

## IN THIS ISSUE

## Joint Report from the Chairs

### MARK YOUR CALENDARS

### FEATURED NOTES

### FEATURED ARTICLES

- **SECOND CIRCUIT HOLDS DISTRICT COURT MUST MANDATORILY ABSTAIN FROM DECIDING PARMALAT STATE COURT ACTION RELATED TO U.S. ANCILLARY BANKRUPTCY PROCEEDING**

*By Lisa Schweitzer & Robin Baik*

- **FATCA PROPOSED REGULATIONS CONFIRM REVOLVING CREDIT FACILITIES COVERED BY "GRANDFATHER" PROVISION**

*By Carol Tello*

- **UNIFORM LAW COMMISSION'S STUDY COMMITTEE ON REAL ESTATE RECEIVERSHIPS: PROJECT UPDATE AND REQUEST FOR COMMENTS**

*By Thomas S. Hemmendinger, Kieran Marion & R. Wilson Freyermuth*

### UCC SPOTLIGHT

### USEFUL LINKS AND WEBSITES

### ENDNOTES

Dear Members:

We are delighted to present you with this edition of the Commercial Law Newsletter featuring the Spotlight Column and three articles concerning recent developments affecting commercial law:

1. In this issue's Spotlight Column, Professors Steve Sepinuck and Kristen Adams highlight five cases as being wrongly decided or incorrectly analyzed, ranging from a case involving the intersection of UCC Articles 2A and 9 to a case involving a battle between a secured creditor and a litigant claiming trademark infringement in accounts generated from goods under the infringing trademark. These cases hail from across the country; certainly no region has a monopoly on getting the UCC wrong.
2. An article by Lisa Schweitzer and Robin Baik of Cleary Gottlieb Steen & Hamilton LLP about a recent Second Circuit decision in *Parmalat Capital Finance Ltd. v. Bank of America Corp.* applying a four-part test to determine whether a district court must abstain from hearing state law claims that are related to a bankruptcy case when those claims can be timely and properly adjudicated in state court.
3. An article by Tom Hemmendinger of Brennan, Recupero, Cascione, Scungio & McAllister, LLP, Kieran Marion of the Uniform Law Commission and R. Wilson Freyermuth of the University of Missouri School of Law on whether a new uniform state law is needed to address the appointment of receivers in the real estate and perhaps other contexts.
4. An update by Carol Tello of Sutherland Asbill & Brennan LLP on the Foreign Account Tax Compliance Act ("FATCA") and newly issued IRS regulations that provide guidance on implementing the reporting and withholding requirements of the Act.

Many thanks go out to the authors of these articles, to our tireless and assiduous editors, Carol Nulty, Christina Rissler, Rebecca Gelfand, Annette Moore and Celeste Pozo, and to our newly established Articles Advisory Board that will help our editors to identify topics and articles for publication in future editions of the Newsletter.

We hope to see you at the ABA Business Law Section's Spring Meeting to be held in Las Vegas from March 22 to 24, 2012. We have an extensive array of CLE programming planned for the meeting, including:

1. UCC/ComFin Joint Committee Meeting. We will launch our joint UCC and ComFin online discussion forum and have a guest presentation on the basics of the futures market, typical collateral arrangement in such markets and new developments in light of MF Global's bankruptcy and the Dodd-Frank legislation.

---

(Thursday, March 22, 8:00 a.m. to 9:30 a.m.)

---

### **MARK YOUR CALENDARS**

**March 28, 2012 – 1:00 p.m. to 2:30 p.m. ET – Special Servicers and Defaulted CMBS Loans.** (CLE Webinar) Click [here](#) for more information.

**March 29, 2012 – 9:00 a.m. to 11:45 a.m. ET – Drafting Indemnification and Hold Harmless Provisions.** (Live CLE) Click [here](#) for more information.

**March 29, 2012 – 1:00 p.m. to 3:45 p.m. ET – Drafting Confidentiality Provisions and Non-Disclosure Agreements.** (Live CLE) Click [here](#) for more information.

**April 3, 2012 – 1:00 p.m. to 2:30 p.m. ET – Pledge Agreements for Partnership and LLC Equity Interests: Crafting Security and Operating Agreements to Protect Lender Interests.** (CLE Webinar) Click [here](#) for more information.

**April 4, 2012 – 1:00 p.m. to 2:30 p.m. ET – Equity Interests as Collateral in Commercial Lending.** (CLE Webinar) Click [here](#) for more information.

**August 2-7, 2012 – ABA Annual Meeting – Chicago Marriott Downtown in Chicago, Illinois.**  
Save the date!

**November 14, 2012 – Commercial Finance Committee and Uniform Commercial Code Committee Joint Meeting – JW Marriott Desert Ridge in Phoenix, Arizona.** Save the date!

2. CLE Program: Ethical Issues in Commercial Transactions. (Thursday, March 22, 10:30 a.m. to 12:30 p.m.)
3. Young Lawyers CLE Program: How to Negotiate a Secured Credit Facility. (Thursday, March 22, 11:30 a.m. to 12:45 p.m.)
4. Secured Creditors Luncheon on Collateral Enforcement Issues. (Thursday, March 22, 12:30 p.m. to 2:30 p.m.)
5. CLE Program: Current State of Syndicated Loan Markets 2012. (Thursday, March 22, 2:30 p.m. to 4:30 p.m.)
6. CLE Program: Let's Play Doctor: Acquisition and Financing of Healthcare Facilities. (Friday, March 23, 8:00 a.m. to 10:00 a.m.)
7. CLE Program: Security Interests in Proceeds of Collateral: The Rules and Recent Development in Case Law and in Bankruptcy. (Friday, March 23, 2:30 p.m. to 4:30 p.m.)
8. CLE Program: Commercial Law Developments. (Saturday, March 24, 8:00 a.m. to 10:00 a.m.)
9. CLE Program: Variation of the UCC by Agreement. (Saturday, March 24, 10:30 a.m. to 12:30 p.m.)

Our subcommittees and task forces also have organized excellent substantive sessions. Many thanks go out to all the chairs and speakers for their tremendous work; their efforts will ensure that we will all have an excellent opportunity at the Spring Meeting to catch up on key developments in commercial law.

Looking forward, the ABA Annual Meeting will take place this year from August 2<sup>nd</sup> to August 7<sup>th</sup> in Chicago, Illinois. The joint UCC/ComFin Fall Meeting featuring a day's worth of CLE programming will take place on Wednesday, November 14, in Scottsdale, Arizona.

We look forward to seeing you at these upcoming meetings and encourage you to look out for future webinars we will be hosting and to get involved in our committees. Please do not hesitate to contact either of us with any questions or to find out how to participate more fully.

**Penny Christophorou**

UCC Committee Chair  
[pchristophorou@cgsh.com](mailto:pchristophorou@cgsh.com)

**Jim Schulwolf**

Commercial Finance Committee Chair  
[JSchulwolf@goodwin.com](mailto:JSchulwolf@goodwin.com)

---

### **Featured Notes**

---

The Permanent Editorial Board for the Uniform Commercial Code has published draft commentaries for public comment:

1. A Comment on Limited Liability Partnerships under the Choice of Law Rules of Article 9, which will clarify that the proposed 2010 UCC Article 9 Amendments were not intended to imply a change in the “registered organization” status of limited liability partnerships organized under the Uniform Partnership Act (1997) and similar LLP statutes and that these entities are not “registered organizations” for purposes of UCC Section 9-102(a). Click [here](#) for a copy of the commentary. Comments are due by **April 2, 2012**.
2. A Comment on the Application of UCC Sections 9-406 and 9-408 to Transfers of

---

### **VIEW CURRENT REPORTS AND DEVELOPMENTS OF THE FOLLOWING COMMITTEES AND TASK FORCES:**

#### **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](#)
- [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 Commercial Law Newsletter](#)
- [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](#)

Interest in Unincorporated Business Organizations, which will analyze the extent to which UCC Sections 9-406 and 9-408 override transfer restrictions in limited liability partnerships, limited liability corporations and other similar entities and will address favorably concerns over the ability of parties to such agreements to “pick their partners”. Click [here](#) for a copy of the commentary. Comments are due by **April 2, 2012**.

3. A Comment on the NY Court of Appeal’s decision in *Highland Capital*, which will highlight that the *Highland Capital* decision was incorrectly decided and will point to the applicability of articles of the UCC beyond Article 9 (as to which a 2010 Amended Comment has been proposed) that “UCC Sections 8-102(a)(13) and 8-102(a)(15) should be interpreted so that an obligation of an issuer that fulfills other criteria for being classified as a ‘security,’ but is not in bearer form and with respect to which there exist no books maintained for the purpose of registration of transfer, is not a ‘security.’” Click [here](#) for a copy of the commentary. Comments are due by **April 2, 2012**.

---

Also for those of you looking for good pro bono/volunteer opportunities, the ABA Business Law Section and Junior Achievement are partnering to promote youth financial literacy. Business lawyers often witness firsthand the high cost of ignorance about personal finances. Volunteer yourself and your firm to provide personal finance instruction to high school students within the Junior Achievement program. Check [here](#) for more information about the Section’s efforts.

---

#### Featured Articles

---

### **SECOND CIRCUIT HOLDS DISTRICT COURT MUST MANDATORILY ABSTAIN FROM DECIDING PARMALAT STATE COURT ACTION RELATED TO U.S. ANCILLARY BANKRUPTCY PROCEEDING**

By [Lisa Schweitzer](#) and [Robin Baik](#),  
Cleary Gottlieb Steen & Hamilton LLP

Under 28 U.S.C. § 1334(c)(2), a district court must abstain from hearing state law claims that are related to a bankruptcy case when those claims can be timely adjudicated in state court. In *Parmalat Capital Finance Ltd. v. Bank of America Corp.*, Nos. 09-4302-cv (L) et al., 2012 WL 539957 (2d Cir. Feb. 21, 2012) (to be published in F.3d), the United States Court of Appeals for the Second Circuit (the “Second Circuit”) ruled that certain state court actions brought by Parmalat (as defined below) affiliates or their representatives against their former auditor Grant Thornton should be transferred back and remanded to the Illinois court based on the Second Circuit’s application of a four-factor test governing mandatory abstention it adopted in a prior appeal in the same case.

#### The Facts

Plaintiff-appellant Dr. Bondi (“Bondi”) represented Parmalat Finanziaria, S.p.A. (“Parmalat”) in Italian bankruptcy proceedings commenced in 2003 as its extraordinary commissioner under Italian law. Plaintiff-appellant Parmalat Capital Finance Limited (“PCFL”) is a Grand Caymans-based corporate subsidiary of Parmalat. PCFL is in liquidation in the Cayman Islands.

In 2004, Bondi and PCFL commenced separate ancillary U.S. bankruptcy proceedings under former 11 U.S.C. § 304 (the predecessor to chapter 15 of the Bankruptcy Code) in the U.S. Bankruptcy Court for the Southern District of New York (the “Southern District of New York”) in order to enjoin litigation against PCFL and

## **COMMITTEE LEADERSHIP ROSTERS**

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

## **EDITORIAL BOARD**

**Annette C. Moore**  
*Editor (UCC)*  
**Sidley Austin LLP**  
**(312) 853-0817**

**Carol Nulty Doody**  
*Editor (UCC)*  
**Skadden, Arps, Slate, Meagher &  
Flom LLP**  
**(212) 735-2595**

**Celeste Pozo**  
*Editor (UCC)*  
**Hughes Hubbard & Reed LLP**  
**(305) 379-7230**

**Christina B. Rissler**  
*Editor (ComFin)*  
**Sutherland Asbill & Brennan LLP**  
**(404) 853-8041**

**Rebecca Gelfand**  
*Editor (Com Fin)*  
**Sutherland Asbill & Brennan LLP**  
**(404) 853-8603**

---

## **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

Parmalat in the United States. Prior to the commencement of the § 304 proceedings, purchasers of Parmalat's debt and equity securities had filed securities fraud class action lawsuits in the United States against Parmalat and various banks and auditing firms that had allegedly participated in the fraud, including the Appellees Grant Thornton International, Inc., Grant Thornton International Ltd. and Grant Thornton LLP (collectively, "Grant Thornton"), who had been auditors for Parmalat and PCFL. The Bankruptcy Court enjoined the actions as against the debtors and the class action plaintiffs subsequently dropped Parmalat from the class action lawsuits.

In 2004 and 2005, Bondi and PCFL separately filed suits in Illinois state court against Grant Thornton, alleging claims arising under Illinois state law including professional malpractice, fraud, negligent misrepresentation, and unlawful civil conspiracy.<sup>1</sup> Grant Thornton removed these cases in separate proceedings to the United States District Court for the Northern District of Illinois on the basis of 28 U.S.C. §§ 1334(b) and 1452, arguing that removal of each case was proper because the case was "related to" Parmalat and PCFL's respective § 304 proceedings pending in the Southern District of New York. Appellants moved to remand the cases to Illinois state court, arguing that the district court was required to abstain from hearing the cases pursuant to the mandatory abstention provided under 28 U.S.C. § 1334(c)(2). The Appellants' motions were denied, the cases were transferred to and consolidated in the Southern District of New York, and their claims were dismissed. Bondi and PCFL appealed to the Second Circuit.

In a 2011 decision, the Second Circuit vacated the district court's decision not to abstain under § 1334(c)(2), and articulated a four-factor test to determine whether a case can be "timely adjudicated" by state courts for purposes of § 1334(c)(2), including: "(1) the backlog of the state court's calendar relative to the federal court's calendar; (2) the complexity of the issues presented and the respective expertise of each forum; (3) the status of the title 11 bankruptcy proceeding to which the state law claims are related; and (4) whether the state court proceeding would prolong the administration or liquidation of the estate." *Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 580 (2d Cir. 2011) (citing *In re Georgon*, 157 B.R. 847, 851 (N.D. Ill. 1993)). The Second Circuit remanded the cases for the district court to determine whether the cases could be "timely adjudicated" in Illinois state court as analyzed under the four-factor test. On remand, the district court again concluded that mandatory abstention did not apply. The Appellants renewed their appeals to the Second Circuit seeking mandatory abstention.

## **The Decision**

The Second Circuit analyzed each of the four factors *de novo*, and concluded that the cases can be "timely adjudicated" by Illinois state court for purposes of mandatory abstention under § 1334(c)(2).

### *1. Backlog of the state court's calendar relative to the federal court's calendar*

With regard to the first factor, the "backlog of the state court's calendar relative to the federal court's calendar," the Second Circuit agreed with the district court that on balance this factor weighed against abstention but emphasized that this factor is not dispositive. The Second Circuit noted that the district court was familiar with the case having overseen discovery and accordingly an Illinois court that was new to the case may be somewhat slower in ruling on the pending summary judgment motion. However, the Second Circuit concluded that a mere delay of a few months, where there was no evidence of general backlog in the Illinois courts, was insufficient alone to not abstain.

### *2. Complexity of the issues presented and the respective expertise of each forum*

The Second Circuit concluded that the second factor, "the complexity of the issues presented and the respective expertise of each forum," favors abstention. In particular, the Second Circuit focused on the assertion of an *in pari delicto* defense, the nature and scope of which remained unsettled under Illinois law. The Second Circuit was not moved by arguments that the district court was better equipped to adjudicate these cases due to its familiarity with the underlying facts, instead emphasizing that the focus is

article, please contact one of the following Commercial Law Newsletter Editors [Annette C. Moore](#), [Carol Nulty Doody](#), [Celeste Pozo](#), [Christina B. Rissler](#), or [Rebecca Gelfand](#).

---

the complexity of the specific legal issues presented.

3. *Status of the title 11 bankruptcy proceeding to which the state law claims are related*

The “status of the title 11 bankruptcy proceeding to which the state law claims are related” also was found to favor abstention. Since the pending U.S. bankruptcy case was an ancillary proceeding rather than a full chapter 11 case, the Second Circuit found no evidence showing the adjudication of the cases would have an effect on the § 304 ancillary proceedings. Accordingly, the federal interest in “related-to” jurisdiction was not implicated in a remand of the cases.

4. *Whether the state court proceeding would prolong the administration or liquidation of the estate*

The Second Circuit similarly concluded that the fourth factor, “whether the state court proceeding would prolong the administration or liquidation of the estate,” weighed in favor of abstention given that Parmalat’s ability to pay creditors under its approved Concordat in its Italian bankruptcy proceedings did not depend on the resolution of the U.S. litigations. The Second Circuit clarified that this factor considers the effect on the bankruptcy estate (here, the subject of the Italian and Cayman proceedings), not merely the pending U.S. ancillary bankruptcy proceedings. The Court also rejected the Appellees’ argument that remand of the cases to the state court would harm creditors by increasing the cost of litigation, noting that the inquiry focuses not on whether abstention increases the ultimate payout to the creditors, but on whether it unduly prolongs the administration of the estate.

Based on the four-factor test, the Second Circuit determined that mandatory abstention under § 1334(c)(2) was warranted in these cases. While recognizing that some additional time will be expended by remanding these cases, the Second Circuit concluded that such a delay does not outweigh the substantial factors that call for abstention, namely the complexity of the state law issues, the deference owed to state courts with respect to state law matters, and the minimal effect of the state cases on the federal bankruptcy action and on the administration of the underlying estates. The Second Circuit did comment that the cases are “unusual cases” in that Grant Thornton had asserted third party contribution claims against Parmalat in securities fraud class actions also pending in the District Court for the Southern District of New York, and that Parmalat and its representatives could have asserted claims against Grant Thornton in that pending litigation. However, the ability to bring such claims in federal court should not weigh upon the abstention analysis where the debtor in fact chose to avail itself of the state court and the defendants had waived this argument against abstention by failing to raise it earlier.<sup>2</sup>

#### Implications

The *Parmalat* decision is noteworthy in that it provides a roadmap of how to approach weighing the various factors previously espoused by the Second Circuit to consider whether abstention is mandatory in favor of state court litigation. According to the decision, the four-factor test is meant to guide courts in reaching the balance between, on the one hand, creating a federal forum for purely state law cases which, due to delay, might impinge upon the federal interest in the administration of a bankruptcy estate, and, on the other, ensuring that purely state law cases remain in state courts when they would not significantly affect that federal interest. In answering the mixed question of fact and law, the four factors ultimately are interrelated and may carry different weight depending on, among other things, the time and resources available to the relevant courts at times, the key issues in adjudging the state law questions, the nature and status of the underlying bankruptcy proceedings, and the level of impact the state court proceeding will have to the administration or liquidation of the estates. Of note, the fact that the related U.S. bankruptcy cases were mere ancillary proceedings and the foreign proceedings were both in end stages and likely materially unaffected by the U.S. litigations was significant to the Second Circuit and may prove to be a basis for distinguishing other state cases that are related to pending bankruptcy cases and thus removed to federal court.

---

## FATCA PROPOSED REGULATIONS CONFIRM REVOLVING CREDIT FACILITIES COVERED BY “GRANDFATHER” PROVISION

By [Carol Tello](#), Sutherland Asbill & Brennan LLP

On February 8, 2012, the Internal Revenue Service (the “IRS”) issued detailed proposed regulations providing operational guidance to financial institutions and withholding agents currently taking steps to implement the reporting and withholding requirements established under the new chapter 4 (sections 1471-1474) of the Internal Revenue Code (the “Code”), commonly referred to as the Foreign Account Tax Compliance Act (“FATCA”). See [REG-121647-10](#). In those proposed regulations was the positive answer to the question of whether a revolving credit facility would qualify for relief under the “grandfather” provision, which is discussed below.

Under the new chapter 4 provisions, a withholding agent will be required to withhold U.S. tax of 30 percent on each payment of interest (but not principal) made to a foreign lender that does not enter into an agreement with the IRS to identify and report account information on U.S. owned accounts. A foreign lender that enters into such an agreement has the status of a “Participating FFI” and, as such, will not be subject to 30 percent withholding if it provides a certificate to the U.S. withholding agent that it is a “Participating FFI.” The fact that a foreign lender receives interest under a credit agreement for its own account (and not on behalf of an account holder) does not relieve a foreign lender from being subject to chapter 4.

One issue of concern to the commercial lending community was whether revolving credit facilities are covered by the so-called “grandfather” rule that excepts from withholding payments made under an obligation that was in existence on March 18, 2012, an issue discussed in the article, *The New FATCA Tax Withholding Rules — Practical Considerations For Drafting Credit Agreements*, which appeared in the **Fall 2010** issue of the Commercial Law Newsletter. The grandfather provision is a statutory rule designed to permit an orderly transition to the imposition of the identification, reporting, and 30 percent withholding rules imposed under FATCA. Although preliminary guidance under Notice 2010-60 issued by the IRS would have appeared to apply to revolving credit facilities, no explicit provision provided such a rule. The proposed regulations, however, explicitly provide that a revolving credit facility is covered under the grandfather rule. *See* Prop. Treas. Reg. §1.1471-2(b). Even better, the grandfather rule has been extended by regulation to cover obligations existing on January 1, 2013. Thus, any lending agreement entered into as late as December 31, 2012 will be covered by the grandfather rule. This means that no withholding should occur on payments made under a lending agreement entered into on or before December 31, 2012. However, compliance with the other FATCA provisions is required, including the provision by a foreign lender of a Form W-8BEN that provides the foreign lender’s FATCA status. Revised Forms W-8BEN will be issued by the IRS that will permit a foreign lender to check a box to identify the foreign lender’s FATCA status to a U.S. borrower.

The grandfather provision will cease to apply, however, if there is a “material modification” to a lending agreement as that “material modification” will be treated as a newly issued obligation as of the date of the modification. Presumably, this means that a “material modification” executed prior to January 1, 2013 will qualify for the grandfather provision while a “material modification” that occurs on or after January 1, 2013 will not so qualify.

For debt obligations, the term “material modification” is defined under existing regulations under section 1001 of the Code. Generally, a “material modification” means: (i) changes in yield; (ii) changes in the timing of payments; (iii) changes in the obligor or debt collateral; (iv) changes from debt to equity and from recourse to nonrecourse classification; and (v) changes involving financial and accounting covenants.

In addition to obligations that qualify for the “grandfather” provision, the proposed regulations provide for a group of financial institutions that will not be subject to withholding as those financial institutions pose a low risk of FATCA-avoidance, so-called “deemed-compliant” FFIs. Deemed-compliant FFIs are divided into two sub-categories: registered and certified.

Two types of registered “deemed-compliant” FFIs are of interest to the commercial lending community. Significantly, small local banks that only solicit customers from within their country of residence (or, for a local bank located in the European Union, only to customers within the European Union) and other requirements. Such a local bank will have to register with the IRS every three years and certify that it complies with the applicable requirements. Although a deemed-compliant local bank will not be subject to FATCA withholding, it will have to conduct account identification procedures required of a participating FFI. A local FFI will identify itself to a withholding agent by providing a Form W-8BEN with a claim of local bank FATCA status.

Another category of a registered “deemed-compliant” FFI is a non-reporting FFI, which is a member of a participating FFI affiliated group. A non-reporting FFI, sometimes referred to as “ring-fenced,” will either close any U.S. accounts or transfer them to an affiliate that is a participating FFI. As with the local FFI, a non-reporting FFI must perform account identification procedures and provide a Form W-8BEN to a withholding agent that identifies its FATCA status.

An FFI that is a certified deemed-compliant FFI does not have to register with the IRS as does a registered deemed-compliant FFI. However, it must certify itself with each withholding agent by providing certain documentation to each withholding agent.

One category of deemed-compliant certified FFI is the non-registering local bank which must be licensed and operated as a bank (within the Code meaning of a bank) that is engaged primarily in the business of making loans and taking deposits from unrelated retail customers solely in its country of incorporation. Such a non-registering bank must have no more than \$175 million in assets and so is similar to a local savings and loan bank in the United States. Because of the limitations imposed on such a certified deemed-compliant FFI, it likely would not be making cross-border loans.

Because the LSTA Model Lending Agreement has already incorporated FATCA provisions, it is likely that most borrowers and lenders have adapted to the new FATCA world. However, changes could be made to the proposed regulations, so attention should be provided to the final regulations when they are issued. The Department of the Treasury is predicting that final FATCA regulations will be issued in late summer. Stay tuned!

---

## UNIFORM LAW COMMISSION'S STUDY COMMITTEE ON REAL ESTATE RECEIVERSHIPS: PROJECT UPDATE AND REQUEST FOR COMMENTS

By **Thomas S. Hemmendinger**, Brennan, Recupero, Cascione, Scungio & McAllister, LLP, **Kieran Marion**, Uniform Law Commission and **R. Wilson Freyermuth**, University of Missouri School of Law

For centuries, English chancery courts used receivership as an equitable remedy to protect creditors.<sup>3</sup> This practice carried over to the United States.<sup>4</sup> Within Constitutional limits, receivership continues as an alternative to chapter 7 or 11 bankruptcy proceedings.<sup>5</sup>

Traditionally, mortgage lenders have sought the appointment of a receiver pending foreclosure for one or more reasons, including:

- The foreclosure process under local law takes a substantial period of time, and the lender seeks a receiver to collect rents pending the foreclosure sale.
- The property is subject to waste, deterioration, or some other immediate physical harm that threatens to reduce the value of the property.
- The property may have environmental contamination.
- The collateral includes personal property, and the mortgagee wants to use judicial foreclosure as conclusive evidence that the sale was done in a commercially reasonable manner.

A number of states have enacted statutes dealing with receivers, but there is little comprehensive state statutory guidance regarding the appointment and powers of receivers.

In 2011 the Uniform Law Commission (ULC) established a Study Committee to review whether a Uniform Act on the appointment and powers of real estate receivers would be appropriate and well-accepted by the States. The Study Committee has identified a comprehensive list of issues on receivership that any ULC Drafting Committee should consider and address in a Uniform Act, should the ULC appoint a Drafting Committee.

The Study Committee seeks the views of stakeholders, including the relevant Sections of the American Bar Association. To that end, this article summarizes the seven broad groups of issues that the Study Committee has identified. The Study Committee's full report is available [here](#).

### 1. Scope of a Uniform Act.

One of the first issues is whether any potential Uniform Act should focus narrowly on receivership of mortgaged real estate, or instead apply more broadly to other types of receivership. Courts have appointed receivers for broader purposes, such as the liquidation of insolvent business entities for the benefit of creditors generally, and the operation of non-insolvent business entities where owners are at an impasse.

Either way, for a number of reasons, the Study Committee believes any Uniform Act should be limited to collateral other than the mortgagor's primary residence. Implementing such a limit on scope requires consideration of a number of issues, such as:

- Whether the applicability of the Uniform Act should be limited by the number of dwelling units at the property.
- If not, the effect of the receivership on the owner-occupied dwelling unit.
- Whether the Uniform Act should apply to second and/or third homes and the like.
- How the Uniform Act should address primarily commercial property on which the mortgagor may reside, such as a farm or ranch.

If a receiver is appointed to take custody of property, one would expect the receiver to collect rents and perform certain landlord duties. However, questions might arise regarding the extent of the property over which the receiver would take custody. For example:

- Whether, and if so how, a Uniform Act should address real estate-related interests such as un-severed oil, gas and mineral interests, water rights, and fixtures.
- How to address personal property, such as equipment, furnishings, inventory, and intangible property (such as licenses, permits and variances, development rights), and executory contracts such as leases and franchise agreements.
- How to address mortgagor-owned business operations located on the property.

The Study Committee is also considering whether a Uniform Act should specify the exclusive rules on receiverships, or merely supplement the courts' general equity jurisdiction and power.

## 2. Appointment of a Receiver.

The Study Committee is of the view that any Uniform Act should provide a comprehensive list of grounds that would justify the appointment of a receiver, and clarify the extent to which any individual ground is necessary as a condition precedent to appointment of a receiver.

Various state laws differ on the grounds for obtaining a real estate receiver. Some courts consider a number of factors in deciding whether to appoint a receiver.<sup>6</sup> Other courts will not appoint a receiver unless the petitioner shows waste or impairment of its collateral.<sup>7</sup> A few courts go even further, requiring proof of the mortgagor's insolvency as a condition precedent to receivership.<sup>8</sup>

Historically, receivership is a discretionary remedy. In response to this principle, modern commercial mortgages often provide for the mortgagor's consent to the appointment of a receiver after default, without regard to whether statutory or equitable grounds exist for appointing a receiver. The effect of such clauses varies among the states. Therefore, the Study Committee believes that any Uniform Act should clarify whether such a clause entitles the mortgagee to a receiver as a matter of right, or only subject to the court's discretion.

Any Uniform Act should also address the extent to which parties other than a mortgage lender may seek appointment of a receiver. Possible candidates include: (1) the mortgagor; (2) unsecured creditors; (3) officers, directors, managers or holders of equity interests in the mortgagor; (4) tenants of the mortgaged property; (5) judgment creditors; (6) attaching creditors; (7) mechanics lien claimants; (8) co-owners or others with an interest in the real estate; (9) spouses in a divorce or support proceeding; or (10) public officials.

## 3. Qualifications for Receivers.

Some jurisdictions require appointment of an independent third party as receiver. In some instances, however, courts have appointed the mortgagee as a receiver.<sup>9</sup>

Other issues relating to qualifications for serving include: (1) whether the receiver must be an individual, or can be an entity; (2) whether the receiver must possess particular professional qualifications (such as attorney, accountant, or real estate professional); and (3) whether the receiver must post a surety bond, and if so how the court should set the amount.

## 4. Powers of Receivers.

Most existing state receivership statutes do not comprehensively specify the receiver's powers. In the typical case, the order appointing the receiver establishes the scope of the receiver's powers. Under this approach, a receiver could not exercise any powers not expressly granted by the receivership order. One solution might be for a Uniform Act to provide a comprehensive list of "default" powers that a receiver could exercise after appointment unless the receivership order expressly withheld any such power.

One of the most important issues on receiver's powers is the power to sell the mortgaged real estate. Federal law authorizes receivers to sell mortgaged property.<sup>10</sup> However, existing state law is unclear whether a receiver can sell the property, either subject to the existing mortgage or free and clear of the mortgage and subordinate liens, as in a foreclosure sale. Some state statutes authorize receivers to sell property, but in the absence of a statute, some courts do not permit receivers to sell property.

The Study Committee recommends that any Uniform Act should address these issues:

- A receiver's power to sell the mortgaged real estate.
- Whether the receiver can sell the property free and clear of liens and encumbrances, with the same attaching to the proceeds of sale.

- If a receiver can sell free and clear of liens, whether the receiver can sell over the objection of secured creditors.
- How the receiver may conduct such a sale and what procedures should govern such sales.
- The rights of secured creditors to credit bid.
- Whether the court or the market should determine the value of the secured claims.

The Study Committee believes that any Uniform Act should clearly establish the receiver's authority to manage the property, to collect rents (consistent with the provisions of the Uniform Assignment of Rents Act), to compel turnover of property, and to pay expenses incurred in the management or operation of the property. An Act should also address the receiver's authority to engage agents to perform his/her duties.

Other issues on the powers of a receiver include:

- Whether the receiver may improve the mortgaged real estate, or is limited to mere preservation of the existing real estate.
- Whether the receiver may borrow funds as needed for the maintenance, renovation, or completion of a real estate project, and if so on what terms.
- Whether the receiver may reject existing leases or executory contracts, and if so with what consequences.
- Whether the receiver may assume and assign existing leases or executory contracts; and, if so, how to deal with contractual provisions or other laws that prohibit assignment.
- Whether the receiver may enter into new leases or executory contracts, and if so based on what standards.
- The extent to which the receiver may commence, prosecute, defend, and settle legal proceedings relating to the mortgaged real estate.
- The receiver's employment of professionals (such as attorneys, accountants, brokers).
- Whether a Uniform Act should provide a "model" form receivership order.

##### 5. Procedural and Related Issues.

The Study Committee has identified a number of procedural issues that any Uniform Act might address:

- The process for appointing receivers, including provisions for *ex parte* appointment.
- The stay of creditor or other actions against receivership property.
- The receiver's procedural and ministerial duties, including notice and reporting requirements.
- Avoidance powers.
- Claims procedure and distribution.
- Compensation of receivers.
- Terminating receivership proceedings or discharging the receiver.

##### 6. The Receiver's Legal Status.

Under existing state laws, the receiver has certain fiduciary duties to creditors, and is also an officer of the court. In bankruptcy cases, a party in interest must obtain court permission to sue the trustee.<sup>11</sup> Whether or not this is an appropriate mechanism for state court receivers, any Uniform Act should deal with the extent, if any, to which a receiver is immune from suit for actions or omissions while

serving as receiver.

## 7. Relationship with Other Law.

Any receivership statute must take into account other laws, including:

- *Equity.*
- *Real Property Law.*
- *Other Uniform Acts* – including the Uniform Commercial Code, the Uniform Assignment of Rents Act, the Uniform Fraudulent Transfer Act, and the Model Marketable Title Act.
- *Regulatory Laws.*
- *Federal Law* – including the Bankruptcy Code and the federal receivership statute.

We welcome your advice and comment. If you are interested in discussing the project or meeting, please contact Thomas Hemmendinger, Kieran Marion or R. Wilson Freyermuth at the email address provided below.

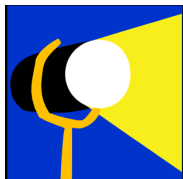
Thomas S. Hemmendinger is an attorney with Brennan, Recupero, Cascione, Scungio & McAllister, LLP and is Chairperson of the Uniform Law Commission's Study Committee on the Appointment and Powers of Real Estate Receivers. Thomas can be reached at [themmendinger@brscsm.com](mailto:themmendinger@brscsm.com). Kieran Marion is the staff liaison to the Uniform Law Commission's Study Committee on the Appointment and Powers of Real Estate Receivers. Kieran can be reached at [kmarion@uniformlaws.org](mailto:kmarion@uniformlaws.org). R. Wilson Freyermuth is the John D. Lawson Professor of Law at the University of Missouri School of Law and an observer to the Uniform Law Commission's Study Committee on the Appointment and Powers of Real Estate Receivers. R. Wilson Freyermuth can be reached at [freyermuthr@missouri.edu](mailto:freyermuthr@missouri.edu).

---

## UCC Spotlight

---

By **Stephen L. Sepinuck** and **Kristen Adams**



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 decisions.

### ***Lyon Financial Services, Inc. v. Jude's Medical Center, Ltd.*** **2011 WL 6029195 (N.D. Ill. 2011)**

This case highlights – or at least should have highlighted – some important differences between Articles 2A and 9.

Simplified slightly, the facts are as follows. Lyon Financial Services, Inc. leased two pieces of equipment to Jude's Medical Center, Ltd. The leases required payments over sixty months, totaling \$276,000 and \$133,000, respectively. A few years later, Jude defaulted. Lyon repossessed the equipment and sold the items for \$2,500 and \$10,600. Lyon then pursued Jude's CEO, Abboud, who had guaranteed the obligations under both leases.

Abboud defended on the basis that Lyon had not conducted the sales in a commercially reasonable manner, and claimed that factual issues about the commercial reasonableness of the sales were a basis for denying Lyon's motion for summary judgment. Abboud also claimed that the leases had created security interests and were therefore governed by Article 9.

The court first dealt with whether the transactions were leases or sales with a retained security interest. Looking at the safe harbor in § 1-203(b), the court noted that the leases could not be terminated by the lessee but that no evidence was presented that any of the four characteristics identified in § 1-203(b) were present. Therefore, the court concluded, the transactions were true leases and Article 2A governed.

The court's conclusion on this issue was probably correct but its analysis was flawed. If the safe harbor rule of § 1-203(b) is

not met, the analysis is supposed to revert to subsection (a), which requires courts to examine all the facts and circumstances. *See, e.g., In re Pillowtex, Inc.*, [349 F.3d 711](#), 717-20 (3d Cir. 2003); *In re Grubbs Constr. Co.*, [319 B.R. 698](#) (Bankr. M.D. Fla. 2005); *Coleman v. DaimlerChrysler Servs. of N. Am., LLC*, [623 S.E.2d 189](#) (Ga. Ct. App. 2005). Under that analysis, the transaction might nevertheless be a sale with a retained security interest. For example, a lease with an option to buy at the end for non-nominal consideration might be a sale if the lessee's only real economic choice was to exercise the option. This might be true if all of the lessee's business equipment were subject to the lease and the lessee would have to find alternative goods or go out of business if it failed to exercise the option. It might also be true if the costs incurred and damage likely to be caused in their removing and returning the goods were less than the option price.

Moving to the resales, the court first dealt with Abboud's claim that he was not provided with adequate advance notification. On this point, the court observed that Abboud had failed to identify any requirement of notification after default under a lease, as opposed to a security agreement. Nevertheless, drawing from § 2-706, the court assumed that notification was required. In doing so, the court repeated the Minnesota Court of Appeals' error in *Deutz-Allis Credit Corp. v. Jensen*, [458 N.W.2d 163](#), 166 (Minn. Ct. App. 1990), which it cited. The court then found that Lyon had given adequate notification. As to the commercial reasonableness of the sales, the court ruled that, given the low prices realized, this was a factual issue preventing summary judgment.

The court's analysis on both notification and commercial reasonableness was flawed. Given the court's conclusion that the transactions were leases, not sales with a retained security interest, Lyon was under no obligation to provide notification of the subsequent sales or to conduct the sales in a commercially reasonable manner. Nothing in Article 2A imposes these requirements and that omission is not an oversight. In fact, § 2A-502 states that, "[e]xcept as otherwise provided in this Article or the lease agreement, the lessor or lessee in default under the lease agreement is not entitled to notice of default or notice of enforcement from the other party to the lease agreement," and its commentary makes it clear that this is a distinction between Articles 2A and 9. Furthermore, § 2A-527(2) includes a specific reference to "commercial reasonableness" in the context of disposition by a new lease agreement, but the portions of § 2A-527 relating to disposition by sale do not include such a reference, and none should be implied. That is because, unlike a seller's right to resale damages under Article 2 or a secured party's right to a deficiency under Article 9, a lessor's damages are unaffected by the resale price. The lessor is instead entitled to: (i) the past rent due, plus; (ii) the present value of future rent for the remaining lease term minus the present value of market rent for the remaining lease term. §§ 2A-527(3), 2A-528(1). Had the court recognized and considered the irrelevance of the sale price to the measure of damages, it might have understood that notification and commercial reasonableness of the sale were not required, and granted Lyon's motion for summary judgment.

***Algonquin Power Income Fund v. Christine Falls of New York, Inc.*,  
[2011 WL 6178802](#) (N.D.N.Y. 2011)**

This case involves attachment of a security interest to a commercial tort claim and its proceeds. The court correctly analyzed the first issue, properly concluding that the security interest did not attach to the *claim*. However, the court grievously erred on the second issue when it ruled that the security interest did not attach to the *proceeds of the claim*.

In 1988, Trafalgar Power, Inc. and its affiliates ("Trafalgar") acquired secured financing from Aetna Insurance Co., which later assigned its interest to Algonquin Power Income Fund ("Algonquin"). The following year, Trafalgar sued the engineers that had designed some of Trafalgar's power plants for miscalculations that resulted in an estimate of energy production that was far larger than the completed power plants were able to attain. In 1999, a jury awarded Trafalgar \$7.6 million on its claim. Trafalgar assigned its interest in the judgment to an affiliate and in 2000 Algonquin sued them both, claiming a prior security interest in the judgment. In 2001, the judgment was paid and put in escrow pending resolution of the dispute about which party was entitled to the funds. A few months later, Trafalgar filed for bankruptcy protection. The bankruptcy court ruled in favor of Trafalgar and Algonquin appealed.

The district court first concluded that a malpractice action was not assignable under Connecticut law. It also concluded that, even though the security agreement described the collateral to include "any interest in any kind of property or asset, whether real, personal or mixed, and whether tangible or intangible," that language was insufficiently particular to include the malpractice claim. Both of these conclusions seem sound.

Although the court had no need to, and thus did not, examine revised Article 9, the result under current law would be no different. Revised Article 9 has two important limitations on the grant of a security interest in a commercial tort claim. First, the generic term "commercial tort claim" is not an adequate description, and the even more general language in Algonquin's security agreement would similarly be inadequate. *See* § 9-108(e)(1); *Beane v. Beane*, [2011 WL 223167](#) (D.N.H. 2011) (generic references in the security agreement to "accounts and other rights to payment" and "payment intangibles" were insufficient to create a valid security interest in commercial tort claims); *Conley v. Pub. Safety Grp., Inc.*, [771 N.W.2d 653](#) (Iowa Ct. App. 2009) (generic reference in the security agreement to "proceeds from any lawsuit due or pending" was insufficient to create a valid security interest in commercial tort claims). Second, no security interest can attach to a commercial tort claim under an after-acquired property clause. *See* § 9-204(b)(2); *In re Am. Cartage, Inc.*, [656 F.3d 82](#) (1st Cir. 2011); *Waltrip v. Kimberlin*, [79 Cal. Rptr. 3d 460](#) (Ct. App. 2008). For each of these reasons, Algonquin's security interest would not attach to Trafalgar's tort *claim*, which apparently arose after the security agreement was executed.

The court then turned to Algonquin's argument that, even if its security interest did not attach to the malpractice *claim*, its security interest did attach when the claim was "transformed to a judgment, bond claim, contract claim, and interest in an escrow

account,” types of collateral that its security agreement did cover. The court rejected this argument out of hand. Quoting the bankruptcy court, it stated that “[i]f the security agreement does not expressly grant a security interest in the underlying tort claim or its proceeds, no subsequent transformation will magically result in an automatic attachment of those proceeds.” It even repeated the reference to “magic,” as if Algonquin’s argument was somehow fanciful. But it was not Algonquin’s argument that was fanciful, it was the court’s understanding of secured transactions and Article 9.

Property transforms from one classification to another all the time. Thus, for example, a debtor may sell inventory to generate accounts. A security interest in the debtor’s existing and after-acquired accounts will not cover the inventory, but will attach automatically to any proceeds of inventory that fall under the definition of accounts. Similarly, a security interest in a bank account will extend to any funds subsequently deposited into the bank account, regardless of what kind of property the debtor liquidated to generate the funds. In other words, as the debtor’s property transforms, it may shift from non-collateral to collateral. Even a simple change in use – such as when inventory is taken off the shelf and used as equipment – may cause a security interest to attach (or de-attach). It is not clear why the court had so much difficulty accepting this simple concept.

*In re Miller*,  
[2012 WL 32664](#) (Bankr. C.D. Ill. 2012)

This case shows why states need to enact the 2010 amendments to Article 9. Unfortunately, it does so at the expense of a secured party that quite arguably did nothing wrong.

The facts of the case are quite simple. The secured party filed a financing statement identifying one of the married debtors as “Bennie A. Miller.” This was the name the debtor had used much of his life and which appeared on his driver’s license, social security card, tax returns, and the deed to his residence. Seven months after the debtors filed a chapter 13 bankruptcy petition, they sought to avoid the secured party’s lien. The bankruptcy court ruled for the debtors, concluding that the filing was ineffective to perfect because the debtor’s legal name was the name on his birth certificate, “Ben Miller,” and a search under that name did not reveal the filing. In making this ruling, the court rejected the argument that the debtor might have two acceptable names, such that a filing against either would be sufficient to perfect.

This is the only known decision to invalidate a filing that identified the debtor by the name used on the debtor’s driver’s license. Certainly numerous cases have refused to treat as effective a filing against the debtor’s nickname, but none of those cases involved a name that actually appeared on the debtor’s driver’s license. See *In re Larsen*, [2010 WL 909138](#) (Bankr. S.D. Iowa 2010) (“Mike D. Larsen” instead of “Michael D. Larsen”); *In re Jones*, [2006 WL 3590097](#) (Bankr. D. Kan. 2006) (“Chris Jones” instead of “Christopher Gary Jones”); *In re Borden*, [353 B.R. 886](#) (Bankr. D. Neb. 2006) (“Mike Borden” instead of “Michael R. Borden”), *aff’d*, [2007 WL 2407032](#) (D. Neb. 2007); *In re Berry*, [2006 WL 2795507](#) (Bankr. D. Kan.), *opinion supplemented*, [2006 WL 3499682](#) (Bankr. D. Kan. 2006) (“Mike” instead of “Michael”); *In re Kinderknecht*, [308 B.R. 71](#) (B.A.P. 10th Cir. 2004) (“Terry J. Kinderknecht” instead of “Terrance Joseph Kinderknecht”). Indeed, in *Borden*, the court rejected the use of a nickname in part because that was not the name that appeared on his birth certificate, driver’s license, real estate deeds, bank accounts, tax returns, and bankruptcy petition. 353 B.R. at 887.

The flaws in the *Miller* court’s analysis were twofold: (i) in requiring the debtor’s “legal” name on the financing statement; and (ii) even if the debtor’s legal name were necessary, equating the name on debtor’s birth certificate with the debtor’s legal name. Nowhere in its text or comments does Article 9 use the phrase “legal name.” Instead, § 9-502 requires the name of the debtor, § 9-503(a)(4)(A) supplements that marginally by indicating the name of an individual should be the “individual . . . name,” and § 9-506(c) indicates that if a search under the debtor’s “correct name” yields the filing, then the filing is not seriously misleading. In short, Article 9 requires the debtor’s *correct* individual name, not the debtor’s *legal* name. Even if the legal name were required, there is no reason to assume, as the court blithely did, that the birth certificate name is the legal name of an adult who goes by something different. Although the *Kinderknecht*, *Borden*, and *Pankratz Implement* decisions, all of which the court cited, referred to the debtor’s “legal name,” none of those cases equated “legal name” with the name on the debtor’s birth certificate. In fact, none of these cases purported to define the term at all. In most states, an individual’s legal name can be anything the debtor regularly uses for non-fraudulent purposes. See Darrell W. Pierce, *The Revised Article 9 Filing System: Did It Meet Its Objectives?*, 44 UCC L.J. 1, 12-13 (2011).

So, what is an individual debtor’s *correct* name? A strong argument can be made that, under current law, the debtor’s correct name is the name that the debtor uses and by which the debtor is generally known, particularly by creditors. See *Peoples Bank v. Bryan Bros. Cattle Co.*, [504 F.3d 549](#) (5th Cir. 2007) (“Louie Dickerson” instead of “Brooks L. Dickerson” was effective because the debtor held himself out to the community as Louie Dickerson and frequently used his nickname in business affairs); cf. 1 BARKLEY CLARK & BARBARA CLARK, *THE LAW OF SECURED TRANSACTIONS* ¶ 2.09[1][d] (3d ed. 2011) (suggesting that in most cases the name on the debtor’s driver’s license, bankruptcy petition, or social security card is the best evidence of the debtor’s “legal” name and only in cases of conflict among those documents should the name on the debtor’s birth certificate be used). After all, the UCC is intended to facilitate commercial transactions, not frustrate them. See § 1-103(a). Given that few debtors carry around their birth certificate, it would be a hassle for secured parties to require that the debtor exhibit that document before completing a financing statement. Moreover, it is far easier for searchers to search under the name the debtor uses than by the name on a piece of paper that few ever see.

Admittedly, this standard lacks certainty and can be quite problematic when the debtor goes by more than one name. However, in *Miller*, the debtor was known by only one first name – “Bennie” – and that name appeared on his state-issued driver’s license and all his contemporary financials. Only his birth certificate, which was of course quite old in comparison, indicated a different first name. Therefore, “Bennie” was his *correct* name, even if not his *legal* name.

Fortunately, the 2010 amendments will add clarity on this point and change the result. Under either version of § 9-503 offered for states to enact – Alternative A or Alternative B – a filing that identifies an individual debtor by the name on the debtor’s driver’s license will be effective, provided the license is current and is issued by the state in which the debtor is located.

***Commercial Capital Bank v. House,***  
**2012 WL 220214 (W.D. La. 2012)**

In this priority dispute between two secured parties, the court reached the correct result but its analysis was unnecessarily complicated. The case also illustrates a common practice that secured parties needlessly follow.

The facts of the case are essentially as follows. In 1997, 1999, and 2009, the debtor borrowed funds from Farm Service Agency (“FSA”). Each debt was secured by the debtor’s farming equipment. FSA filed a proper financing statement for each transaction, each time on the date the loan was made or a few days before. It also filed timely continuation statements for the first financing statement. In 2011, the debtors paid off the first and second loans but they remained obligated on the third loan, for approximately \$428,000.

In 2005, the debtors borrowed approximately \$500,000 from Commercial Capital Bank (“CCB”). Fifteen months later, the debtors granted CCB a security interest in their equipment. CCB perfected that security interest by filing a proper financing statement. In 2011, CCB brought an action against FSA, raising numerous arguments why FSA’s perfection had lapsed.

The court ruled in favor of FSA. Citing § 9-322(a), it stated that priority between secured parties is based on “the date of perfection.” The court then concluded that, even though the debtors had paid off the first loan, because the security agreement for that transaction covered future advances, the security interest created in that transaction secured the third loan. Hence the date of FSA’s perfection for priority purposes was the date of the first loan.

The decision is correct but the fact that the security agreement covered future advances is immaterial. Priority among perfected secured parties is not, as the court indicated, based on the first to *perfect*, but the first to *file or perfect*, as long as there is no period thereafter when there is neither filing nor perfection. *See* § 9-322(a)(1). Thus, as long as the third loan was in fact secured – whether pursuant to a future-advances clause in one of the previous security agreements or pursuant to a new security agreement – priority would be based on the date of the first filing. Secured creditors such as FSA routinely file new financing statements for each transaction but, provided the financing statements cover the same collateral, there is no reason to do so. Financing statements identify the debtor, the collateral, and the secured party, not a particular loan or transaction. There is absolutely no need for a second, duplicative filing, provided the first is properly continued.

***Variety Wholesalers, Inc. v. Prime Apparel, LLC,***  
**2011 WL 6036084 (N.C. Ct. App. 2011)**

This decision should be very distressing for lenders with a security interest in accounts generated from trademarked goods.

The dispute in the case began with the sale of trademarked apparel by Prime Apparel, Inc. to one of its wholesale customers. Quick Response Marketing, Inc. (“QRMI”) claimed that it owned the trademark and instructed the customer to make payment to QRMI. The customer brought an interpleader action seeking a ruling on who was entitled to the payment and it deposited \$235,000 with the court. CIT Group Commercial Services, Inc. (“CIT”) intervened, claiming a perfected security interest in Prime’s accounts and entitlement to the funds.

The trial court ruled for QRMI and CIT appealed. CIT argued that even if Prime had violated QRMI’s trademark rights, QRMI had merely an unsecured claim for infringement, which would be subordinate to CIT’s security interest in the account. In a very brief opinion, the appellate court affirmed. Its entire analysis consisted of the following syllogism:

- (1) Prime’s violation of QRMI’s trademark meant that Prime had no right to the goods sold, nor any money generated from the sale of those goods.
- (2) Prime therefore had no right in the account receivable to pass on to CIT.
- (3) Thus, CIT had no security interest in the interpleader funds.

This analysis is simply wrong. The Lanham Act makes a trademark violator liable to the trademark owner, *see* 15 U.S.C. § 1125(a), but does not make all proceeds of the trademarked goods the property of the trademark owner. Nor should it, given that the damages for the trademark violation may have little relationship to the total sales price of the goods. Moreover, nothing in the Lanham Act imposes a constructive trust on all proceeds received for the trademarked goods. While a constructive trust *might* be an

equitable remedy available to the trademark owner in some instances, it is a remedy that does not normally override the property rights of a third party. In other words, while a constructive trust can be used to obtain priority over *unsecured* creditors, it does not allow for priority over *secured* creditors. See RESTATEMENT (THIRD) OF THE RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. d (2011).

This unfortunate decision puts a wrinkle in accounts financing that cannot readily be smoothed over. The court ruled that the debtor lacked property rights in the infringing goods and their proceeds, and there is nothing that a lender could put in the security agreement to alter that conclusion. So, if this decision holds up, accounts financiers will need to include trademark issues in their due diligence.

Of course, accounts financiers should probably already be concerned about the debtor's trademark infringement. After all, a trademark owner might have the right to impound the goods, particularly if the infringer's buyer intends to resell them. This would prevent new accounts from being generated. Moreover, a debtor who sold infringing goods that the buyer could not resell would no doubt be violating the warranty of title. See § 2-312(3). In such a case, the buyer would have a defense to payment of the purchase price, see § 9-404(a)(1), rendering the account rather poor collateral.

Stephen L. Sepinuck is a Professor at Gonzaga University School of Law, Co-Director of the Commercial Law Center and former Chair of the ABA Business Law Section's Uniform Commercial Code Committee. Stephen can be reached at [ssepinuck@lawschool.gonzaga.edu](mailto:ssepinuck@lawschool.gonzaga.edu). Kristen Adams is a Professor and Associate Dean for Academics at Stetson University College of Law and Vice Chair of the ABA Business Law Section's Uniform Commercial Code Committee. Kristen can be reached at [adams@law.stetson.edu](mailto:adams@law.stetson.edu).

---

## Useful Links and Websites

---

*Compiled by Commercial Law Newsletter Co-Editors Annette C. Moore, Carol Nulty Doody, Celeste Pozo, Christina Rissler and Rebecca Gelfand*

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

1. [www.lexology.com](http://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](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 International Sale of Goods and 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](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.php](http://www.hcch.net/index_en.php)

*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 [Annette C. Moore](#), [Carol Nulty Doody](#) or [Celeste Pozo](#), the Uniform Commercial Code Committee Editors or [Rebecca Gelfand](#) or [Christina B. Rissler](#), the Commercial Finance Committee Editors.*

---

#### ENDNOTES:

<sup>1</sup> Bondi filed a similar suit in New Jersey state court against Citigroup, Inc. (“Citigroup”), and PCFL filed another lawsuit in North Carolina state court against Bank of America Corp. (“Bank of America”). Bondi’s suit against Citigroup remained in New Jersey state court while PCFL’s North Carolina suit was removed to the Southern District of New York. With respect to PCFL’s North Carolina suit, the district court granted summary judgment to Bank of America, which was affirmed by the Second Circuit. *See Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.*, 412 F. App’x 325 (2d Cir. 2011) (summary order). Also, after the Italian bankruptcy court approved the plan of reorganization (the “Concordato”), plaintiffs in the securities fraud class action litigation and Grant Thornton were allowed to file claims against Parmalat. The securities class actions were eventually settled.

<sup>2</sup> Under 28 U.S.C. § 1452(b), the appropriate court to remand a case to state court is the “court to which [the state law] claim or cause of action [was] removed.” Because these cases were originally removed from Illinois state court to the District Court for the Northern District of Illinois, which were then transferred to the District Court for the Southern District of New York, the Second Circuit stated in a footnote that the district court, on remand, should transfer the cases to the District Court for the Northern District of Illinois, “which can then remand the actions to Illinois state court.” *Parmalat*, 2012 WL 539957, at \*7 n.5.

<sup>3</sup> 1 RALPH E. CLARK, *THE LAW AND PRACTICE OF RECEIVERS* § 4 (3d ed. 1959).

<sup>4</sup> *See, e.g., Petrovics v. King Holdings, Inc.*, 188 A. 514, 515 (R.I. 1936) (“[To] conserve the assets of the corporation and preserve its property for those interested therein, equity has inherent jurisdiction, independent of statute, to appoint a receiver.”).

<sup>5</sup> *See, e.g., Gilchrist v. GE Capital Corp. (In re Spartan Int’l, Inc.)*, 262 F.3d 295 (4th Cir. 2001); *In re Newport Offshore Ltd.*, 219 B.R. 341 (Bankr. D.R.I. 1998); *Cambio v. G-7 Corp.*, No. 96-0705, 1998 WL 1472896 (R.I. Super. Ct. Feb. 11, 1998).

<sup>6</sup> *See, e.g., Fleet Bus. Credit, L.L.C. v. Wings Rests., Inc.*, 291 B.R. 550 (N.D. Okla. 2003).

<sup>7</sup> *ANJ Future Invs., Inc. v. Alter*, 756 So. 2d 153 (Fla. Dist. Ct. App. 2000).

<sup>8</sup> *Mut. Benefit Life Ins. Co. v. Frantz Klodt & Son, Inc.*, 237 N.W.2d 350 (Minn. 1975).

<sup>9</sup> *See, e.g., First Interstate Bank of Lea Cnty. v. Heritage Square, Ltd.*, 833 P.2d 240 (N.M. 1992).

<sup>10</sup> 28 U.S.C. §§ 2001 et seq.

<sup>11</sup> *Barton v. Barbour*, 104 U.S. 126, 129 (1881).