Subcommittee on Syndications and Lender Relations](#)
- [ADR Task Force](#)
- [Model Intercreditor Agreement Task Force](#)
- [Surveys of State Commercial Laws](#)

UCC SUBCOMMITTEES

- [Subcommittee on Annual Survey](#)
- [Subcommittee on Article 7](#)
- [Subcommittee on General Provisions and Relations to Other Law](#)
- [Subcommittee on International Commercial Law](#)
- [Subcommittee on Investment Securities](#)
- [Subcommittee on Leasing](#)
- [Subcommittee on Letters of Credit](#)
- [Subcommittee on Membership](#)
- [Subcommittee on Payments](#)
- [Subcommittee on Sale of Goods](#)
- [Subcommittee on Secured Transactions](#)

COMFIN AND UCC JOINT TASK FORCES

- [Commercial Finance Terms Joint Task Force](#)
- [Deposit Account Control Agreements Joint Task Force](#)
- [Filing Office Operations and Search Logic Joint Task Force](#)
- [Legislative Enactment of Article 9](#)
- [Model IP Security Agreement Joint Task Force](#)
- [Survey of State Guaranty Laws](#)

COMMITTEE LEADERSHIP ROSTERS

- [Commercial Finance Committee](#)
- [Uniform Commercial Code Committee](#)

Protecting Lender Interest in Borrower Insurance Proceeds

A 90-minute CLE [webinar/teleconference](#) will be presented by Frederic J. Giordano with an interactive Q&A and will be held **Tuesday, April 12, 2011, at 1:00-2:30 p.m. EDT.**

This webinar will provide counsel for lenders and financial institutions with a review of how insurance proceeds are treated under the UCC and bankruptcy law. The panel will discuss recent legal developments impacting insurance requirements in financing transactions and outline loss mitigation strategies for lenders.

LSTA Publishes New Model Credit Agreement Provisions

Bridget Marsh, Deputy General Counsel, LSTA

On March 25, 2011, the [Loan Syndications & Trading Association](#) (“LSTA”) published a new Model Credit Agreement Provisions (“MCAPs”).

Originally published in 2005, the MCAPs include the boilerplate provisions typically found in any credit agreement. Agency, assignment, and yield protection (amongst other) provisions were created as model language for the syndicated loan market and have been widely adopted since their first release. Notably, the new publication, which was vetted by the LSTA legal membership, has been expanded to include model defaulting lender language.

After Lehman filed for bankruptcy in 2008, lenders, who had traditionally focused on the borrower’s creditworthiness, began to assess the viability of the other lenders in their syndicate and any potential risks should one of them default under the credit agreement. In response to these concerns, the market began to develop defaulting lender language for inclusion in syndicated loan deals. After taking account of defaulting lender clauses as they evolved post-Lehman, the LSTA led a member project to create a standard form of defaulting lender language for inclusion in an expanded form of the MCAPs. At the same time, the LSTA seized the opportunity to refresh the MCAPs to reflect current market practice.

The new defaulting lender language provides that a lender is a defaulting lender if it has failed to fund a portion of its loans within two days of being required to fund, has notified the agent that it does not intend to comply with its funding obligations (or failed to confirm that it will comply) or made a public statement to that effect, or has, or has a parent company that has, become the subject of a bankruptcy proceeding. Once classified as a “defaulting lender”, such lender’s vote is generally disregarded for any required lender vote. Consequently, when determining whether required lender approval has been met, the defaulting lender’s outstanding term loans, unused commitments, and amounts drawn under a revolver are to be disregarded. However, a defaulting lender still retains a voting right for certain key matters. The language also provides that the borrower may rely on the so called “yank a bank” provision to replace a defaulting lender and require such lender to assign its loans and unfunded commitments to an eligible assignee.

The LSTA and its members continue to work on the MCAPs’ tax language and expect that language to be finalized in Spring 2011.

EDITORIAL BOARD

[Carol Nulty Doody](#)

Editor (UCC)

*Skadden, Arps, Slate, Meagher &
Flom LLP
(212) 735-2595*

[Kelly L. Kopyt](#)

Editor (UCC)

*Secretary of the Commonwealth of
Massachusetts
(617) 878-3034*

[Christina B. Rissler](#)

Editor (ComFin)

*Sutherland Asbill & Brennan LLP
(404) 853-8041*

DO YOU WANT TO...

- **WRITE FOR AN OFFICIAL ABA PUBLICATION?**
- **GET PUBLISHED, WITHOUT TOO MUCH OF A TIME COMMITMENT?**
- **CONNECT WITH OTHER MEMBERS OF THE UCC OR COMFIN COMMITTEES?**

If so, submit an article for possible publication in a future issue of the Commercial Law Newsletter. Publishing an article with the Commercial Law Newsletter is a great way to get involved with the UCC Committee and the ComFin Committee. Articles can survey the law nationally or locally, discuss particular UCC or Commercial Finance issues, or examine a specific case or statute. If you are interested in submitting an article, please contact one of the following Commercial Law Newsletter Editors – [Carol Nulty Doody](#), [Kelly L. Kopyt](#), or [Christina B. Rissler](#).

Featured Articles

NEW CHALLENGES PUT FCC LICENSE “PROCEEDS” COLLATERAL IN JEOPARDY

By **Paige K. Fronabarger**, Wilkinson Barker Knauer, LLP

Recent challenges to established precedent are shining a spotlight on the risks secured creditors face where the intended loan collateral includes proceeds of airwave licenses or authorizations granted to borrowers (or guarantors) by the United States Federal Communications Commission (“FCC”). The FCC licenses of broadcasters, wireless communications companies and other media businesses are essential to their business operations, are often their most valuable assets, and generally cannot be subject to a lien. Consequently, the right of a secured creditor to obtain a lien on the proceeds of FCC licenses (especially upon the sale or other disposition of such licenses after a default) is crucial to the secured creditor’s ability to realize the enterprise value of such borrower (or guarantor). Therefore, one can argue, that such right is also crucial to the ability of broadcasters, wireless communications companies and other media to access affordable credit.

Under its federal mandate, the FCC is required to regulate the public airwaves and ensure that only qualified persons or entities hold licenses.¹ Section 301 of the Federal Communications Act of 1934, as amended (the “Act”), states that the government controls the airwaves and may give permission “for the use of such channels, but not the ownership thereof.”² And while the Act does not expressly prohibit granting a security interest in an FCC license, the FCC, by its rules and policies, has adopted that prohibition and courts have upheld it.³ The rationale behind the FCC’s prohibition is that enforcement of a lien in an FCC license could result in foreclosure and transfer of the license without FCC approval.⁴

The FCC and, until recently, lower courts, have not left lenders without any remedy. Both have recognized a secured lender’s right to create and enforce a security interest in the proceeds from sale or other disposition derived from the sale, transfer or other disposition of FCC licenses. Recognition of this right largely arose in response to the Bankruptcy Court in the Western District of Wisconsin’s summary judgment in *In re Tak Communications, Inc.*⁵ The *Tak* court found that the security interests granted to Tak’s creditors in its FCC licenses (including the right to sell the business holding the licenses as a going concern) were prohibited under the communications laws.⁶

Later in *MLQ Investors, L.P. v. Pacific Quadracasting*, a court-appointed receiver sold all of the assets of a debtor’s radio station.⁷ Upon conclusion of the sale, the district court directed the receiver to distribute all of the sale proceeds (including those derived from the sale of the radio station’s FCC licenses) to its secured creditor. Following an earlier court’s holding in *In re Ridgeley Communications, Inc.*⁸, the *MLQ* court rejected *Tak* and ruled that the creditor had perfected its security interest because the creditor sought to protect its interest in the proceeds of the station licenses. In reaching this result, the Bankruptcy Court in *MLQ*, like the court in *Ridgeley*, recognized a distinction between a licensee’s public right to transfer its license and the licensee’s private right to receive money from the sale of its license, which is treated as a “general intangible” under the Uniform Commercial Code perfectible prior to sale of the license.⁹

In 1994, the FCC addressed the question directly in its order in *In re Cheskey*.¹⁰ An aggrieved party asked the FCC to deny an assignment application filed in furtherance of a bankruptcy court ordered license sale because the order required the sale proceeds to be paid to the licensee’s secured creditor. The FCC expressly rejected the holding in *Tak*. Instead, the FCC determined that its 1988 decision in *In re Bill Welch*¹¹ provided precedent that a security interest in the proceeds of the license sale does not violate FCC policy.

The FCC's statement in *Cheskey* has not stopped debtors and junior creditors from challenging a first lien creditor's right to the full enterprise value of the company in a bankruptcy sale. In 2004, the Wisconsin Bankruptcy Court in *In re Media Properties* approved the sale of a television station's assets (including its FCC license) to a third party.¹² After closing, the station's prior "all assets" secured lender asserted a claim against the sale proceeds. The trustee for the bankruptcy estate objected to the claim on the grounds that the creditor's security interest in the license was limited to "sale proceeds as they may have existed prior to bankruptcy," of which there were none.¹³ The trustee argued that any proceeds from a post-petition station sale were "after-acquired" property and not subject to the creditor's pre-petition security interest under 11 U.S.C. § 552.¹⁴ Since the creditor is precluded from taking a security interest directly in the FCC license, the trustee reasoned that the creditor was precluded from perfecting a security interest in the proceeds derived from the sale of that same asset under 11 U.S.C. § 552(b).¹⁵ The Wisconsin Bankruptcy Court rejected the trustee's assertion on the grounds that a portion of the license remains after the FCC prerogatives are carved out, and that such remaining interest may be secured as a general intangible which continues in proceeds by operation of law under UCC § 9-203(g).¹⁶ In addition, the *In re Media Properties* court noted that 11 U.S.C. § 552 gives "the bankruptcy court considerable latitude to apply pre-petition security interests to post-petition proceeds."¹⁷ Several other courts have reached a similar conclusion. For example, the 11th circuit in *In re Beach Television Partners* agreed "with the developing case law that recognizing a security interest in the proceeds from the sale of an FCC broadcasting license, does not contravene the FCC's authority to regulate broadcast frequencies."¹⁸

But on October 19, 2010, the Bankruptcy Court for the District of Colorado ignored the body of precedent favoring creditor's rights to license proceeds and denied a first lien creditor's security interest in proceeds from a future sale of the debtor's estate.¹⁹ Radio broadcaster Tracy Broadcasting Corporation ("Tracy") borrowed money from Valley Bank and Trust Co. ("Valley Bank") pursuant to a promissory note which was secured by a commercial security agreement that conferred a security interest in Tracy's "general intangibles" and the proceeds thereof. Valley Bank filed UCC financing statements listing Tracy's "general intangibles" and "proceeds" as collateral. In August 2009, Tracy filed for bankruptcy and the bankruptcy court appointed a Chapter 11 trustee on February 16, 2010. A pre-petition unsecured creditor commenced an adversary proceeding, arguing that Valley Bank did not have a security interest in the FCC license or its future proceeds because such rights were pre-petition rights and proceeds from a post-petition settlement agreement which would result in the sale of the station was after acquired property.²⁰ Since the 10th Circuit Court of Appeals had not yet addressed whether a license holder may confer a security interest in the proceeds of an FCC-approved transfer, the Bankruptcy Court was not bound by in-circuit precedent. While the Colorado Bankruptcy Court acknowledged that a number of cases have followed *Ridgley* by recognizing that an FCC license includes certain private rights which can be secured as a general intangible, it expressly rejected the Wisconsin court's application of Section 552 of the Bankruptcy Code in *In re Media Properties*. Section 552 prohibits a "security interest from encumbering any value that the estate may receive from any future transfer of the license."²¹ At the time of Tracy's bankruptcy, any sale of Tracy's FCC licenses was subject to two contingencies: 1) negotiation of a purchase agreement and 2) FCC approval of the sale. Since neither condition had been satisfied as of the petition date, the Court found that Section 552 of the Bankruptcy Code was dispositive, and unlike the debtor in *In re Media Properties*. Tracy did not have a sufficient pre-petition interest in a sale and therefore could not transfer such interest to the bank.²² The *In re Tracy Broadcasting Corporation* case is currently on appeal.

On November 9, 2010, Sprint Nextel, citing *In re Tracy Broadcasting Corporation*, took a similar position and filed a challenge in Terrestrial Network, Inc.'s bankruptcy case alleging that the plan developed by the trustee violated the communications laws because it impermissibly granted senior secured noteholders a lien in Terrestrial's FCC Licenses (and the proceeds from such sale).²³ The Sprint Nextel claim remains pending before the U.S. Bankruptcy Court for Southern District of New York. How that court will rule is unclear because the Second Circuit Court of Appeals has not yet addressed this question.

Last, a similar issue was raised as part of the bankruptcy of ION Media Networks, Inc. (formerly Paxson Communications Corporation) ("ION"). In that case, ION had issued \$725 million of secured first lien debt and \$405 million of secured second lien debt which were each secured by liens on substantially all of the assets of the company. "FCC Licenses" were included in ION's description of "Collateral." A separate provision excluded from the Collateral grant certain "Special Property" defined as "any permit, lease, license agreement or other personal property ... to the extent that any requirement of law ... prohibits the creation of a security interest therein."²⁴

Second lien creditor, Cyrus Master Fund Ltd ("Cyrus") challenged ION's proposed plan of reorganization which granted all first lien creditors an interest in the enterprise value of ION and specifically included the proceeds from the sale of FCC licenses held by ION's wholly owned license subsidiaries. The case raised two main issues: first, whether the first lien creditors had obtained a valid lien on the FCC Licenses and/or the proceeds of the FCC Licenses and second, whether language in the intercreditor agreement between ION's first and second lien creditors prohibited Cyrus from contesting the validity or enforceability of those liens.

The ION Bankruptcy Court did not answer Cyrus's question as to whether the liens in the FCC Licenses were perfected. Instead, the Bankruptcy Court broadly enforced Cyrus's waiver in the intercreditor agreement. So while the ION decision provides strong support for the enforcement of pre-bankruptcy waivers and intercreditor agreements, it did not address whether the first lien creditor had an enforceable interest in the license proceeds.

These challenges collectively raise concerns about the treatment of FCC license proceeds in bankruptcy. Despite recent FCC policy statements promoting competition and innovation in the marketplace and a desire for expanded deployment of high cost communications networks, FCC licensees remain prohibited from using their licenses as valuable financing collateral to build those very networks.

Until *Tracy* is reversed, the Supreme Court addresses the split among the circuits or the FCC changes its rules to permit lenders to take security interests in a debtor's FCC licenses subject to prior FCC approval, communications lenders should proceed with caution—especially if their loans could be subject to the jurisdiction of the Bankruptcy Court in the District of Colorado.

AN ATTEMPT TO “DEMISTIFY” QUEBEC SECURED TRANSACTIONS LAW (PART II)

By **Kiriakoula Hatzikiriakos, McMillan LLP**

The first Part of this Article drew a portrait of the basic Quebec secured transactions concepts and vehicles. In our attempt to demystify Quebec law in this area, we explained the *Civil Code of Quebec* (“CCQ”) concepts and compared them to those found in Article 9 of the *Uniform Commercial Code* (“art. 9 of the UCC”). This approach proved very useful and demonstrated that, in terms of functionality, the CCQ security concepts are not so different from those found under art. 9 of the UCC.

In this Part II,²⁵ we will delve a little further into the Quebec secured transactions regime. We will present particular issues often encountered in financing transactions involving Quebec debtors or assets. Again, wherever possible, we will draw parallels between the CCQ and art. 9 of the UCC. While preparing Part I, we contemplated this Part II would address the following issues:

- (1) How can you protect your client's interest in goods sold to a Quebec buyer? How is a “purchase money security interest” treated under Quebec law?
- (2) Have you ever had a consignment agreement governed by New York law with property being consigned to a Quebec-based consignee? How do you protect your client's rights as consignor in Quebec?
- (3) How are sales (assignments) of accounts receivables treated and perfected in Quebec?
- (4) How is security structured in Quebec in the context of a syndicated lending transaction? Are you familiar with the concept of “fondé de pouvoir”?
- (5) Which conflict of law rules should the lender be aware of when structuring a cross-border transaction with significant assets in Quebec?

However, given the number of topics involved and to keep you interested, we decided to cover the first two topics enumerated above in this Part II and, the three following topics in Part III of this series.

II. Particular Quebec Secured Transactions Issues

A. Purchase Money Security Interests

The purchase money security interest concept (“PMSI”), as understood under art. 9 of the UCC, does not exist as such under the CCQ. This obviously raises the following question: how does (i) the seller who sold goods to a buyer on credit, or (ii) the third party who extended credit to the buyer to allow it to purchase goods, protect itself? Does a security interest in the goods give the seller or the third party special priority over other secured creditors? The CCQ does offer protection but not without presenting some interesting challenges.

One way for a vendor to ensure a better position over a prior registered security interest in future assets of its buyer-debtor is for the vendor to register a “vendor's hypothec” on the assets sold.²⁶ The protection is not, however, automatic. Certain conditions must be fulfilled: a hypothec²⁷ must be created in the deed of sale and be registered at the Register of Personal and Movable Real Rights (“RPMRR”) within 15 days after the sale, and the prior registered security interest must have been granted before the purchase of the goods. Note that the hypothec has to be created “in the deed of sale” and the “sale” is understood to apply to a “one-time” transaction, not to “ongoing/from time to time” asset sales and purchases such as those governed by a master sale and purchase agreement. If the vendor-seller relationship is an ongoing one which contemplates sales of goods from time to time, then a deed of sale must be entered into for each sale and registered within 15 days thereafter. Evidently, these requirements are much more cumbersome than the PMSI conditions under art. 9 of the UCC. What about the third party who finances the purchaser?

Unlike the PMSI regime which can benefit a third party who finances the purchaser, the “vendor's hypothec” does not extend to this third party. It is possible however for the financier to benefit from the rights granted to the vendor under the vendor's hypothec, but a

few additional steps must be taken. Once the vendor's hypothec is registered, the financier can request a hypothec on the purchase price balance and on its accessory (the vendor's hypothec) or simply, an assignment of the foregoing. Again, this will only give the financier the vendor's rights as previously described. A new hypothec (or assignment) will need to be entered into if the transaction is governed by a master sale agreement.

Since the vendor's hypothec regime seems to be limited to a "one-time" sale and must be registered within 15 days after the sale, how else can the vendor or its financier protect itself if it fails to meet these requirements?

A conventional hypothec (security interest) could be included in the sale agreement. A few issues with this alternative... If it is difficult to describe the goods sold, the hypothec may charge the universality of the debtor's-buyer's assets. In this scenario, personal property searches need to be conducted at the RPMRR to assess the existence of other creditors because a hypothec ranks according to its date and time of registration. If other creditors exist, the vendor or its financier will need to negotiate subordination agreements²⁸ with existing creditors in order to benefit from a first-ranking position on the goods sold.

If no creditors exist at the time of registration of the hypothec, it is not uncommon for the deed of hypothec to include a provision whereby the creditor benefiting from a hypothec on all of the vendor's assets renounces its rights to the exercise of any hypothecary rights (remedies) ensuing from its hypothec, other than on the goods financed by such creditor. This contractual undertaking can be made known to third parties consulting the RPMRR.²⁹ Hence, a subsequent creditor consulting the RPMRR will be able to see that the hypothec granted to the vendor's financier charges all the buyer's assets, but was truly put in place to ensure recourse by such financier to the assets financed.

Evidently, the vendor's hypothec regime is not as convenient as the PMSI. To the extent the relationship between a vendor and a purchaser is of the nature of an instalment sale (conditional sale), where the vendor reserves title to the assets until payment in full of the sale price, the vendor can publish (register) its ownership right in the goods sold at the RPMRR. An instalment sale under Quebec law is a term sale where the seller reserves ownership of the property sold until full payment of the sale price.³⁰ The reservation of ownership (retention of title) in respect of personal property acquired for the service of operation of an enterprise needs to be registered within 15 days from the sale to be effective against third parties from such date.³¹ With this filing in hand, the vendor shows the world that it is the owner of the assets sold. No subordination agreements with prior ranking creditors of the purchaser are required and the vendor can take back the property from the defaulting purchaser in the manner prescribed by the CCQ.³²

The CCQ also allows for the registration of the reservation of ownership rights of the seller at the RPMRR where the agreement between the parties contemplates sales of the property "of the same kind" on an ongoing basis (ie. master instalment sale agreement). Unlike the "15 days of the sale" registration requirement for a "one-time" instalment sale, no specific timeframe for registration of the seller's reservation of ownership rights under a master instalment sale agreement is prescribed.³³

If a creditor is financing the buyer's acquisition, whether it be in the context of a "one-time" instalment sale or in a master instalment sale agreement, the creditor can inherit the seller's reservation of ownership rights. The transfer (assignment) of such rights to the financier needs to be published (registered) at the RPMRR to be effective against third parties.³⁴

As more fully described in Part I of this article, registration of rights under a master agreement preserves all the rights of the seller or transferee (e.g. financier) in the sold property and in the universality of movable property of the same kind that may be involved in sales or transfers in the ordinary course of business between two enterprises following the registration.³⁵

An important advantage of a reservation of ownership filing is avoiding the need to negotiate subordination agreements with creditors of the buyer. The seller retains title to the assets sold and, therefore, they do not become part of the buyer-debtor's estate until such time as full payment of the sale price has been made.

From a conflict of laws perspective, when do the CCQ rules come into play? When should the seller or the buyer's financier consult with Quebec counsel to ensure its interest in the assets sold is properly protected?

Under the CCQ, the conflict of law rules relating to security differ from those applicable to real rights and to sales.³⁶ Presenting all the relevant rules is beyond the scope of this article. What one needs to keep in mind is that if the sale agreement involves a Quebec buyer, the contract is governed by Quebec law or the sold property is located (or is destined to arrive) in Quebec, prudence dictates to consult with Quebec counsel and make the relevant filing at the RPMRR.³⁷

B. Consignments

The legalities surrounding consignment agreements are yet another area where Quebec law differs from art. 9 of the UCC. The difference is not so much in the definition of what constitutes a consignment agreement,³⁸ but rather in the fact that it is not characterized as a “secured transaction” under Quebec law.³⁹ Understanding the Quebec legal regime for consignments may be relevant if your client is a U.S.-based consignor and the goods consigned are located in the premises of a consignee in the Province of Quebec.

Consignment agreements are not defined under the CCQ, nor under any other specific legislation. Therefore, they are considered “innominate” contracts.⁴⁰ Given the absence of any statutory framework for consignments, we need to turn to the judicial authorities for guidance as to how a consignment agreement is conceived and interpreted under Quebec law. Quebec courts are pretty consistent in applying the following criteria, which in fact are very similar to the common law criteria, to assess whether an agreement is a true consignment:⁴¹

1. Existence of an agreement or contract;
2. Identification of the goods placed in consignment in a manner such that they are not confused with the other goods belonging to the consignee;
3. Separate bookkeeping methods in order to distinguish the product of the sale of the goods placed in consignment from the product of the consignee’s other sales in the course of the latter’s business operations;
4. Payment of the price due by the consignee after the sale by the consignee of the goods placed in consignment;
5. Return of goods unsold to the supplier; and
6. Parties’ behaviour in the execution of the “consignment” agreement conforms to such agreement.

The Quebec Superior Court in the *Trizec* case (which first established the criteria) clearly stated that all of the elements need to be complied with for an agreement to be recognized as a consignment agreement.

Quebec courts have been rigorous in applying the above criteria. In the event the consignment agreement or the supporting documentation does not fulfill this criteria, the consignor can find itself in the unfortunate situation where its ownership interest in the purported consigned goods is not recognized or transferred over to the consignee or a third party purchaser. Furthermore, if the consignee goes into bankruptcy, the consignor would not be entitled to exercise the remedies it would otherwise have if a true consignment was in place, such as possession of the goods which can be identified or entitlement to the proceeds of sale following a sale by the consignee’s trustee in bankruptcy.

Unlike the protection afforded to consignors under art. 9 of the UCC,⁴² the consignor’s interest in the consigned goods is rather precarious under Quebec law. The consignor’s interest in the goods is not a “security interest”, even less a PMSI. In fact, the consignor’s interest cannot be published and, therefore, rendered effective against third parties, as is the seller’s ownership right in assets sold pursuant to an instalment sale, as previously discussed. Consignment agreements differ from instalment agreements in many ways. The criteria set out above by the courts apply to establish consignment agreements, not instalment sales. Accordingly, “converting” or “adapting” a consignment into an instalment sale in order to allow for publication (registration) of the consignor’s interest in the goods sold as if it were a reservation of ownership is not reflecting the true nature of the transaction. At the outset, such a filing may seem like an “easy” way to evidence the consignor’s title in the goods. However, it may not mean much when the consignee’s trustee in bankruptcy enters the picture.... In that context, the reservation of ownership filing may cast a shadow on the true nature of the transaction between the parties and place the consignor in a difficult position. If the trustee relies on the filing and argues that the transaction is a conditional sale and the buyer has paid for the goods and, hence, has become the owner, then the consignee’s creditors would have first claims on such assets, leaving the consignor in a very vulnerable position.

So what is the consignor to do in order to protect its rights in the goods consigned? The safest way to ensure that a Quebec court would characterize a transaction as a consignment is to specifically enumerate the *Trizec* case criteria in the agreement. The agreement should also indicate that it is the intention of the parties to enter into a consignment agreement. Above and beyond this, in practice, the parties should be able to demonstrate that they are taking the necessary measures to ensure that the criteria are complied with (e.g. labeling the consigned goods for purposes of identification).

Furthermore, the consignor can require a hypothec on all of the consignee’s assets as security for the payment and performance of the consignee’s obligations.⁴³ To avoid making this hypothec an impediment to subsequent potential creditors of the consignee, it would be

wise to have the consignor renounce in favour of the consignee and the consignee's present and future creditors to exercising any hypothecary rights and remedies on the charged property (collateral) other than on the goods sold by the consignor to the consignee. Obviously, the hypothec will only charge the "goods sold" once the assets enter the consignee's estate, that is once the goods are resold by the consignee to a third party.

*

This Part II has demonstrated that the laws of Quebec, particularly in the areas of purchase money security interests and consignments, do not offer the same protection art. 9 of the UCC grants to vendors and consignors. As we discussed, protection mechanisms are available in the CCQ, but they are not always as "convenient" as what is offered under art. 9 of the UCC. This being said, it is crucial for U.S. counsel representing a vendor or a consignor to consult with a Quebec expert when faced with a transaction involving Quebec assets. This must be done at an early stage in the transaction in order to benefit from the best protection Quebec law has to offer. Also, let's keep in mind that "tailoring" an already negotiated and, perhaps even, an executed agreement to Quebec law can be a daunting task. That is why advice on Quebec law should be obtained as soon as possible in order to avoid unwarranted surprises and compromising the chance of having a secured position!

Stay tuned for Part III in the next issue:

- How are sales (assignments) of accounts receivables treated and perfected in Quebec?
- How is security structured in Quebec in the context of a syndicated lending transaction? Are you familiar with the concept of "fondé de pouvoir"?
- Which conflict of law rules should the lender be aware of when structuring a cross-border transaction with significant assets in Quebec?

UCC Spotlight

By [Stephen L. Sepinuck](#), Professor, Gonzaga University



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.

Diesel Props S.R.L. v. Greystone Business Credit II LLC, 631 F.3d 42 (2d Cir. 2011)

In this case, the court confused contract rights with property rights, with the result that it improperly limited a secured party's rights and remedies.

The debtor was the U.S. distributor of shoes manufactured by two Italian subsidiaries of Diesel S.p.A. (Diesel). The distribution agreement required that the debtor, at the end of each sales campaign, provide Diesel with a list of the sales orders collected. The debtor's major financier, Greystone Business Credit II LLC ("Greystone"), had a security interest in all of the debtor's assets. Greystone also entered into tripartite agreements with the debtor and the Diesel subsidiaries. Those agreements detailed the circumstances under which Greystone would finance new inventory and pay the Diesel subsidiaries.

In 2007, when the debtor was in default on various revenue covenants in its loan agreement with Greystone, Diesel shipped more goods to the debtor for which Diesel was never paid. Diesel terminated the distribution agreement and sued Greystone for failure to make payment under the tripartite agreements. Diesel also designated its U.S. subsidiary as its U.S. distributor. That subsidiary had no experience selling to retailers and no information about retailers' prior orders from the debtor. However, the subsidiary hired a former employee of the debtor who provided the subsidiary with the debtor's "order book," a complete list of the debtor's open orders. The subsidiary used this information to generate substantial sales. One employee referred to the order book as the hired employee's "dowry" and wrote that "Christmas came early this year."

Greystone counterclaimed for unjust enrichment, seeking recovery for the value of its "purloin[ed]" collateral: the order book. The district court awarded judgment for Greystone, both on Diesel's claim against it and on Greystone's counterclaim. On appeal, the Second Circuit affirmed the judgment with respect to Diesel's claims but reversed with respect to Greystone's counterclaims.

The court's analysis of the unjust enrichment action was rather brief. It wrote that, in general, a first-in-time principle applies to determine the priority of a security interest. Thus, a secured creditor takes subject to the rights of a person whose interest in the collateral preceded the secured creditor's interest. Quoting cases dealing with warrant rights, the court stated that a later-in-time assignee can take priority over an earlier claimant if the later assignee was a bona fide purchaser, but that status requires that the purchaser have no knowledge of the adverse claim. Because Greystone was aware of the terms of the distribution agreement when it acquired its security interest, it took subject to Diesel's earlier rights. The court expressly stated that "when a creditor takes a security interest in collateral to which it knows a third party has even an unperfected contract right, it takes that interest subject to those pre-existing [rights]."

The court's analysis is flawed, primarily because the court seems to have confused contract rights with property rights. In the warrant cases the court relied upon, the earlier transaction created – at least arguably – property rights in the warrants. Thus, when the security interest attached, it attached (so the argument goes) only to the remaining rights the debtor retained. In this case, however, it does not appear that Diesel had property rights in the debtor's order book. All the court said about the distribution agreement was that it gave Diesel a contractual right to information – information contained in the order book. Nothing in the court's analysis indicates that Diesel ever received an assignment of or security interest in the order book itself. In other words, the debtor promised to provide information to Diesel in the future, but that is different from making a present transfer of property rights. In the absence of such a transfer, Greystone's security interest in the order book should have trumped Diesel's contractual rights. *See* § 9-201(a).

Even if Diesel had some property rights in the debtor's order book, it was incumbent on the court to ascertain the nature of those rights. If Diesel's rights were a security interest – in other words, if the rights secured the debtor's obligations under the distribution agreement, which seems likely – then priority should have been governed by Article 9, not by some common-law, first-in-time principle. Because Greystone's security interest was perfected while Diesel apparently did nothing to perfect, Greystone should have had priority under § 9-322(a)(2).

The most troubling aspect of the court's analysis is not the result reached, but the blithe indifference to Article 9 and the quick embrace of common-law principles. It is certainly true that the UCC is built upon a large edifice of common law that continues to supplement the Code's rules. *See* § 1-103(b). But the Code should be the starting point of any priority analysis, and supplemental principles of common law should not be used to supplant the Code's statutory directives or undermine its policies.

In re Mwangi,
432 B.R. 812 (9th Cir. BAP. 2010)

Rarely does one come across a case as fundamentally flawed and dangerous as this one. The fact that it was issued by the Ninth Circuit Bankruptcy Appellate Panel – a court with extensive expertise and wisdom in commercial law and whose decisions have never before been spotlighted in this column – makes it all the more disturbing.

The case involves the right of a bank to place an administrative freeze on the bank account of a bankruptcy debtor. Wells Fargo Bank runs a computer comparison of the names of all new Chapter 7 bankruptcy debtors against its list of deposit account holders. Upon discovering that the Mwangis had filed a chapter 7 petition, Wells Fargo froze their deposit accounts and sent a letter to the chapter 7 trustee seeking instructions about what to do. The trustee did not respond but the debtors did. Claiming 75% of the funds in the accounts as exempt, the debtors demanded that Wells Fargo release funds to them. Wells Fargo refused and sent a letter to the debtors' counsel. The letter stated that the deposit account was an asset of the bankruptcy estate and that, pursuant to the Bankruptcy Code, Wells Fargo was required to follow the trustee's directions, at least until the time for objecting to the debtor's exemption claim had expired. Unsatisfied with this response, the debtors sought sanctions for willful violation of the automatic stay. The bankruptcy ruled for Wells Fargo and the debtors appealed.

The BAP began by analyzing the Supreme Court's decision in *Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995). It interpreted that decision as holding merely that an administrative freeze on a bank account did not violate § 362(a)(7), the stay of post-petition setoff. As to § 362(a)(3), which stays any act to exercise control over property of the estate, the BAP said that the Supreme Court merely did not want to interpret that rule as proscribing what § 542(b) authorizes, and hence the Supreme Court's decision was limited to when a bank was acting as creditor with setoff rights. In other words, according to the BAP, a freeze to preserve setoff rights was permissible, but a freeze as stakeholder was not.

The BAP then moved on to the standing issue. After correctly concluding that the deposit account was property of the estate – not property of the debtors – the BAP nevertheless ruled that the debtors had standing to claim violation of the stay. In other words, the bank exercised control over property of the estate but the debtor could claim damages for any injury thereby. On the issue of whether the freeze violated the stay, the court wrote:

Wells Fargo could have paid the account funds to the trustee; it did not. Wells Fargo could have released the account funds claimed exempt to the [debtor] when demand was made; it did not. Wells Fargo could have sought direction from the bankruptcy court, by way of a motion for relief from stay or otherwise, regarding the account funds; it did not. Instead it chose to hold the funds until a demand was made for payment that it alone deemed appropriate. If that is not “exercising control over” the funds, we do not know what is.

Say what? Release the funds to the debtors? Surely not. At the time of the debtors’ demand, the deposit account was property of the estate and the period for objecting to the debtors’ exemption claim had not expired. Releasing the funds to the debtors would have been improper, *see* § 542(b) (payment should be “to, or on the order of, the trustee”), and would have subjected Wells Fargo to liability to the estate should the bankruptcy court later sustain an objection to the claimed exemption.

The other options mentioned by the court – paying the trustee or seeking a court order – were certainly things Wells Fargo could have done. But requiring them would be bad policy. The trustee might well be happy to have the funds earning interest in a bank account and might not want the hassle and expense of opening a new deposit account at another institution merely to hold the funds for what in all likelihood will be just a few weeks (until the time for objecting to exemptions expires). Seeking a court order requires paying a lawyer and consumes judicial resources, costs likely not to be justified given the small amount that will often be at issue (\$1,300 in the *Mwangi* case).

Aside from a miserly view of the Supreme Court’s decision in *Strumpf* and a misguided view of what Wells Fargo could or should have done differently, there is a bigger problem with the BAP’s decision. The court suffered from a critical misconception. Throughout its opinion, the BAP repeatedly referred to the “account funds,” as if the funds were a *res* at issue in the case. But that is not what a deposit account is. “A deposit account is not vault cash or a bailment of any kind. It is merely the unsecured promise of the bank to repay the deposit.” *Show Me the Money*, 25 Clark’s Secured Transactions Monthly 7, 8 (Dec. 2009).

Thus the issue should not have been whether Wells Fargo exercised control over the “*account funds*,” but whether it exercised control over the *deposit account*. For the court to criticize Wells Fargo for “hold[ing] the funds until a demand was made for payment that it alone deemed appropriate” ignores the fact that this is exactly how a depository bank *honors* its deposit account obligations. Indeed, given that Wells Fargo, on its own initiative, wrote to the Trustee acknowledging the obligation and seeking instructions about what to do with the deposit account, it is hard to see how Wells Fargo was improperly exercising control over the deposit account.

The implications of the BAP’s analysis are deeply troubling. To say that a bank by refusing to pay “exercises control” over the “funds in the account,” and therefore violates the automatic stay, is to say that any account debtor whose creditor is in bankruptcy violates the stay by failing to pay when due. Indeed, it arguably turns almost every breach of contract into a stay violation. Such an expansive view of § 362(a)(3) cannot be squared with § 542.

Fortunately, at least four other courts have rejected the reasoning used by the BAP in *Mwangi*, each in a case involving Wells Fargo Bank. *See In re Zavala*, 2011 WL 476874 (Bankr. E.D. Cal. 2011) (debtor lacks standing to complain and, in any event, the freeze does not violate the stay); *In re Bucchino*, 439 B.R. 761 (Bankr. D.N.M. 2010) (same); *In re Young*, 439 B.R. 211 (Bankr. M.D. Fla. 2010) (same); *In re Phillips*, 2010 WL 3943730 (Bankr. M.D.N.C. 2010) (temporary refusal to pay the debtors served to both maintain the status quo and preserve property of the estate for the trustee, and thus did not violate the stay). Moreover, the BAP’s decision is reportedly on appeal to the Ninth Circuit. Nevertheless, for now the BAP decision is binding within the Ninth Circuit – a point blithely and bravely ignored by the court in *Zavala* – and that in turn puts banks in a real bind.

In re Royal West Properties, Inc.,
441 B.R. 158 (Bankr. S.D. Fla. 2010)

This case concerns the proceeds of mortgage receivables. The court reached the correct result but its reasoning was slightly off the mark in at least two important respects.

The debtor was a retailer of vacant lots in Florida. The debtor sold many of its lots on credit, taking back a mortgage in the lot sold. To raise capital, the debtor borrowed from numerous “investors” and in return gave each a security interest in one or more mortgage receivables. These security interests were perfected by possession of the mortgage note. Many of the debtor’s customers defaulted and the debtor settled some of their obligations, often by accepting a deed in lieu of foreclosure. When the debtor later went into bankruptcy, the trustee challenged whether the investors whose receivables the debtor had settled held a perfected security interest in the lots the debtor re-acquired.

The court began its analysis by questioning whether the debtor had authorization to settle the mortgage receivables. Quoting § 9-315(a)(1), the court noted that a security interest in collateral does not continue in collateral sold if the secured party authorizes the sale

free and clear of the lien. Then, noting that a security interest automatically attaches to proceeds of collateral, § 9-315(a)(2), the court concluded that if the investors authorized the debtor to dispose of the mortgage receivables, their claims would not be secured by any collateral, including the re-acquired vacant lots.

This conclusion is wrong. While an authorized disposition of collateral free and clear does cut off the security interest in the original collateral, it does not prevent the security interest from attaching to proceeds. This is evidenced by the different language of paragraphs (1) and (2) of § 9-315(a). The former, dealing with the security interest in the original collateral, includes an exception for sales free and clear. The latter, dealing with the security interest in identifiable proceeds, does not. Moreover, from a practical standpoint, secured creditors would almost never authorize a sale free and clear if that meant they also waived any interest in the proceeds.

The court then moved on to whether the investors had authorized the debtor to settle the mortgage receivables. Relying on the fact that the investors had done nothing to “police their investment” – they had never contacted the mortgagors to advise them of their interests and had allowed the debtor to continue to service the receivables – the court concluded that the debtor had either actual or implied authority to settle the receivables. This conclusion seems reasonable as a matter of agency law but the court should have examined Article 3 on who may enforce an instrument. After all, an obligor on an instrument is not an “account debtor,” *see* § 9-102(a)(3), and nothing in Article 9 deals with who may enforce the instrument maker’s obligation. *See* § 9-404 cmt. 5.

Having erroneously concluded that the investors obtained no security interest in the re-acquired lots because they had authorized the debtor to dispose of their receivables free and clear, the court nevertheless discussed whether, if the investors did have a security interest in the lots, that security interest was perfected. Citing to the perfection rules of § 9-315(c), (d), the court observed that the security interest would be perfected only for twenty days. After that, none of the three rules in § 9-315(d) would allow perfection to continue. The investors had not perfected in the receivables by filing and, even if they had, perfection in the lots cannot be accomplished by filing in the UCC office. *Cf.* § 9-315(d)(1). The lots were clearly not cash proceeds. *Cf.* § 9-315(d)(2). And the investors had not recorded their interests in the real estate records. § 9-315(d)(3).

The court’s conclusion is correct but its analysis was faulty. Security interests in real estate are outside the scope of Article 9. *See* § 9-109(d)(11). As a result, neither the temporary perfection rule of § 9-315(c) nor the rules in § 9-315(d) for extending that perfection applies. Indeed, one can make a strong argument that even the automatic attachment rule of § 9-315(a)(2) does not apply. Accordingly, for the investors to have a perfected interest in the re-acquired lots – and perhaps for them to have any interest in those lots – they must have complied with the real property law of Florida. Because they had not done so, the interests could not withstand the trustee’s strong arm powers.

Nevertheless, the court’s ultimate conclusion that the investors lost to the trustee was correct.

Useful Links and Websites

Compiled by Commercial Law Newsletter Co-Editors Carol Nulty Doody, Kelly Kopyt, and Christina Rissler.

Please find below a list of electronic links that our members may find useful:

1. www.lexology.com – In cooperation with the Association of Corporate Counsel, Lexology provides articles and practical tips relating to the practice of law.
2. The UCCLAW-L listserv is sponsored by West Group, publisher of the “UCC Reporting Service” The listserv is an e-mail discussion group focusing on the Uniform Commercial Code. To subscribe to the UCCLAW-L listserv, go to <http://lists.washlaw.edu/mailman/listinfo/ucclaw-l>
3. The American Law Institute – http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=21
4. U. Penn’s archive of NCCUSL final acts and drafts can be accessed at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm>
5. Pace University’s database of the United Nations Convention on Contracts for the Institute of International Commercial Law Database can be accessed at <http://cisgw3.law.pace.edu>
6. 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/Centers-Programs/commercial_law_center/default.asp
7. The International Association of Commercial Administrators (“IACA”) maintains links to state model administrative rules (MARS) and contact information for state level UCC administrators. This information can be accessed at <http://www.iaca.org>

8. The Uniform Law Commissioners maintains information regarding legislative reports and information regarding upcoming meetings, including the Joint Review Committee for Uniform Commercial Code Article 9. You can access this information at <http://www.nccusl.org/Committee.aspx?title=Commercial Code Article 9>
9. Information on the work of The United Nations Commission on International Trade Law (“UNCITRAL”) (including the work of its working groups on Procurement, International Arbitration and Conciliation, Transport Law, Electronic Commerce and Insolvency Law) is available at <http://www.uncitral.org/uncitral/en/index.html>
10. The American College of Commercial Finance Lawyers – <http://www.accfl.com>
11. The Secretariat of Legal Affairs (“SLA”) develops, promotes, and implements the Inter-American Program for the Development of International Law. For more information, go to <http://www.oas.org/DIL/>
12. The National Law Center for Inter-American Free Trade (“NLCIFT”) is dedicated to developing the legal infrastructure to build trade capacity and promote economic development in the Americas. For more information, go to <http://www.natlaw.com>
13. Information on the Hague Conference on Private International Law and its current status is available at http://www.hcch.net/index_en
14. Information on the International Institute for the Unification of Private Law (“UNIDROIT”) project to enhance the internal adequacy and cross-border compatibility of existing national laws, including the Draft Convention on Substantive Rules Regarding Intermediated Securities, is available at <http://www.unidroit.org/english/workprogramme/study078/item1/main.htm>

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 [Carol Nulty Doody](#) or [Kelly L. Kopyt](#), the Uniform Commercial Code Committee Editors or [Christina B. Rissler](#), the Commercial Finance Committee Editor.

¹ Persons or entities may be disqualified from holding a license for a number of reasons including, but not limited to the type of licenses involved, foreign ownership, cross-ownership or spectrum cap limitations and character questions.

² 47 U.S.C. § 151 *et seq.* (2011).

³ There have been two exceptions to this policy. First, the FCC itself has taken an exclusive security interest in licenses subject to the auction installment payment program and a senior security interest in the proceeds of a sale of an auctioned license. Second, in 2004, the FCC revised its rules to permit licensees who borrow money from the Department of Agriculture’s Rural Utilities Service (“RUS”) to grant a security interest in their wireless licenses to RUS, subject to prior FCC approval of any transfer of control. *See* Report and Order and Further Notice of Proposed Rulemaking, FCC 04-166, in WT Docket Nos. 02-381, 01-14, and 03-202, adopted July 8, 2004, and released September 27, 2004.

⁴ D.H. Overmyer Telecasting Co., Inc. v. Lake Erie Communications, Inc. (In re D.H. Overmyer Telecasting Co., Inc.), 35 B.R. 400, 401 (Bankr. N.D. Ohio 1983).

⁵ In re Tak Communications, Inc., 138 B.R. 568 (1992), *aff’d*, 985 F.2d 916 (7th Cir. 1993).

⁶ *Id.* at 579.

⁷ MLQ Investors, L.P. v. Pacific Quadracasting, Inc., 146 F.3d 746, 749 (9th Cir. 1998).

⁸ *Id.* at 748. *See*, In re Ridgely Communications, Inc., 139 B.R. 374 (Bankr. MD. 1992). *See also*, Thomas Communications, Inc. v. Allied Financial Corp., 161 B.R. 621 (Bankr. S.D. WV 1993).

⁹ *See also*, NBD Park Ridge Bank v. SRJ Enterprises., Inc. (In re SRJ Enterprises, Inc.), 150 B.R. 933, 941 (Bankr. N.D. Ill. 1993) (Bankruptcy Court held that a debtor’s market share value constitutes pre-petition intangible property, and that a post-petition sale constitutes the proceeds of that intangible property).

¹⁰ In re Cheskey, 9 F.C.C.R. 986, 987 (1994).

¹¹ In re Bill Welch, 3 F.C.C.R. 6502, 6503 (1988) (held that Sections 301 and 304 of the Communications Act do not bar the for-profit sale to a private party, subject to prior FCC approval, of the private rights a permittee has in its FCC license.).

¹² Wells Fargo Foothill, Inc. v. Kepler (In re Media Properties), 311 B.R. 244 (Bankr. W.D. Wis. 2004).

¹³ *Id.* at 246.

¹⁴ *Id.* at 247.

¹⁵ *Id.*

¹⁶ *Id* at 250.

¹⁷ *Id.*

¹⁸ *In re Beach Television Partners*, 38 F.3d 535, 536 (11th Cir. 1994).

¹⁹ *See* *Spectrum Scan LLC v. Valley Bank and Trust Co. (In re Tracy Broadcasting Corporation)*, 438 B.R. 323 (Bankr. Colo. 2010), available at <http://www.cob.uscourts.gov/opinions/10-1130abc.pdf>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *See* Objection of Sprint Nextel Corporation to Motion of the Debtors for Interim and Final Orders: (I) Authorizing Debtors to Obtain Post-Petition Financing; (II) Authorizing Debtors to Use Cash Collateral; (III) Granting Adequate Protection to Prepetition Secured Parties; and (IV) Scheduling a Final Hearing (Entered: 11/09/2010), available at [TerreStar Networks Inc., et al.](#), Docket No. 124.

²⁴ *In re ION Media Networks, Inc.*, 419 B.R. 585 (Bankr. S.D.N.Y. 2009).

²⁵ I would like to extend my appreciation to my colleague and friend Clifton Jarin, associate in the Financial Services group of McMillan LLP who assisted me in this Part.

²⁶ Art. 2954 *Civil Code of Québec*.

²⁷ For conditions of a valid hypothec, see Part I of this Article, section I. A.

²⁸ *See* art. 2956 CCQ.

²⁹ The RPMRR application for registration form contains a section where parties can make public particular facts relating to the filing.

³⁰ *See* art. 1745 CCQ.

³¹ The Ontario *Personal Property Security Act*, R.S.O. 1990, c. P.10 (“PPSA”) applies to a conditional sale: see s. 2(a).

³² Art. 1749 CCQ.

³³ Art. 2961.1 CCQ. The registration is effective for a period of 10 years and may be renewed. The article provides that the registration of reservations of ownership must relate to the “universality of movable property of the same kind that may be involved in sales or transfers in the ordinary course of business between persons operating enterprises”. There has not been any case law prescribing the parameters of a sufficient description of property “of the same kind” for the purpose of the filing. The challenge is to provide a description such that the seller’s title to the assets sold would not be compromised against a trustee in bankruptcy of the buyer and its creditors. This can be difficult where the buyer deals with more than one seller of similar assets. Note that art. 2961.1 CCQ also applies to the registration of rights of ownership under leasing contracts and of rights under leases with a term of more than one year.

³⁴ Art. 1745 and 2961.1 CCQ.

³⁵ *See* Part I in ABA, Business Law Section, “An Attempt to “Demystify” Quebec Secured Transactions Law (Part I)” in *Commercial Law Newsletter*, June 18, 2010.

³⁶ For security, see art. 3102 ssq. CCQ; for real rights, see art. 3097 CCQ (*situs*); for sales, see art. 3114 CCQ.

³⁷ As discussed previously, the filing could be a “vendor’s hypothec” (art. 2954 CCQ); a reservation of ownership filing for an instalment sale agreement (art. 1745, 2961.1 CCQ) or a conventional hypothec on the buyer’s property.

³⁸ Under Quebec law, a consignment is a transaction in which a person delivers goods to a merchant for the purpose of sale, but no definition is provided such as under art. 9-102(a)(20) UCC.

³⁹ *See* art. 9-109(a)(4) UCC.

⁴⁰ Under Quebec law, there are three categories of agreements : nominate, innominate and mixed. Nominated agreements are regulated by the CCQ or by another specific statute. A contract of sale is an example of a nominate contract. Innominate agreements are contracts that have not been addressed by the legislative authorities. Mixed agreements are contracts that are derived from two or more nominate contracts, for example a sale and service agreement.

⁴¹ *Trizec Equities Ltd. v. Hassine*, [1982], C.S. 1141 (“*Trizec case*”).

⁴² Art. 9-103(d) UCC (consignor’s inventory purchase money security interest). The PPSA applies to a consignment that secures the purchase price of goods supplied thereunder: see s. 2 PPSA.

⁴³ The hypothec amount should be set high enough to cover the total amount of indebtedness contemplated under the consignment agreement.