

Commercial Law Newsletter

Messages from the Chairs



[Committee on Commercial Finance](#)

Lynn Soukup, Chair, Pillsbury Winthrop Shaw Pittman LLP

Vancouver Spring Meeting April 16-18, 2009

We have a full schedule of CLE programs and subcommittee and task force meetings beginning on the morning of Thursday April 16th and ending on the afternoon of Saturday April 18th. The [planned schedule is attached](#). A final schedule with topics for the subcommittee and task force meetings will be distributed closer in time to the meeting date by email to ComFin members.

[More...](#)



[Committee on Uniform Commercial Code](#)

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

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

Proposed PEB Commentary

The Permanent Editorial Board for the Uniform Commercial Code has proposed a new commentary relating to UCC sections 4A-502(d) and 4A-503. The proposed commentary provides that neither the originator nor the beneficiary of a funds transfer has any property claim to the value held by an intermediary bank and, therefore, neither a creditor of the originator nor a creditor of the beneficiary may attach that value by levy, garnishment or the like. A full copy of the proposed commentary appears at the end of this column. Anyone wishing to comment on the proposal may do so by May 8. Instructions on where to submit comments are on the first page of the proposal.

[More...](#)

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

Messages from the Chairs

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

Mark Your Calendars

- [2009 Section of Business Law Spring Meeting Schedule](#)

Featured Articles

- [Summary of International Instruments Relating to Secured Transactions](#)
- [Addressing the Challenges of UCC Filing and Searching in Washington, D.C.](#)
- [Loan Syndications and Trading: A Recap of 2008](#)
- [The Current State of the Bankruptcy Code Safe Harbor Protections for "Financial Contracts"](#)
- [Lender Liability: Taking Stock in an Uncertain Time](#)

Synergy Group Report

- [Committee on Uniform Commercial Code: Spotlight](#)
- [Committee on Commercial Finance: Subcommittee and Task Force Reports](#)
- [Committee on Uniform Commercial Code: Subcommittee Reports](#)
- [Joint Subcommittee and Task Force Reports](#)
- [Useful Links and Websites](#)
- [Committee Leadership Rosters](#)

Editorial Board:

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

Christine Gould Hamm
Co-Editor (ComFin)
Husch Blackwell Sanders LLP
816-283-4626

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

Mark Your Calendars

- **April 16-18, 2009 - Business Law Section Spring Meeting - Vancouver, British Columbia**
Please join us in beautiful Vancouver this Spring for over 70 CLE programs, over 300 committee and subcommittee meetings and an exciting spread of social networking events, including CLE programs on the syndicated loan market, national and international insolvency laws, and the annual review of commercial law. For more details please visit the ABA Section of Business Law's 2009 Spring Meeting [website](#).
- **May 4-5, 2009 - Commercial Loan Workouts: Where Credit Meets the Law - Las Vegas, Nevada**
Former ComFin Committee Chair Bob Zadek will present a hands-on, in-depth commercial loan workout conference. Additional information is available [here](#).
- **June 10-12, 2009 - Global Business Law Forum - Hong Kong, China**
The theme for the 2nd Annual Global Business Law Forum will be "*legal developments impacting companies doing business in Asia and the Pacific Rim*." More information is available [here](#).
- **June 29-30, 2009 - Commercial Loan Workouts: Where Credit Meets the Law - Chicago, Illinois**
In case you missed this CLE in May, former ComFin Committee Chair Bob Zadek will present an encore of his hands-on, in-depth commercial loan workout conference. Additional information is available [here](#).
- **July 30, 2009 - ABA Annual Meeting - Chicago, Illinois**
The 2009 ABA Annual Meeting will be held in the "Windy City." Consistent with previous years, we expect a number of exciting CLE programs, committee and subcommittee meetings and social events. Registration and other information is available [here](#). Please contact your subcommittee or task force chairs to get involved.

Featured Articles

[Summary of International Instruments Relating to Secured Transactions](#)

Neil Cohen, Brooklyn Law School and Steve Weise, Proskauer Rose LLP

Several international organizations - The Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT), and the United Nations Commission on International Trade Law (UNCITRAL) - have been active in preparing instruments that can affect secured transactions and similar financing transactions. Some of these instruments are conventions that have gone into effect with the United States as a "contracting state." Others are conventions not yet in effect because the required number of ratifications has not been achieved. Still others are model laws or "legislative guides" that may influence the development of the law, particularly outside the United States. When these instruments have the force of law, they should be considered by persons engaging in transactions that may be governed by them.

[More...](#)

[Addressing the Challenges of UCC Filing and Searching in Washington, D.C.](#)

Clare Oliva, National Corporate Research, Ltd.

As lenders and their counsel know, Revised Article 9, §9-307(c), which became effective in July 2001, requires filing in Washington, D.C. for debtors that are not "registered organizations," such as foreign entities, where the chief executive office is located in a jurisdiction that does not have a UCC-type filing/notice system that would give priority over the rights of a lien creditor with respect to the collateral. Less well known, however, is that the D.C. Recorder of Deeds' office has not updated its filing system and procedures to adequately handle on a daily basis the resulting increase in volume of filings. This presents significant challenges that secured lending practitioners need to be aware of and address when filing or searching UCCs in Washington, D.C.

[More...](#)

[Loan Syndications and Trading: A Recap of 2008](#)

Bridget Marsh and Ted Basta, Loan Syndications and Trading Association

Last year, in an article published in this journal, we gave an overview of the history of the leveraged loan market. We traced not only the growth of the asset class over the past 15 years but the growth of the Loan Syndications and Trading Association (the "LSTA"), the not-for-profit organization for the corporate loan market whose mission is to promote a fair, orderly and efficient corporate loan market. Among our conclusions, we commented that, as 2007 drew to a close, both the primary market and secondary trading market were in a period of flux as borrowers and lenders evaluated the future and noted that the market and the LSTA were entering a more challenging period with loan prices more closely correlated to, and no longer shielded from, the daily price fluctuations of other asset classes.

[More...](#)

[The Current State of the Bankruptcy Code Safe Harbor Protections for "Financial Contracts"](#)

Richard Levin, Cravath, Swaine & Moore LLP

The Bankruptcy Code specially protects "commodity contracts", "forward contracts", "securities contracts", "repurchase agreements" and "swap agreements", as well as related "master netting agreements", as each of those terms is defined in the Code, between the debtor and specified categories of counterparties. Such contracts and agreements are variously referred to as "financial contracts", derivative contracts" or simply "safe harbor contracts." The automatic stay does not apply to the exercise by protected counterparties "of any contractual right...to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements."

[More...](#)

[Lender Liability: Taking Stock in an Uncertain Time](#)

Eugene C. Kim and Gina Giang, Sheppard Mullin Richter & Hampton LLP

Despite several years of little activity in the area of lender liability, the unprecedented slowdown in the global economy and continuing unrest in the credit markets may prove to be fertile ground for disputes between lenders and borrowers, guarantors or other third parties. When lending institutions pursued enforcement remedies in response to widespread defaults in the 1980s and 1990s, they were met by a massive upsurge in claims filed against them. Today, the number of lenders taking enforcement actions is once again on the rise, which may result in a corresponding increase in borrowers challenging and courts probing lender practices.

[More...](#)

Committee on Commercial Finance: Subcommittee and Task Force Reports

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

Committee on Uniform Commercial Code: Subcommittee Reports

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

Joint Subcommittee and Task Force Reports

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

Committee Leadership Rosters

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

ComFin Chair's Column March 2009 Commercial Law Newsletter

Vancouver Spring Meeting April 16-18, 2009

We have a full schedule of CLE programs and subcommittee and task force meetings beginning on the morning of Thursday April 16th and ending on the afternoon of Saturday April 18th. The [planned schedule is attached](#). A final schedule with topics for the subcommittee and task force meetings will be distributed closer in time to the meeting date by email to ComFin members.

ComFin is sponsoring the following CLE programs:

- *Current State of the Syndicated Loan Markets in the United States and Canada (Thursday 10:30 am)*
- *Non-uniformity: Is it the Spice of Life or a Recipe for Disaster? (Thursday 2:30 pm, co-sponsor of UCC Committee Program)*
- *Anatomy of a Canadian/U.S. Cross-Border Securitization Transaction (Thursday 2:30 pm, co-sponsor of Securitization and Structured Finance Committee Program)*
- *Hands Across the Borders: Comparative Insolvency Regimes in the United States, Canada and Mexico (Friday 10:30 am)*
- *How Well Do You Know Your Neighbor? What's New and What's Different about Canadian Secured Transactions (Friday 2:30 pm, co-sponsor of UCC Committee Program)*
- *Commercial Law Developments (Saturday 10:30 am)*
- *What Every Commercial Lawyer Needs to Know about the Restatement (Third) of Restitution and Unjust Enrichment (Saturday 1:00 pm, co-sponsor of UCC Committee Program)*

Our joint dinner with the UCC Committee will be held Thursday evening. The dinner reservation form can be accessed [here](#). The dinner venue is a few blocks walk from the meeting hotels and the entrée choice will be selected at the table.

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

IMPORTANT: THINK ABOUT TRAVEL DOCUMENTS. Information about Canadian and U.S. travel documentation requirements is available [here](#).

I hope that, despite the economic downturn, many of you will be able to attend the meeting.

Virtually There

For those who can't attend meetings this year, we're offering more ways to participate "virtually." ComFin has sponsored several ABA telephone conference CLE programs, including:

- *Nightmare on Main Street: What Keeps Lenders Up at Night?* March 25, 2009 program addressing lender liability and bankruptcy issues of increased interest to lenders and borrowers in the current economic environment. Recording available [here](#).
- *Loan Restructuring: Let's Make a (New) Deal.* Pre-bankruptcy and workout due diligence, issues surrounding the explosion of second lien financings and current issues in securing cash collateral and/or DIP financing. Recording of February 25, 2009 program available [here](#).

The *Mark Your Calendars* section in this newsletter lists other upcoming events. In addition, the Business Law Section supports non-CLE teleconferences for our subcommittees and task forces, so sign up for the groups that interest you in order to receive information from them. A complete list of the ComFin subcommittees and task forces and a description of their activities can be accessed [here](#).

In addition the [ComFin website](#) provides a calendar of upcoming events, access to program materials and news on developments (including the UCC Article 9 revisions currently under discussion and the UNCITRAL Secured Transactions Guide application to IP collateral).

eSource

Each month the Business Law Section publishes **eSource**, an electronic newsletter that includes information on recent developments, articles on current issues and information about upcoming events. Past issues of **eSource** can be accessed [here](#). If you are interested in writing a short (500 word) piece on recent developments or practice points for **eSource** please contact me.

That's All for Now ...

Hope to see many of you in Vancouver.

Lynn

ComFin Committee Chair

CHAIR'S COLUMN

March 2009



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

Proposed PEB Commentary

The Permanent Editorial Board for the Uniform Commercial Code has proposed a new commentary relating to UCC sections 4A-502(d) and 4A-503. The proposed commentary provides that neither the originator nor the beneficiary of a funds transfer has any property claim to the value held by an intermediary bank and, therefore, neither a creditor of the originator nor a creditor of the beneficiary may attach that value by levy, garnishment or the like. A full copy of the proposed commentary appears at the end of this column. Anyone wishing to comment on the proposal may do so by May 8. Instructions on where to submit comments are on the first page of the proposal.

Article 9 Revisions

The Joint Review Committee for Article 9 of the Uniform Commercial Code held its third meeting on March 6-8 in Chicago. A complete report of that meeting is available on the UCC Committee [web page](#). The Joint Review Committee plans to have a draft set of revisions ready for a first reading at the ULC's annual meeting this summer. After further Committee review, the revisions will be presented to the ALI for consideration and approval in the spring of 2010 and to the ULC for consideration and approval in the summer of 2010.

Spring Meeting

As you no doubt know by now, the Spring Meeting of the ABA Business Law Section will be in Vancouver this year from April 16–18th. A complete copy of the Committee's schedule is attached, but here are a few highlights.

Programming

The UCC Committee is sponsoring three CLE programs during the meeting:

Non-uniformity: Is It the Spice of Life or a Recipe for Disaster?

Thursday, April 16 at 2:30-4:30pm

How Well Do You Know Your Neighbor? What's New and What's Different about Canadian Secured Transactions

Friday, April 17 at 2:30-4:30pm

What Every Commercial Lawyer Needs to Know About the Restatement (Third) of Restitution and Unjust Enrichment

Saturday, April 18 at 1:00-3:00pm

Stump the Chumps Returns!

On Friday April 17 at 1:30-2:30pm, the Committee's ever popular *Stump the Chumps* will be making a return after a one-year hiatus. Attendees will be given the opportunity to pose questions to a panel of commercial law experts consisting of:



Kristen D. Adams



Katherine S. Allen



E. Carolan Berkley



Richard L. Goldfarb



Norman M. Powell

Questions may also be submitted in advance by e-mail to me at ssepinuck@lawschool.gonzaga.edu.

UCC Committee Award for Exceptional Service

Also at 1:30pm on Friday, April 17, immediately before *Stump the Chumps* begins, the Committee will bestow its Award for Exceptional Service on a most worthy individual. Past recipients are Fred Miller (2006) and Barkley Clark (2007). Come help us honor a colleague who has dedicated amazing amounts of time and energy to the improvement of commercial law generally and the UCC in particular.

UCC / ComFin Dinner

Finally, the UCC Committee and the Commercial Finance Committee will be holding their customary joint dinner on Thursday, April 16. A copy of the registration form for that dinner is also attached. I hope to see you in Vancouver.

Stephen L. Sepinuck
Professor, Gonzaga University School of Law
ssepinuck@lawschool.gonzaga.edu

BUSINESS LAW SECTION SPRING MEETING
APRIL 16-18, 2009
Vancouver, BC

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

Friday, April 17

Time	Commercial Finance	UCC			
8:00-8:30am	<div style="background-color: #cccccc; width: 100%; height: 100%;"></div>				
8:30-9:00am					
9:00-9:30am			Subcommittee Meeting: Agricultural & Agri-Business Financing	Subcommittee Meeting: Investment Securities:	
9:30-10:00am					
10:00-10:30am			Subcommittee Meeting: Aircraft Financing		
10:30-11:00am					
11:00-11:30am				Program: Cross Border Insolvency	
11:30-12:00pm					
12:00-12:30pm					
12:30-1:00pm	Task Force Meeting: Model Intercreditor Agreement	Joint Subcommittee Meeting: Payments: Discussion of ULC Payment Study Project			
1:00-1:30pm		Committee Meeting: <i>Stump the Chumps & Presentation of UCC Award of Exceptional Service</i>			
1:30-2:00pm					
2:00-2:30pm	<div style="background-color: #cccccc; width: 100%; height: 100%;"></div>				
2:30-3:00pm					
3:00-3:30pm			Subcommittee Meeting: IP Financing	Committee Forum: <i>How Well Do You Know Your Neighbor? What's New and What's Different about Canadian Secured Transactions</i>	
3:30-4:00pm					
4:00-4:30pm					
4:30-5:00pm	Leadership Meeting	Leadership Meeting			
5:00-5:30pm					
5:30-6:00pm	<div style="background-color: #cccccc; width: 100%; height: 100%;"></div>				
6:00-6:30pm					
6:30-7:00pm					
7:00-7:30pm	<p align="center">Section Dinner</p>				
7:30-8:00pm					
8:00-8:30pm					
8:30-9:00pm					

Saturday, April 18

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

American Bar Association ♦ Section of Business Law
Commercial Finance & Uniform Commercial Code Joint Committee Dinner

The Terminal City Club
837 West Hastings Street
Vancouver, BC

Thursday, April 16, 2009
7:00 PM – Cocktail Reception (Cash Bar)
8:00 PM - 11:00 PM - Dinner

DINNER RESERVATION FORM

Name: _____ Member ID# _____

Firm: _____

Address: _____

City: _____ State: _____ Zip: _____

Business Telephone: _____ Fax: _____

Accompanied by: _____

Are special arrangements needed for the physically challenged? _____

DINNER FEE

_____ # of tickets @ \$100 each = \$ _____

Please let us know of any special dietary needs you may have: _____

METHOD OF PAYMENT

_____ Enclosed check (made payable to the American Bar Association)

_____ MasterCard _____ Visa _____ American Express

Card #: _____ Exp. Date: _____

Signature: _____

Please return this registration form and your payment no later than March 26, 2009; 5:00PM Central Standard Time to:

Toyin Alaka
American Bar Association ♦ Section of Business Law
321 N. Clark Street
Chicago, IL 60654
alakat@staff.abanet.org
Phone (312) 988-5564; Fax (312) 988-5578

(Faxed reservations must include credit card payment)

Refund Policy: Requests for refunds on ticketed events will be granted only if the request is received in writing prior to Thursday, March 26, 2009. No refunds will be granted after that date. To request a refund, please email Toyin Alaka at the above email address.

Permanent Editorial Board for the Uniform Commercial Code

**PEB COMMENTARY NO. ____
SECTIONS 4A-502(d) and 4A-503**

Draft for Public Comment

February 27, 2009

Comments on this draft must be submitted by no later than May 8, 2009.

Comments may be submitted as follows:

by email to ddissinger@ali.org

or

by mail to
Deanne Dissinger, Associate Deputy Director
The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104

This draft is available online at:

www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=4.

PEB COMMENTARY NO. ____
SECTIONS 4A-502(d) and 4A-503

INTRODUCTION

A funds transfer is a series of payment orders starting with an originator's order to the originator's bank to cause a sum certain amount of money to be paid to a beneficiary. The series of payment orders culminates with a beneficiary bank crediting the account of a beneficiary for that sum certain. U.C.C. § 4A-104(a) (definition of funds transfer). Generally the originator owes the beneficiary a debt and the series of payment orders is a mechanism used to make a transfer of value through the debiting and crediting of bank accounts from the originator to the beneficiary. The funds transfer often involves one or more intermediary banks that receive a payment order from the originator's bank or another bank and that intermediary bank issues its own payment order to another bank or the beneficiary's bank. Several cases have raised the issue of whether a creditor of the beneficiary may serve creditor process on an intermediary bank and thus "capture" the value transfer while it is in process.

Article 4A provides that the creditor of the beneficiary may not serve creditor process on any bank other than the beneficiary's bank. U.C.C. § 4A-502(d). Official Comment 4 to Section 4A-502 further explains the concept:

A creditor of the originator can levy on the account of the originator in the originator's bank before the funds transfer is initiated . . . but cannot reach any other funds *because no property of the originator is being transferred*. A creditor of the beneficiary cannot levy on property of the originator and until the funds transfer is completed by acceptance by the beneficiary's bank of a payment order

for the benefit of the beneficiary *as the beneficiary has no property interest in the funds transfer which the beneficiary's creditor can reach* (emphasis supplied).

Official Comment to Section 4A-503 further explains both Sections 4A-502(d) and 4A-503 are designed to prevent interruption of a funds transfer after it has been set in motion and that, in particular, intermediary banks are protected.

A funds transfer is a series of payment orders that create contractual obligations only as to the sender and receiver of each payment order. Those contractual obligations are not the property of either the originator or the beneficiary. In a simple funds transfer, the originator instructs its bank, the originator's bank, to debit the originator's account and order the beneficiary's bank to credit the beneficiary. Those instructions are payment orders. U.C.C. § 4A-103 (definition of "payment order," "beneficiary" and "beneficiary's bank"; § 4A-104 (definition of "funds transfer," "originator" and "originator's bank"). See also Regulation J, 12 C.F.R. § 210.26 (governing payment orders issued to or by the a federal reserve bank). The originator is the "sender" of the payment order and the originator's bank is the "receiving bank." U.C.C. § 4A-103 (definitions of "sender" and "receiving bank"). If the originator's bank accepts the originator's payment order, the originator owes an obligation to the originator's bank to fund that payment order with sufficient credits to pay the amount of the payment order. U.C.C. § 4A-402(b). The originator's bank owes an obligation to the originator to execute the accepted payment order according to the instructions of the originator. U.C.C. § 4A-302.

In execution of the originator's payment order, the originator's bank may send its own payment order to the beneficiary's bank, but more commonly it will send its payment order to an intermediary bank. U.C.C. § 4A-104 (definition of "intermediary bank"). The originator's bank

is the sender of its payment order and the intermediary bank is the receiving bank of that second payment order. Upon acceptance of that second payment order, the intermediary bank owes an obligation to the originator's bank, not the originator, to execute its own payment order that replicates *the originator's bank's payment order* (emphasis supplied). U.C.C. § 4A-302 (obligation in execution owed by receiving bank to its sender). The originator's bank, not the originator, owes payment of the originator bank's payment order to the intermediary bank. U.C.C. § 4A-402(b) (sender owes obligation to pay the amount of an accepted payment order to its receiving bank). In the event the originator does not have sufficient credits to cover its payment order, but the originator's bank's payment order has been accepted by the intermediary bank, the originator's bank still owes a payment obligation to the intermediary bank. The intermediary bank has no right of recovery against the originator, but only has a right of recovery against the originator's bank (its sender) for payment of the payment order.

Further, the intermediary bank will then issue its own payment order to the beneficiary's bank for the beneficiary's bank to credit the account of the beneficiary when the beneficiary's bank accepts that payment order. Accordingly, the intermediary bank owes an obligation to pay for that order to the beneficiary bank, not the beneficiary. U.C.C. § 4A-402(b). Upon the beneficiary bank's acceptance of the payment order, it is the beneficiary's bank that owes an obligation to pay the beneficiary, usually by crediting an account of the beneficiary. U.C.C. § 4A-404. See also Regulation J §§ 210.28, 210.29, 210.30, 210.31 and 210.32.

In summation, under the Article 4A structure, the issuance and acceptance of payment orders create rights and obligations only as between (i) the sender of the payment order and its receiving bank (e.g., between originator and originator's bank as to the originator's payment

order), (ii) the originator's bank and an intermediary bank as to the originator's bank's payment order, and (iii) the beneficiary bank that has accepted a payment order and the beneficiary.

Accepted and executed payment orders thus create contractual obligations that result in a series of credits and debits to bank accounts rather than transferring property of the originator to the beneficiary.¹ A receiving bank owes its contractual obligation to its sender in execution of the payment order and the sender owes its contractual obligation to pay the amount of the payment order to its receiving bank. The intermediary bank has no contractual obligation to the originator or beneficiary and neither the originator or the beneficiary have any contractual obligation to the intermediary bank. Thus, credits in an intermediary bank are credits in favor of the originator's bank, *and are not property of either the originator or the beneficiary* (emphasis supplied).

DISCUSSION

In a series of cases applying Admiralty Rule B regarding attachment, the federal courts in New York have held that the intermediary bank in a funds transfer is holding "property" of the originator or beneficiary and have thus allowed creditor process on an intermediary bank in an effort to collect a debt owed by either the originator or the beneficiary (as the case may be).²

¹This analysis is the same as that under Uniform Commercial Code Article 8 § 8-502 in the context of the indirect holding system for securities. That process also involves credits and debits to "securities accounts." Official Comment 2 to § 8-502 states that because securities trades are typically settled on a net basis (as are funds transfers under § 4A-403), it would ordinarily be impossible for anyone to trace the path of any particular security. Even if there were only one trade, however, the "security entitlement of the buyer [in the Article 4A context, the credit to the beneficiary's account] *is not the same item of property that formerly was held by [seller] . . . , but is a new package of rights that . . . [buyer] acquired against [the securities intermediary]*" (emphasis supplied).

²Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, Admiralty Rule B(1)(a) permits attachment of "the defendant's tangible or intangible personal property" in the hands of named garnishees and thus allows garnishment of such property held by a bank.

See, e.g., Winter Storm Shipping, Ltd. v. TPI, 310 F.3d 263 (2d Cir. 2002), cert. den. 539 U.S. 927 (2003); Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434 (2d Cir. 2006); Consub Delaware LLC v. Schahin Engenharia Limitada and Standard Chartered Bank, 534 F.3d 104 (2d Cir. 2008); Navalmar (U.K.) Ltd. v. Welspun Gujarat Stahl Rohren, Ltd., 485 F. Supp. 2d 399 (S.D.N.Y. 2007); Compania Sudamericana de Vapores S.A. v. Sinochem Tianjin Co., 2007 WL 1002265 (S.D.N.Y. 2007); but see Seamar Shipping Corp. v. Kremikovtzi Trade Ltd., 461 F. Supp. 2d 222 (S.D.N.Y. 2006).

These decisions stem from the opinion of the court in *Winter Storm* that the value held by the intermediary bank is property of either the originator or the beneficiary. Under Article 4A, which is also adopted federal law in Regulation J for funds transfers through a federal reserve bank, the originator does not have any claim against the intermediary bank for return of the value in the event the funds transfer is not completed. Rather the only party with a claim against the intermediary bank is the sender to that bank, which is typically the originator's bank. In an uncompleted funds transfer, it is the originator's bank that must refund the value to the originator. U.C.C. § 4A-402(d). The intermediary bank owes its refund obligation to its sender, the originator's bank, not the originator. The originator's bank must refund to the originator even if it cannot recover from the intermediary bank.³ The beneficiary likewise has no claim to

³A simple example illustrates these courts' error in conflating privity based contract claims between two parties to create property rights in a third party. Assume A owes B an obligation, B owes C an obligation, and C owes D an obligation. Under garnishment law, D cannot garnish A to satisfy the obligation C owes D. A holds no property of C (A owes B). Now substitute the Article 4A terms to this simple example. A is the intermediary bank who has received payment of a payment order issued by B, the originator's bank, and C is the originator. D is the garnishing creditor. The court in *Winter Storm* and its progeny have in essence allowed D (the originator's creditor) to garnish A (the intermediary bank) to collect on the debt C (the originator) owes to D.

any payment from the intermediary bank. The beneficiary's only claim to the funds is against its bank, the beneficiary bank, and then only when the beneficiary bank has accepted the payment order. U.C.C. § 4A-404. The intermediary bank thus holds no property of either the originator or the beneficiary. Since Admiralty Rule B does not define what is "property" of a party, normally courts look to other law on that issue.

Other law is sufficient to define the parties' rights in a funds transfer. Article 4A is uniform law, enacted in every state in the United States, and Regulation J, which adopts in large part Article 4A's provisions, is uniform in applying to all funds transfers through the federal reserve system. Both define uniformly the rights of parties in a funds transfer. The *Consub* court reasoned that leaving the functional usefulness of Rule B attachments to the vagaries of the laws of fifty states would create a measure of anarchy, but was seemingly unaware that U.C.C. Article 4A is uniform law in all U.S. jurisdictions and is adopted federal law.⁴ The court also failed to explain how Rule B provides any basis for determining whether anyone had any "property" rights in the value held at the intermediary bank.⁵

⁴The courts following *Winter Storm* have ignored not only the applicable law directly on point regarding property rights, but have also ignored applicable precedent pre-dating Article 4A. The court in *Reibor International Limited v. Cargo Carriers (Kacz-Co.) Ltd.*, 759 F.2d 262 (2d Cir. 1985) considered whether the CHIPS credit involved was property subject to attachment under the Admiralty Rules. The court said that federal law generally governs questions as to the validity of Rule B attachments, but the Admiralty Rules themselves offered little guidance and so the court agreed with the district court that state law more directly in point should be turned to. This is entirely consistent with respect to other contexts where federal law relies on state law to determine whether property is involved, such as in bankruptcy. *See, e.g., Butner v. United States*, 440 U.S. 48 (1979). The court also stated it turned to state law partly to minimize disruptive divergences between state and federal law, freeing garnishees from the burden of keeping track of yet another difference between state law and federal law.

⁵ The *Consub* court also believed that the *Winter Storm rule* was not shown to be unworkable. Note that U.C.C. Article 4A is substantially premised on the ability to net obligations because of the large sums involved. U.C.C. § 4A-403. If a particular creditor can

CONCLUSION

In uniform law under UCC Article 4A and under Regulation J, neither the originator or the beneficiary of a funds transfer have any property claim to the value held by an intermediary bank in a funds transfer. Thus, neither a creditor of an originator nor the creditor of a beneficiary may successfully issue creditor process⁶ to an intermediary bank as the intermediary bank is not holding property of either the originator or the beneficiary. To the extent that the cases cited earlier indicate to the contrary, that reasoning is disapproved and should not be followed.

seize funds and frustrate that plan, the resultant systemic risk may well provide the demonstration that the *Winter Storm* approach and its progeny is unworkable.

⁶ “Creditor process” means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account. As to “account,” see “authorized account” defined in § 4A-105(a)(1).

**SUMMARY OF
INTERNATIONAL INSTRUMENTS RELATING TO
SECURED TRANSACTIONS**

By Neil Cohen and Steve Weise

Several international organizations - The Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT), and the United Nations Commission on International Trade Law (UNCITRAL) - have been active in preparing instruments that can affect secured transactions and similar financing transactions. Some of these instruments are conventions that have gone into effect with the United States as a "contracting state." Others are conventions not yet in effect because the required number of ratifications has not been achieved. Still others are model laws or "legislative guides" that may influence the development of the law, particularly outside the United States. When these instruments have the force of law, they should be considered by persons engaging in transactions that may be governed by them. Even when they do not currently have the force of law, attorneys should be aware of these instruments, as they may presage legal developments in accordance with the rules recommended in them. This article summarizes the scope, application, and status of the instruments.

General

- *UNIDROIT: Convention on International Factoring*: This Convention addresses the relationship among factor, supplier, and debtor resulting from assignment of receivables arising from sale of goods. Seven countries are parties to this Convention. The United States has signed the Convention but has not ratified it.¹
- *United Nations Convention on the Assignment of Receivables in International Trade*: Provides rules (some substantive, others conflict of laws) governing assignments of receivables (not limited to receivables arising from the sale of goods) in international trade, whether outright or for security. This Convention is not yet in effect. The United States has signed this Convention but has not ratified it.

¹ See <http://www.unidroit.org/english/implement/i-88-f.pdf>.

- *UNCITRAL: Legislative Guide on Secured Transactions*: Comprehensive law governing creation, third-party effectiveness, priority, and enforcement of security rights in movables and outright transfers of receivables. The UN General Assembly has approved this Guide.

Mobile Equipment

- *UNIDROIT: Convention on International Interests in Mobile Equipment (Cape Town)*: Addresses creation, effectiveness against third parties, priority, and enforcement of rights created by security interest, conditional sale, or lease of mobile equipment that is the subject of a protocol. This Convention has been joined by 31 states, including the United States.
- *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*: Protocol to Cape Town Convention for airframes, aircraft engines, and helicopters. This Protocol has been joined by 28 states, including the United States.²
- *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg Protocol)*: Protocol to Cape Town Convention for rolling stock. This Protocol is not yet in force.

Leasing

- *UNIDROIT: Model Law on Commercial Leasing*: This model law provides substantive rules governing both financial and non-financial leases of property (including assets that become fixtures) used in trade or business, including plant, capital goods, equipment, future assets, specially manufactured assets and living and unborn animals. This was approved by the UNIDROIT Governing Council in Fall 2008.

Securities

- *Hague: Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary*: Determines applicable law governing rights resulting from credit of securities to a securities account and disposition of securities held with an intermediary, as

² China joined on February 3, 2009.

well as issues of perfection, priority, and realization. This Convention is not yet in effect.

- *UNIDROIT: Convention on Substantive Rules Regarding Intermediated Securities*: This Convention provides substantive rules concerning the rights resulting from the credit of securities to a securities account as well as rules for security interests therein; it also addresses priority of interests, and protection from adverse claims for good-faith purchasers. This project is continuing.

Private International Law

- *Hague: Feasibility Study on the Choice of Law in International Contracts*: Study for possible international instrument addressing choice-of-law issues, including party autonomy and its limits and determination of applicable law in the absence of choice by the parties. This project is continuing.

ADDRESSING THE CHALLENGES OF UCC FILING AND SEARCHING IN WASHINGTON, D.C.

by Clare Oliva, National Corporate Research, Ltd. (“NCR”)

As lenders and their counsel know, Revised Article 9, §9-307(c), which became effective in July 2001, requires filing in Washington, D.C. for debtors that are not “registered organizations,” such as foreign entities, where the chief executive office is located in a jurisdiction that does not have a UCC-type filing/notice system that would give priority over the rights of a lien creditor with respect to the collateral. Less well known, however, is that the D.C. Recorder of Deeds’ office has not updated its filing system and procedures to adequately handle on a timely basis the resulting increase in volume of filings. This presents significant challenges secured lending practitioners need to be aware of and address when filing or searching UCCs in Washington, D.C.

Did You Get the File Date You Expected?

The D.C. Recorder of Deeds’ office (“ROD”) is often unable to process all filings received on the date submitted. Additionally, ROD's procedures allow, in certain cases, for some UCCs to be processed and filed ahead of others previously submitted. ROD views UCC filings received in two categories: (1) five or fewer filings submitted at one time, and (2) more than five filings submitted at one time. More than five filings submitted simultaneously is considered a “*bulk submission*.” ROD prefers to receive bulk submissions by 11 AM, but will accept them later; however getting UCCs in a bulk submission filed the day they are submitted is unlikely when submitted after 11 AM. Five or fewer filings can be submitted any time between 8:30 AM and 3:45 PM and usually get the same day’s date, even when submitted AFTER bulk submissions submitted after 11 AM. In general, most filings are filed by the next business day at the latest, although there are occasional exceptions where filings may get processed and dated two or more days after submission.

- **Tip # 1:** *When working with a service company, make sure your rush D.C. filings are not included in “bulk submissions” after 11 AM.*

Ensuring UCC3s Are Properly Associated with Corresponding UCC1s:

Unlike most filing offices, **ROD's system is not able to connect a UCC3 to the corresponding UCC1 by file number.** As a result, ROD requires that the debtor name be listed in box 10 (Optional Filer Reference Info) of a UCC3 amendment. Providing the debtor name in box 6 only and not in box 10 (except for debtor name change amendments) will, in most cases, result in rejection of the filing.

In those instances where ROD accepts a UCC3 without a debtor name on the form, it often gets indexed as “*Debtor Name Omitted*” (or some variation thereof) and will not be found on a search. This situation was much more common in the first few years under Revised Article 9 until ROD started rejecting UCC3s without the debtor name on it. There are, however, still hundreds of UCC3s in ROD's system that are not indexed under the correct debtor name¹. These filings will not be revealed when a search of the proper debtor name is conducted.

When filing a UCC3 online through the ROD web site, the system prompts the user to “*Enter Debtors from UCC1*”. If the name is not entered, a reminder appears but the entry of the name is not required. Thus, UCC3s filed online without the debtor name(s) entered will also not be found on a search.

¹ On March 5, 2009, a search of ROD's Grantor/Grantee index for the debtor name “Debtor” revealed 337 filings indexed in the system as “*Debtor Name Omitted*”, “*Debtor not listed*” or some variation thereof.

If/when ROD realizes that a filing is not indexed (which can be months after it is accepted), the filing will be returned with a “Re-Recording Certificate” to the party listed in the “Send Acknowledgment to” box on the form. The filer must then return the certificate with a corrected copy of the filing with the debtor name on it and pay an additional fee to get it indexed. ROD will then file the “Re-Recorded Certificate” with a copy of the corrected filing and the index will show the filing date as the date the Re-Recorded Certificate was filed. Note, however, that the copy of the corrected filing will still show the original file date stamped on it. In this situation, the filing accepted without the debtor name on the earlier date will still be floating around in ROD's system and *if searched by file number*, it will come up showing the first (earlier) date.

- **Tip # 2:** *Make sure to include the debtor's name in box 10 on all amendment filings and do a post-filing search against the debtor name to ensure the amendment will be found on a search.*

Filing and Search Considerations for Debtor Names with Foreign Punctuation/Special Characters:

As discussed on the UCCLaw listserve, filers using ROD's web filing system need to be aware of how ROD indexes UCCs against debtor names that contain foreign punctuation or special characters, such as the accent mark in the name “René”. When such a name is submitted on an electronic UCC filing in ROD, instead of disregarding only the punctuation, ROD's system also disregards the character associated with the punctuation. As such, the name “René” would be indexed in ROD's system as “Ren” and would not be found when searching the name “Rene”. Copies of the filing will show the name the way it was indexed, so it is unlikely the filer would be “saved” by D.C.'s Article 9, §28:9-517².

When this type of error is brought to the attention of ROD, the indexing of the name is corrected in the system but no notice is placed in the public index regarding the date the correction was made. Thus, such a filing that is not found initially on a search would later be found by a subsequent searcher without any indication of the index correction date, contrary to **Section 513.17(f)** of D.C.'s UCC Regulations³.

When a paper UCC filing is submitted with a name containing foreign punctuation, the name gets entered into ROD's system leaving off only the punctuation mark(s). Thus, filings submitted electronically and on paper against the same exact debtor name containing special characters will be indexed two different ways in the system.

In April 2008, National Corporate Research, Ltd. (“NCR”) contacted Landata, the company that handles ROD's electronic filing system, about this issue. The company indicated it would consider placing a notice on the ROD's electronic filing web page warning filers not to use foreign punctuation/special characters when preparing filings. As of the date of this writing, however, no such notice has been posted. When asked what, if anything, will be done about past filings indexed incorrectly in ROD because of this issue, Landata indicated it did not have a way to find the past filings and would contact the ROD's office about locating and correcting these filings. NCR has tried

² D.C. §28:9-517: **“Effect of Indexing Errors.** *The failure of the filing office to index a record correctly does not affect the effectiveness of the filed record.”*

³ Section 513.17(f) of D.C.'s UCC Regulations (<http://otr.cfo.dc.gov/otr/cwp/view,a,1330,q,594604.asp#17>) states: **“Errors of the Filing Office** - *The recording office may correct the errors of the recording office personnel in the UCC information management system at any time. If the correction is made after the filing office has issued a certification date that indicates the recording date of a corrected document, the filing office shall proceed as follows. A record relating to the relevant initial financing statement will be placed in the UCC information management system stating the date of correction and explaining the nature of the corrective action taken. The record shall be preserved for so long as the record of the initial financing statement is preserved in the UCC information management system.”*

to contact the ROD's office to ask about this and the manner in which the index is being corrected, but as of this writing, the calls have not been returned.

- **Tip # 3:** *Secured parties who have included foreign punctuation in debtor names on UCCs filed in D.C. electronically may want to do a search to confirm how their filings were indexed and, if necessary, request that the index be corrected for any affected names. Filers wanting the correct name with the special punctuation to appear on copies of the filing made available to searchers would be well advised to avoid electronic filing and submit the filing on paper.*

OTHER SEARCH/INDEXING ISSUES:

Is Searching Only the Grantor Index Enough?

ROD does not conduct searches for the public, but provides an online search system. However, the way filings are indexed can make it difficult to get an accurate search. The system allows searchers to search the "Grantor" or "Grantee" index or both. Normally, a searcher would search only the debtor (Grantor) index, but in D.C., debtors are frequently mis-indexed as secured parties. Thus, if only the Grantor (debtor) index is searched, filings will sometimes be missed because the debtor names have been indexed as Grantees (secured parties)⁴.

- **Tip # 4:** *Make sure to search **both** the Grantor and Grantee indexes in D.C. to ensure you are aware of effective filings against debtors that may have been indexed as Grantees.*

Typos in the Index:

Another concern for searchers is that typos are frequently made when debtor names are entered into the ROD index. On August 21, 2008, NCR noted that 237 filings against Bear Stearns were mis-indexed as "**Bear Steams**" in ROD's index. These are all filings that were not found when someone searched the correct name. At that time, there were 1799 filings in ROD's system indexed against the correct spelling "Bear Stearns". Therefore, as of that date, 12% of the filings against Bear Stearns in ROD were indexed incorrectly. NCR brought this to the attention of the supervisor in the ROD's office at that time and noted that, as of early October 2008, the index had been fixed for these filings. Unfortunately, this type of indexing error is not uncommon and those relying on ROD UCC searches to make lending decisions or write legal opinions cannot be certain all effective filings are revealed on searches.

Through Dates: Can You Rely on Them?

NCR has seen many examples of incorrect through dates being posted to the ROD search system. The incorrect through dates are discovered when clients ask why specific recent filings prior to the through date were not included in search results. By way of example, a search NCR did with a through date of 5/20/08 did not reveal two filings dated 5/14/08. This was brought to the attention of the supervisor in the ROD office on 5/28/08. A daily check of ROD's system finally showed the missing filings on 6/12/08 when the through date was 6/2/08.

What Should Filers and Searchers Do?

Interested parties are urged to communicate concerns to the ROD's office in order for these issues to be addressed. Unless and until these problems are addressed and corrected, filers and searchers may be well advised to:

⁴ As one example, a search of financing statements and amendments for "Citibank" as Grantor (**debtor**) in ROD's system on 12/19/08 revealed 9,360 filings. Filings viewed by NCR in a random sampling confirmed that Citibank was the Grantee for a large number of these filings.

- Always do post-filing searches to ensure filings are properly indexed. While this is recommended in all jurisdictions, it is especially important in D.C. While having a search reveal a filing is not necessary to ensure legal sufficiency,⁵ it can potentially save the secured party the cost of future litigation.
- If the debtor name contains foreign punctuation/special characters, to ensure the filing is on record showing the true, correct name, avoid filing online and submit the filing on paper. When searching debtor names containing these special characters (e.g. “Café Grande, Inc.”), search the name two ways: (1) with just the foreign punctuation removed (e.g. “Cafe Grande, Inc.”) and (2) with the foreign punctuation and letter associated with it removed (e.g. “Caf Grande, Inc.”).
- When working with a service company, make sure your rush D.C. filings are not included in “bulk submissions” after 11 AM and that both the grantor and grantee indexes are always searched.

Until the ROD’s office is able to correct these problems, filers and searchers need to be cognizant of these issues and legal opinions based on D.C. search results should be carefully qualified.

.....

Clare Oliva is a Vice President of National Corporate Research, Ltd. (“NCR”), a nationwide provider of registered agent, filing, research and library services. She has worked in the UCC/corporate service industry since 1978 and has extensive knowledge of the statutory requirements and practical applications of UCC filing rules. Article 9 reference pieces developed by Ms. Oliva have been included in legal publications such as the “Commercial Law Practice Tips” guide of the American Bar Association Business Law Section and in handout materials for the 2002 CLE seminar presented by the New York City Bar Association, “Pitfalls Under Revised UCC Article 9.”

⁵ Per D.C. §28:9-517 – see footnote 2.

LOAN SYNDICATIONS AND TRADING: A RECAP OF 2008

By

Bridget Marsh and Ted Basta¹

Introduction

Last year, in an article published in this journal, we gave an overview of the history of the leveraged loan market. We traced not only the growth of the asset class over the past 15 years but the growth of the Loan Syndications and Trading Association (the “LSTA”), the not-for-profit organization for the corporate loan market whose mission is to promote a fair, orderly and efficient corporate loan market. Among our conclusions, we commented that, as 2007 drew to a close, both the primary market and secondary trading market were in a period of flux as borrowers and lenders evaluated the future and noted that the market and the LSTA were entering a more challenging period with loan prices more closely correlated to, and no longer shielded from, the daily price fluctuations of other asset classes.

As expected, 2008 was a decidedly more challenging period (to say the least), with the secondary market entering an era of unprecedented volatility. Although the market rebounded for a short time in the second quarter, it retreated again during the third quarter and a steep pattern of price declines continued through the end of the year. The most favorable characteristics of the asset class -- low volatility and excellent risk-adjusted returns -- were no longer defining characteristics of the asset class in 2008.

In this article, we will provide an overview of the leveraged loan market in 2008, highlighting several factors -- the marked price declines, the rise in defaults, and the heavy trading volumes -- and then we will discuss how the LSTA has responded to those market conditions and how it plans to navigate the market’s future challenges.

¹ The authors are employees of the LSTA. Bridget Marsh is Senior Vice President and Assistant General Counsel, and Ted Basta is Vice President, Market Data & Analysis.

2008: A Market Recap

Although 2007 will be remembered for the subprime mortgage meltdown that led to a global credit crunch, 2008 will be remembered as the year the US economy was sent spiraling into a recession. Within the leveraged loan market, 2008 will be remembered as the year of the negative return -- the S&P/LSTA Leveraged Loan Index (“LLI”) recorded a negative 29.1% on the year which represented the loan market’s first annual loss after eleven straight years of positive returns, dating from the start of the LLI in 1997. In comparison to the LLI, Closed-end exchange-traded loan funds performed far worse in 2008 at negative 49.6% ([FIGURE 1](#)). The difference in returns can be summarized simply by one word -- leverage -- how it magnified unrealized losses through increased exposure and subsequently produced severe realized losses as funds were forced to sell those positions into a secondary market that never found its perceived bottom until year end. As returns in the leveraged loan market fell to historical lows, volatility reached all-time highs. The LLI average 12-month lagging standard deviation of returns shot up to 4.64% by year-end. This means that volatility in the leveraged loan market was more than four times greater than in 2007.

In 2008, the primary market remained virtually dormant with very little new issuance of leveraged loans. Total new issuance was approximately \$70 billion, of which only about \$2 billion was issued in the fourth quarter. Both figures represent historic year over year declines of 97% and 84%, respectively, according to Reuters LPC. As supply dwindled so did demand. For the first time in a decade, the number of total institutional loan investor groups and portfolios shrank year over year. The number of manager groups fell 20% in 2008 to 246, and the number of active loan investment vehicles under their management shrank 7% to 816, according to Standard & Poors LCD. Despite the reduced number of players, secondary trading volume totaled \$510 billion in 2008 -- which was not far off the record \$520 billion of the previous year.

By the end of March 2008, the secondary loan market found itself mired in a more volatile but less liquid market condition. The average secondary Mark-To-Market (MTM) price fell below 89, off more than 6 points since January, and bid-ask spreads had widened to 145 bps from a sub-100 bps context. Following what was then considered its

worst performance ever, the secondary market rallied off its first quarter lows during the second quarter. The LLI went on to produce the then best quarterly loan market return ever at 4.94% but the rally did not last. By the end of the third quarter, Lehman Brothers had just filed for bankruptcy and the aftershocks reverberated through the entire financial system. Within the leveraged loan market, all MTM price gains of the prior quarter gave way to MTM losses. Previous sources of demand, such as hedge funds, faced redemptions, and some Market Value CLOs and Total Return Swap (TRS) lines were forced to unwind, which flooded an already slumping secondary market with still more supply. As a result of this loss in demand and systemic liquidity strain, the LSTA's 3Q08 Trade Data Study reported a 24% decline in quarterly trading volume which totaled \$107 billion ([FIGURE 2](#)).

The secondary loan market's price declines of the third quarter were pale in comparison to the price drops that reverberated through the secondary market in October. With a default rate already at a five year high of 3.3%, forced selling accelerated in the secondary market as investors who faced price triggers and margin calls were forced to sell holdings quickly through "BWICs" -- "Bids Wanted In Competition." According to LCD, year-to-date BWIC volume had totaled \$10 billion, with one third of that, \$3.3 billion, occurring in the month of October. As a direct result of this liquidity gap, the average MTM price fell 12 points to 73 as bid-ask spreads gapped out almost a full point to 290 bps by month-end ([FIGURE 3](#)). October's record price deterioration launched the percentage of loans priced below 90 to a record high of 95%, from 69% just one month earlier. October's loan returns tumbled to negative 13.22% representing their worst return to date.

November and December brought little relief for investors. By year end, the average MTM price fell to 64 with a bid-ask spread of 315 bps. MTM prices declined 25% in the fourth quarter and 32% for 2008. Fourth quarter trade volume fell \$7 billion to \$101 billion with 66% of trades occurring at a price below 80. Furthermore, the percentage of loans priced below 70 hit a record 57% by year end -- during the previous quarter, this percentage stood at 10% ([FIGURE 4](#)).

Amid the extreme market uncertainty, some investors made opportunistic investments over the first several weeks of 2009, but most remained on the sidelines, waiting to determine whether the market had reached its bottom. The lender base may be at an inflection point -- given today's depressed prices (and implied default and recovery rates), should they bid up the secondary while compelling buying opportunities are still available? Or, given the uncertainty and lack of leverage, should they "sit" on their existing cash reserves? Based on current data, it is possible that some are doing the former. Following seven months of unprecedented downward price volatility, the secondary finally began to pick up lost ground in 2009. MTM prices rose 7% to 69, bid-ask spreads tightened to 275 bps and the percentage of loans priced below 70 fell to "only" 50%. From a total return perspective, the LLI posted record results. After falling 28% in the final four months of 2008, the LLI was up 7.4% during January which represented the highest monthly return ever. Price gains could be attributed to a few factors including the amount of loans available for sale through BWIC activity, which finally abated. Lower volumes indicate that forced selling has subsided for now, but given the speed at which default rates are rising and expected recovery rates are falling that trend might be short-lived. Although January's rally came as a much needed boost to loan investor confidence, the proverbial bear does not seem to be sleeping quite yet.

The LSTA's Response

With the primary market virtually shutdown, secondary prices falling to unprecedented lows, and default rates rising, the LSTA responded swiftly to ever more challenging issues. Some of those issues were expected consequences of the state of the market (such as the greater volume of distressed trading) and some were unforeseen and unintended consequences (such as the potential negative impact on the market arising out of the possible application of certain federal tax provisions). The LSTA reacted quickly to these new market conditions by assuming a greater advocacy role for its members as it pushed for certain legislative changes, publishing revised trading documents, and streamlining the negotiation of documentation to improve settlement times (which is under greater scrutiny as the market focuses on counterparty risk). The section below will examine these initiatives in more detail.

Cancellation of Indebtedness Income

For years, the federal tax provisions relating to the recognition of Cancellation of Indebtedness Income (“CODI”) have provided that if proposed changes to a borrower’s credit agreement were “significant”, then the amendment would be treated as a deemed exchange of the new loan for the existing loan. If the issue price of the new loan were less than the issue price of the existing loan, then the difference is regarded as CODI which must be recognized by the borrower. If the debt is being “publicly traded” according to the provisions, then the issue price of the new loan would generally be the price at which the loan traded at the time of the amendment.² Although the relevant federal income tax law had been in effect for many years, they had little, if any, impact on loan market participants simply because performing loans typically traded close to or at par. With the steep decline in prices, borrowers seeking to modify the terms of their credit agreements could have incurred a significant CODI tax bill even though they would not have benefitted from any actual debt cancellation.

The LSTA immediately recognized the chilling effects such provisions could have on the loan market -- the provisions could force a company which was unable to pay the resultant tax bill into filing for bankruptcy rather than obtaining a sensible modification of their loan and covenant waiver. Within weeks of learning of the issue, the LSTA began advocating in Washington for a solution to the issue, meeting with members of the U.S. Department Treasury Office of Tax Policy to urge changes in administrative policy, and also making representations to Congress, urging legislative reform. Ultimately, the issue was addressed through legislation. In February 2009, by a Senate amendment to the so-called “Stimulus” bill, changes to the tax provisions were passed which provided that borrowers could defer recognition of CODI for several years and then recognize it over a longer period of time. The new law will greatly reduce or eliminate the tax burden for many borrowers and will allow them to seek covenant relief from their lenders and to offer those lenders fees and higher loan margins commensurable to the additional risk they agree to assume.

² For an overview of this issue, please see “Certain Important Tax Consequences of Amending Debt Instruments”, a client alert prepared by Craig Horowitz and Susanna Suh of Cahill Gordon & Reindel.

Increased Trading Volume and Settlement Times

As noted above, secondary trading volume in 2008 was comparable to the record of \$520 billion set the previous year. With such increased trading, the LSTA recognized the need for greater uniformity in the market and set a goal of completing its standard documentation projects by the end of 2008. The LSTA met that goal. In September 2008, we published a form of Proceeds Letter intended for use in instances where settling a trade does not occur until after confirmation and the effective date of a borrower's chapter 11 plan (once the borrower's plan has become effective, settlement can no longer result in transfer of the traded loan, which will have been restructured and discharged by the plan but only in the transfer of the proceeds under the plan of the loan and the related claim). In December 2008, we issued a form of Par Participation Agreement which can be used to settle par trades which cannot settle by an assignment of the loan to the buyer. With these latest publications, the LSTA now offers a complete suite of standardized trading documentation for the secondary market. By providing a standard form for every stage of a par and distressed trade, the time spent negotiating trading documentation and settling a loan trade should be reduced.

The LSTA has also recently released new versions of all trading documentation. Importantly, these revisions include provisions which should further help to reduce settlement times. For example, the LSTA's Par/Near Par Trade Confirmation includes the new Buy-in / Sell-out mechanism which represents an entirely new process for effecting a cover transaction when a par trade has failed to settle on time. It gives the party that is ready to settle a trade (the "performing party") the option to terminate the existing trade and effect a buy-in or sell-out as the case may be. It is hoped that the inclusion of the provision will encourage market participants to settle their par trades more quickly and at least before the right to invoke the new mechanism crystallises in favor of the performing party.

Participants in today's volatile market are acutely aware of counterparty risk and rising default rates. Although the introduction of the revised BISO mechanism represents one

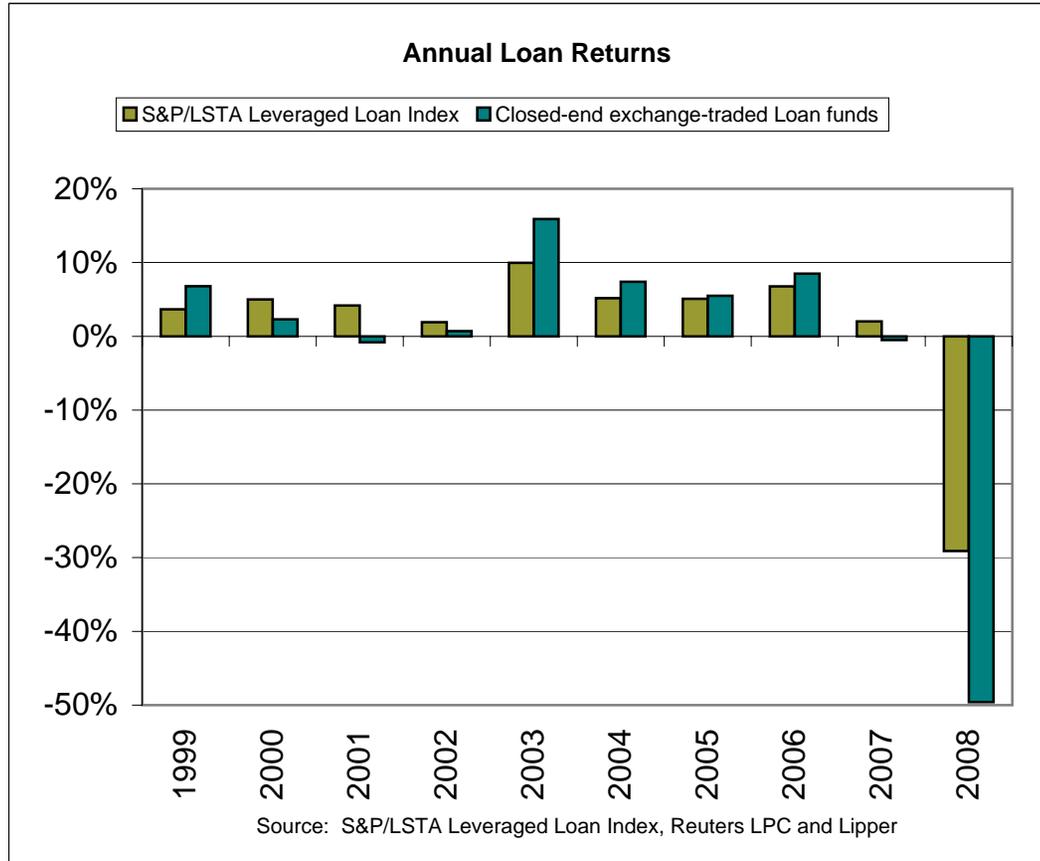
step towards helping to reduce the time it takes to settle a par trade, the LSTA continues to pursue several other legal initiatives all of which are designed to improve settlement times. With the increased volumes of distressed trading, the LSTA continues to seek to eliminate those factors which impede distressed trading. For example, settlement of distressed trades are often delayed as parties negotiate when the market shifted from trading a credit on par documents to distressed documents -- this "shift date" is relevant because it can affect certain representations given by the seller in the loan purchase and sale agreement. A party which continues to trade on par documents after the shift date might be asked to provide certain representations and warranties which speak not only to the status of their own action or inaction but also as to that of sellers who previously owned the loans. Given the possible risk involved in giving such representations, parties sometimes spend a lot of time debating the "real" shift date. The LSTA assists the market in making this determination by polling dealers and then sharing their responses on an anonymous basis with the market. However, the responses are often inadequate or confusing (i.e., several shift dates are given which might be months apart) and often provide little assistance to the market with parties sometimes delaying settlement until the market settles on the selection of one date. The LSTA has recently implemented measures to improve the quality of the responses and dates provided. In addition, we are exploring the possibility of forming a new "Determinations Committee" which would, amongst other things, be tasked with the selection of a shift date for each credit that shifts to trading on distressed documentation. The elimination of uncertainty in this area is yet another step towards gaining more efficiency in the settlement process.

* * *

Today's market certainly looks much different from one year ago and represents a new and more challenging period for not only investors, but also the LSTA. Loan prices are now said to be closely correlated to, and no longer shielded from, the daily price fluctuations of other asset classes. In this environment, the LSTA remains committed to promoting a fair, efficient, and liquid market for loans and maintaining its position as the market's principal advocate. We know that we will be called upon to address issues

raised by our membership as a result of the market volatility and to help effectively and promptly resolve those issues to ensure the market continues to operate smoothly and efficiently. As we commented in our conclusion last year, in all our pursuits and efforts to resolve those issues, the LSTA will continue to strive to resolve market challenges ever mindful of both its buy-side and sell-side constituents. Although sometimes regarded as having divergent views, we believe that the market's challenges of 2009 will raise more issues of shared concern to buy- and sell-side alike. We are confident that these challenges can be faced and surmounted.

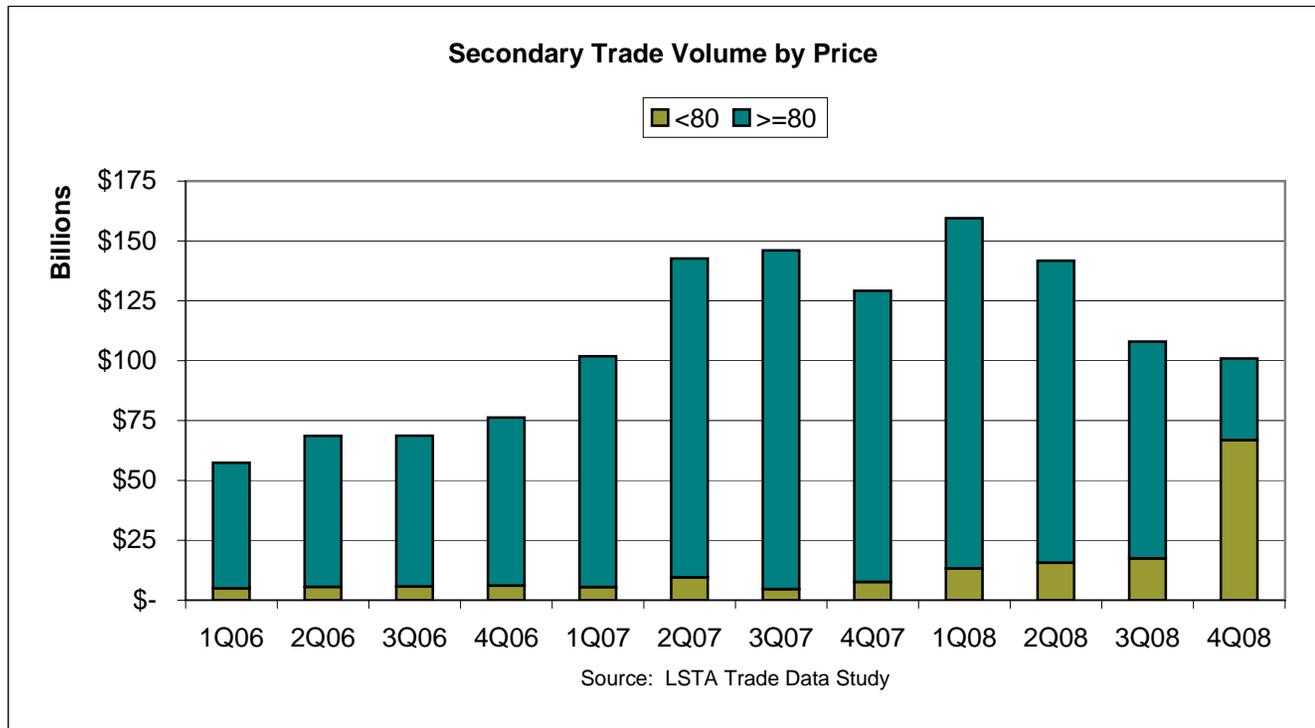
	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
S&P/LSTA Leveraged Loan Index	3.65%	4.99%	4.18%	1.91%	9.97%	5.17%	5.08%	6.77%	2.02%	-29.10%
Closed-end exchange-traded Loan funds	6.80%	2.30%	-0.80%	0.70%	15.90%	7.40%	5.50%	8.50%	-0.50%	-49.60%



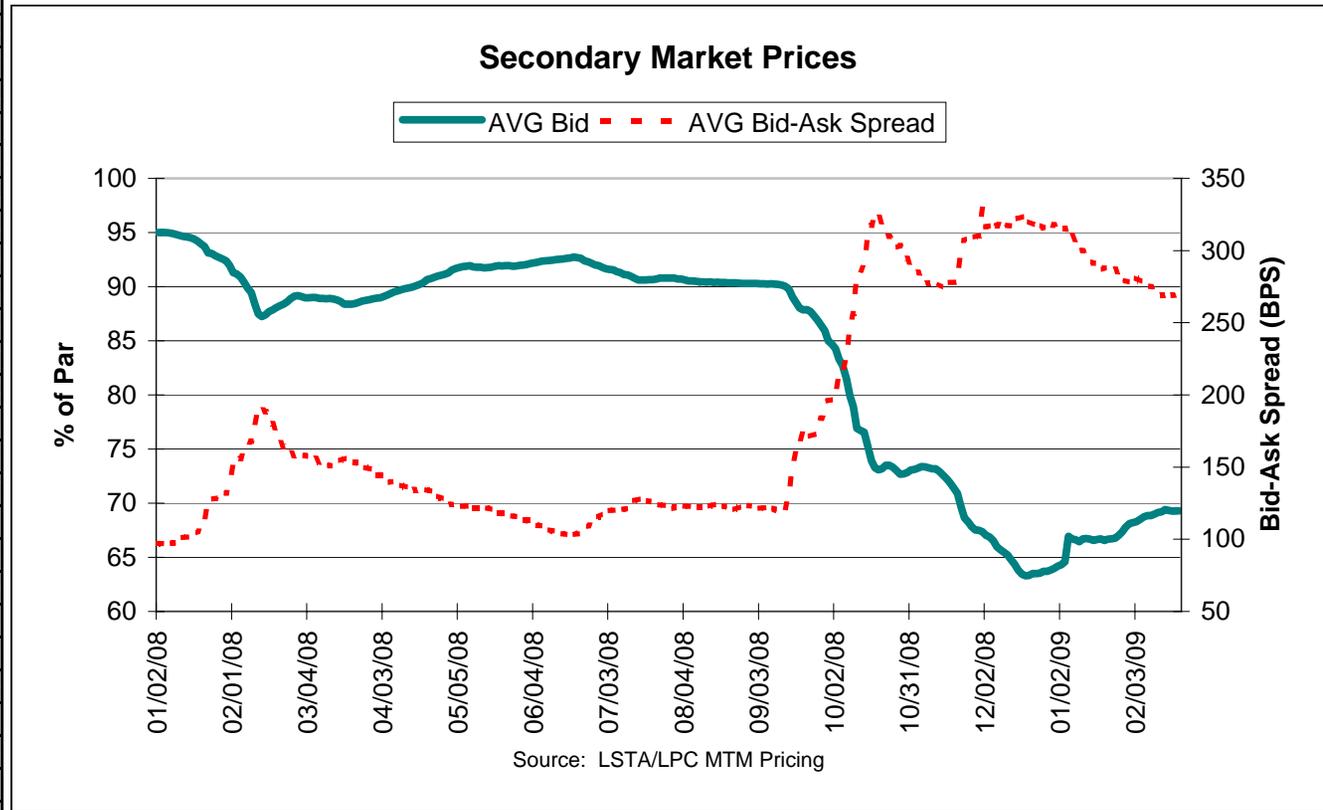
	1Q06	2Q06	3Q06	4Q06	1Q07
<80	\$ 4,925,071,163.90	\$ 5,500,299,250.35	\$ 5,699,284,233.81	\$ 6,056,494,379.09	\$ 5,476,828,978.81
>=80	\$ 52,472,527,773.61	\$ 63,130,823,382.60	\$ 63,014,856,030.52	\$ 70,203,360,845.54	\$ 96,407,082,484.89
	\$ 57,397,598,937.51	\$ 68,631,122,632.95	\$ 68,714,140,264.33	\$ 76,259,855,224.63	\$ 101,883,911,463.70

	2Q07	3Q07	4Q07	1Q08	2Q08
<80	\$ 9,493,778,775.36	\$ 4,609,069,036.27	\$ 7,549,716,288	\$ 13,225,389,908	\$ 15,653,177,646
>=80	\$ 133,199,872,046.40	141438371362.50	\$ 121,651,116,129	\$ 146,263,422,095.00	\$ 126,081,772,507
	\$ 142,693,650,821.76	\$ 146,047,440,399	\$ 129,200,832,417	\$ 159,488,812,003	\$ 141,734,950,153

	3Q08	4Q08
<80	17394193642	\$ 66,804,973,417.10
>=80	90574963172	\$ 34,134,486,655.07
	\$ 107,969,156,813.90	\$ 100,939,460,072.17



Pricing Date	AVG Bid	AVG Bid-Ask Spread
02-Jan-08	95.01308488	97.28398148
03-Jan-08	95.01012623	96.97632716
04-Jan-08	94.99891235	96.5862037
07-Jan-08	94.95955741	97.0237963
08-Jan-08	94.91501698	97.18935185
09-Jan-08	94.83325262	97.89184615
10-Jan-08	94.72154062	100.1552923
11-Jan-08	94.64564123	101.2392308
14-Jan-08	94.59075508	101.5406769
15-Jan-08	94.51614246	102.3504923
16-Jan-08	94.39857969	103.0677538
17-Jan-08	94.20528062	105.6219077
18-Jan-08	93.94312738	109.2673538
22-Jan-08	93.69434154	114.1471692
23-Jan-08	93.11145169	125.4428615
24-Jan-08	93.04459475	127.7382407
25-Jan-08	92.86574985	128.6255692
28-Jan-08	92.71176738	131.9562154
29-Jan-08	92.56318415	131.6028659
30-Jan-08	92.38550122	132.0982622
31-Jan-08	91.93548323	140.1137805
01-Feb-08	91.28631098	151.0215549
04-Feb-08	91.18832713	151.8007622
05-Feb-08	90.87729085	155.5864634
06-Feb-08	90.41392226	162.1110671
07-Feb-08	89.88749604	164.0829268
08-Feb-08	89.45425904	167.7126506
11-Feb-08	88.37543133	180.478012
12-Feb-08	87.47806517	190.4983784
13-Feb-08	87.24428318	191.1249249
14-Feb-08	87.41351081	188.2701201
15-Feb-08	87.70254955	185.364955
19-Feb-08	87.86239226	180.0802083
20-Feb-08	88.0559622	174.906994
21-Feb-08	88.22302173	168.2753571
22-Feb-08	88.38496815	164.2321429



25-Feb-08	88.58584524	161.8551488
26-Feb-08	88.88271935	161.493244
27-Feb-08	89.13001131	157.951994
28-Feb-08	89.16439137	157.4597619
29-Feb-08	89.08639792	158.7979822
03-Mar-08	88.96644303	158.0891667
04-Mar-08	88.98493561	156.9547321
05-Mar-08	88.98582315	156.5521068
06-Mar-08	89.00716766	156.0826409
07-Mar-08	88.92559226	153.4018452
10-Mar-08	88.92091577	153.2020299
11-Mar-08	88.88883065	152.1407143
12-Mar-08	88.89983423	150.7614881
13-Mar-08	88.84872887	151.2605952
14-Mar-08	88.77641429	153.033244
17-Mar-08	88.60933512	154.6370238
18-Mar-08	88.38232285	156.0124036
19-Mar-08	88.39027685	154.5239169
20-Mar-08	88.3846549	153.308368
24-Mar-08	88.43351834	153.2049704
25-Mar-08	88.5658472	152.0676401
26-Mar-08	88.667665	150.2994706
27-Mar-08	88.73204206	149.7502059
28-Mar-08	88.78573412	148.6031471
31-Mar-08	88.88432953	145.4192105
01-Apr-08	88.93102632	144.3846199
02-Apr-08	88.96117456	144.3848246
03-Apr-08	89.07958041	140.4115789
04-Apr-08	89.24856082	138.8805848
07-Apr-08	89.38012135	139.9664912
08-Apr-08	89.53767085	139.6155685
09-Apr-08	89.62277959	138.4061808
10-Apr-08	89.72951866	137.3133236
11-Apr-08	89.83389854	136.3575219
14-Apr-08	89.87820583	135.3982799
15-Apr-08	89.98334708	136.2365205
16-Apr-08	90.09607602	133.8915789

17-Apr-08	90.2117	133.7500585
18-Apr-08	90.35698392	133.8444152
21-Apr-08	90.64419912	134.1870175
22-Apr-08	90.73803801	133.2972515
23-Apr-08	90.84105439	131.0502924
24-Apr-08	90.97734591	130.1002047
25-Apr-08	91.05502093	128.3796802
28-Apr-08	91.13999593	128.6097674
29-Apr-08	91.2593211	127.6507803
01-May-08	91.51705	124.3171143
02-May-08	91.67065571	123.5819429
05-May-08	91.77381257	124.8853143
06-May-08	91.84532665	122.8032092
07-May-08	91.87011629	122.9806571
08-May-08	91.93667421	119.9038109
09-May-08	91.82601857	121.4036
12-May-08	91.79241891	121.4134957
13-May-08	91.80202837	121.7274212
14-May-08	91.73518778	122.1607102
15-May-08	91.76569124	121.7826554
16-May-08	91.8042915	120.5178754
19-May-08	91.88093824	120.3559773
20-May-08	91.94011497	118.1097175
21-May-08	91.92620737	118.1097175
22-May-08	91.94110169	115.8687006
23-May-08	91.94257697	115.6516573
27-May-08	91.8889132	116.1673034
28-May-08	91.92574706	115.7981232
29-May-08	91.97062773	114.2422969
30-May-08	92.01346415	113.004958
02-Jun-08	92.0630465	113.0988235
03-Jun-08	92.13273866	110.8328571
04-Jun-08	92.19480308	111.0217367
05-Jun-08	92.26358539	109.5435674
06-Jun-08	92.34342521	109.3710644
09-Jun-08	92.37940504	107.9561064
10-Jun-08	92.42641821	106.6991597

11-Jun-08	92.45271849	105.7070308
12-Jun-08	92.5141535	103.8177871
13-Jun-08	92.53110475	104.2375698
16-Jun-08	92.5620014	103.928324
17-Jun-08	92.62411709	103.1519048
18-Jun-08	92.6608888	103.0748459
19-Jun-08	92.73438939	103.2852235
20-Jun-08	92.66237849	103.921257
23-Jun-08	92.61314637	105.4827933
24-Jun-08	92.39612228	108.0868245
25-Jun-08	92.28953045	109.5298045
26-Jun-08	92.14503518	113.2609141
27-Jun-08	91.98775592	115.5547934
30-Jun-08	91.93441951	115.4144231
01-Jul-08	91.76799176	117.8875824
02-Jul-08	91.65822077	119.7118579
03-Jul-08	91.59513079	119.8335695
07-Jul-08	91.55558774	120.0807902
08-Jul-08	91.38732337	120.9973641
09-Jul-08	91.28726576	120.0505435
10-Jul-08	91.12230978	120.8941304
11-Jul-08	91.0767065	121.4304065
14-Jul-08	90.93439404	124.7627913
15-Jul-08	90.77889729	126.7976965
16-Jul-08	90.62216911	127.9461518
17-Jul-08	90.60796152	127.4193767
18-Jul-08	90.62942276	127.0489973
21-Jul-08	90.64027703	126.2899189
22-Jul-08	90.65071671	125.501752
23-Jul-08	90.71454661	124.8774526
24-Jul-08	90.79229	124.0009459
25-Jul-08	90.80716784	123.5390541
28-Jul-08	90.78154054	122.6767297
29-Jul-08	90.78679946	121.0096757
30-Jul-08	90.77996504	121.8515176
31-Jul-08	90.7130871	121.9322849
01-Aug-08	90.71015618	121.655672

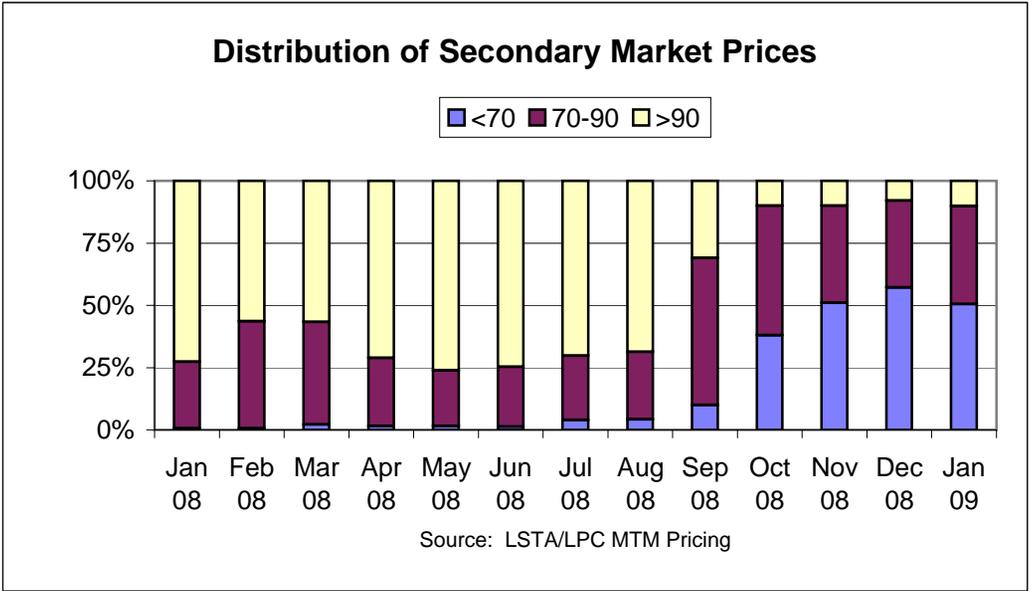
04-Aug-08	90.62967876	123.037043
05-Aug-08	90.52414247	122.8152419
06-Aug-08	90.52567453	122.5379357
07-Aug-08	90.50935737	122.0993029
08-Aug-08	90.45138097	122.3210456
11-Aug-08	90.42721582	122.3855764
12-Aug-08	90.4192118	123.7464611
13-Aug-08	90.43564468	123.0025266
14-Aug-08	90.39555332	124.1728912
15-Aug-08	90.4240191	122.1585942
18-Aug-08	90.38107241	121.8617772
19-Aug-08	90.38977692	123.2939523
20-Aug-08	90.36425756	121.2222016
21-Aug-08	90.34776737	121.0054907
22-Aug-08	90.36390212	120.5261376
25-Aug-08	90.3239291	122.3033862
26-Aug-08	90.30729074	122.6656878
27-Aug-08	90.29308915	123.4592328
28-Aug-08	90.30045159	123.1605291
29-Aug-08	90.30187857	122.7835185
02-Sep-08	90.29079206	122.1188095
03-Sep-08	90.26221349	121.3934921
04-Sep-08	90.26461293	121.8037203
05-Sep-08	90.24038285	120.1169129
08-Sep-08	90.26021266	122.136781
09-Sep-08	90.24355383	120.7473351
10-Sep-08	90.2061934	118.7240369
11-Sep-08	90.14039868	121.0303166
12-Sep-08	90.02959289	122.0189474
15-Sep-08	89.80268763	130.6403158
16-Sep-08	89.0439105	150.8930184
17-Sep-08	88.53187302	160.1985185
18-Sep-08	88.04005013	167.7041953
19-Sep-08	87.8568622	173.5784252
22-Sep-08	87.89415748	174.3431234
23-Sep-08	87.7057699	171.2710995
24-Sep-08	87.33784856	172.9773368

25-Sep-08	86.88224453	178.2066406
26-Sep-08	86.41407682	183.9859635
29-Sep-08	85.94498416	187.2609091
30-Sep-08	85.00768935	195.7538961
01-Oct-08	84.67204675	196.814026
02-Oct-08	84.2687226	200.786
03-Oct-08	83.28912831	214.2572727
06-Oct-08	82.73726753	215.8571688
07-Oct-08	81.52351273	225.0910909
08-Oct-08	79.93619662	247.3361039
09-Oct-08	78.91550649	256.1649091
10-Oct-08	76.92254078	284.2805974
13-Oct-08	76.71905325	286.7906494
14-Oct-08	76.57183429	290.258961
15-Oct-08	75.28371299	309.4923896
16-Oct-08	73.90524182	317.2454026
17-Oct-08	73.25694494	325.9835584
20-Oct-08	73.08284715	324.4133679
21-Oct-08	73.17008472	319.3497409
22-Oct-08	73.49881157	314.8255527
23-Oct-08	73.48663702	309.6517738
24-Oct-08	73.31944473	307.2810797
27-Oct-08	73.03591568	301.9732905
28-Oct-08	72.68858098	303.4667352
29-Oct-08	72.711291	297.4518509
30-Oct-08	72.81218946	294.5688946
31-Oct-08	73.05002494	288.5871979
03-Nov-08	73.11783769	285.2867436
04-Nov-08	73.23573385	284.6605128
05-Nov-08	73.37450949	280.3591026
06-Nov-08	73.35235667	281.0196154
07-Nov-08	73.27113077	277.159
10-Nov-08	73.17546051	278.6793846
11-Nov-08	73.16359795	279.5730691
12-Nov-08	72.91010408	276.5587245
13-Nov-08	72.59990128	274.2850255
14-Nov-08	72.25497366	276.15

17-Nov-08	71.88392864	277.7685166
18-Nov-08	71.38330638	278.1874235
19-Nov-08	70.91613265	282.8879847
20-Nov-08	69.69333632	297.4963683
21-Nov-08	68.66071582	306.7542092
24-Nov-08	68.25937372	309.1378827
25-Nov-08	67.81615918	308.5064796
26-Nov-08	67.54089923	309.3940306
28-Nov-08	67.4963648	310.4595408
01-Dec-08	67.36377908	328.7577296
02-Dec-08	67.02368827	316.4519388
03-Dec-08	66.87339668	317.2527041
04-Dec-08	66.51910204	313.8653827
05-Dec-08	65.97069872	317.0303827
08-Dec-08	65.6945824	321.0152806
09-Dec-08	65.46433069	320.2357801
10-Dec-08	65.21652097	317.534399
11-Dec-08	64.77585438	316.9477577
12-Dec-08	64.35695995	317.9578811
15-Dec-08	63.8276938	322.0476227
16-Dec-08	63.43839844	323.4809091
17-Dec-08	63.29321662	323.5283896
18-Dec-08	63.32435065	320.2285974
19-Dec-08	63.5070239	317.9836364
22-Dec-08	63.50052286	315.4242338
23-Dec-08	63.5420715	317.8009326
24-Dec-08	63.69592098	315.8248187
26-Dec-08	63.69925504	314.7438243
29-Dec-08	63.81269922	313.3443928
30-Dec-08	63.95678966	317.5402326
31-Dec-08	64.17637132	313.8844961
02-Jan-09	64.33349974	315.0400775
05-Jan-09	64.58277855	315.2823256
06-Jan-09	66.94091175	307.9040317
07-Jan-09	66.70982171	310.5896124
08-Jan-09	66.62558992	307.131292
09-Jan-09	66.43719922	307.4184115

12-Jan-09	66.70433668	299.7996491
13-Jan-09	66.72592474	296.4841927
14-Jan-09	66.68596371	292.9225326
15-Jan-09	66.56623211	291.1955091
16-Jan-09	66.64420183	291.6421932
20-Jan-09	66.71110235	286.3892689
21-Jan-09	66.56456745	288.2557813
22-Jan-09	66.66595859	287.3913802
23-Jan-09	66.70355234	286.3409896
26-Jan-09	66.7582276	286.9661458
27-Jan-09	67.04394792	282.9909635
28-Jan-09	67.3437599	283.160599
29-Jan-09	67.79390938	279.1811719
30-Jan-09	68.11560781	278.1163021
02-Feb-09	68.21079089	280.4645313
03-Feb-09	68.28316094	281.0067448
04-Feb-09	68.5070474	278.802526
05-Feb-09	68.74751432	276.9192448
06-Feb-09	68.85311016	275.7615365
09-Feb-09	68.85979479	274.6702865
10-Feb-09	68.99435417	270.4173698
11-Feb-09	69.1536625	269.1973698
12-Feb-09	69.21361823	269.1330469
13-Feb-09	69.39873958	265.5372656
17-Feb-09	69.33575781	268.8635938
18-Feb-09	69.26928021	269.0122656
19-Feb-09	69.28424844	265.6677604
20-Feb-09	69.27996841	269.3054308

	<70	70-90	>90
Jan 08	0.01	0.265	0.72
Feb 08	0.01	0.427	0.56
Mar 08	0.02	0.412	0.57
Apr 08	0.02	0.275	0.71
May 08	0.02	0.224	0.76
Jun 08	0.01	0.242	0.75
Jul 08	0.04	0.258	0.7
Aug 08	0.04	0.272	0.69
Sep 08	0.1	0.59	0.31
Oct 08	0.38	0.52	0.1
Nov 08	0.51	0.39	0.1
Dec 08	0.57	0.35	0.08
Jan 09	0.5	0.39	0.1



The Current State of the Bankruptcy Code Safe Harbor Protections for “Financial Contracts”

By

Richard Levin, Partner & Restructuring Practice Chair, Cravath, Swaine & Moore LLP

The Bankruptcy Code specially protects “commodity contracts”, “forward contracts”, “securities contracts”, “repurchase agreements” and “swap agreements”, as well as related “master netting agreements”, as each of those terms is defined in the Code,¹ between the debtor and specified categories of counterparties. Such contracts and agreements are variously referred to as “financial contracts”, “derivative contracts” or simply “safe harbor contracts”. The automatic stay does not apply to the exercise by protected counterparties “of any contractual right . . . to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements”². In addition, a contractual right “to cause the liquidation, termination, or acceleration of or to offset or net termination values, payment amounts, or other transfer obligations arising under or in connection with” a safe harbor contract “shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by the order of a court in any proceeding under this title.”³ A bankruptcy trustee may not avoid a transfer by, to or for the benefit of a protected counterparty in connection with a safe harbor contract, except as an actual fraudulent transfer.⁴ Finally, protected counterparties under safe harbor contracts receive some protection from the general prohibitions on acquiring setoff rights during the 90 days before bankruptcy, although the protections here are ambiguously drafted.⁵

Two recent bankruptcy decisions address the safe harbor protections’ application in two very different contexts, with mixed results. The first ruled that a cross-affiliate setoff provision in two separate safe harbor contracts between a counterparty and two

¹ 11 U.S.C. §§ 101(25), (38A), (47), (53B), 741(7), 761(4); All references to the “Code” are to the Bankruptcy Code, 11 U.S.C. § ____.

² 11 U.S.C. § 362(b)(6) (commodity contract, forward contract or securities contract). Similar language applies to the other safe harbor contracts.

³ 11 U.S.C. §§ 561 (master netting agreements). Similar language applies to securities contracts (§ 555), commodities contracts and forward contracts (§ 556), repurchase agreements (§ 559) and swap agreements (§ 560).

⁴ 11 U.S.C. § 546(e), (f), (g).

⁵ 11 U.S.C. § 553(a)(2)(B), (a)(3).

affiliated debtors was not enforceable.⁶ The second reversed a bankruptcy court decision that the safe harbor protections do not apply to ordinary commodity supply agreements.⁷

In re SemCrude, L.P.: Bankruptcy Court Disallows Triangular Setoff

The United States Bankruptcy Court for the District of Delaware, in a decision announced January 9, 2009, denied a creditor's request for permission to effect a triangular setoff, that is a setoff of the creditor's claim against one debtor against amounts the creditor owed to another debtor affiliate of the debtor. The decision, if widely followed, could substantially increase a company's credit exposure if the company has multiple contracts with another corporate group's affiliates and has relied on a provision in the contracts allowing the company to offset amounts owing to one affiliate against claims against another affiliate and if the other group's affiliates later file bankruptcy. The bankruptcy court ruled that allowing such a setoff would be inconsistent with the Bankruptcy Code's express setoff provision and with fairness to all creditors.

Background. Chevron USA, Inc. had entered into numerous contracts for the purchase or sale of various petroleum products with three affiliates of SemCrude, L.P., each of which later filed bankruptcy. Bilateral master agreements each contained a broad version of a common cross-affiliate setoff provision:

“in the event either party fails to make a timely payment [or] delivery ... due and owing to the other party, the other party may offset any deliveries or payments due under this or any other Agreement between the parties and their affiliates”. (emphasis added.)

As of the bankruptcy petition date, Chevron owed \$1.4 million to SemCrude and was owed various amounts by the affiliates and sought to effect a “triangular setoff”.

Decision. The bankruptcy court denied permission for the triangular setoff. The court concluded that although the contracts permitted the setoff, Bankruptcy Code section 553 imposes the requirement that debts to be offset must be “mutual”.

Chevron relied on a line of case law to argue that a valid, prepetition contract providing for triangular setoff either satisfies section 553's mutuality requirement or that the parties may contract around it. The court found that none of the cases actually had permitted a triangular setoff.

The Bankruptcy Code does not define “mutual”. Case law is clear, however, that debts are “mutual” only when “they are due to and from the same persons in the same

⁶ In re SemCrude, L.P., Case No. 08-11525, United States Bankruptcy Court for the District of Delaware, Docket No. 2754 (Jan. 9, 2009).

⁷ Nat'l Gas Distr's v. E.I. duPont de Nemours and Co., Inc. (In re Nat'l Gas Distr's, LLC), Case No. 07-2105 (Feb. 11, 2009).

capacity.” On its face, then, the mutuality requirement prohibits triangular setoffs of the type Chevron proposed. The court therefore rejected the argument that debts owing among different parties are “mutual” based on contractual netting provisions. The court also ruled against a “contractual exception” to section 553’s mutuality requirement.

Though some may view a cross-affiliate setoff provision as a de facto guarantee, the court did not and expressly excepted guarantees from the scope of its decision. Because all of the master agreements were bilateral, the court did not address multi-lateral agreements at all.

Although the court’s decision rested on a strict reading of section 553, it also noted that it was “consistent with the purpose of section 553 and the broader policies of the [Bankruptcy] Code [that] similarly-situated creditors are treated fairly and enjoy an equality of distribution By allowing parties to contract around the mutuality requirement of section 553, one creditor or a handful of creditors could unfairly obtain payment from a debtor at the expense of other creditors, thereby upsetting the priority scheme of the Code and reducing the amount available for distribution to all creditors”. “Such a result is clearly contrary both to the text of the Code and to the principle of equitable distribution that lies at the heart of the Code.”

Chevron has since filed a motion for reconsideration. Chevron argues that the contracts are safe harbors contracts (apparently, contrary to its position at the original hearing on the motion) and that the safe harbor protections prohibit “any provision of this title [11]”, including section 553, from limiting the operation of the setoff provisions of the agreements. The motion is currently set for hearing on March 12, 2009. A decision is expected soon after the hearing.

The Effect of the Decision. Although not precedential, if the decision is widely followed, it would render largely unenforceable bi-lateral triangular setoff provisions, cross-affiliate setoff provisions and master netting agreements that provide for setoff among different entities in corporate groups. Contract counterparties may resort instead to express cross-affiliate guarantees or to multi-lateral agreements, which might provide the necessary mutuality.

In re Nat’l Gas Distr’s.: Court of Appeals Protects Commodity Supply Agreements from Bankruptcy

The United States Court of Appeals for the Fourth Circuit, in a decision announced February 11, 2009, ruled that a natural gas supply agreement between a natural gas distributor and its customer may be eligible for protection under the financial contracts “safe harbor” provisions of the Bankruptcy Code. Although the Court of Appeals returned the case to the bankruptcy court for further proceedings to determine whether the safe harbor applies to these particular gas supply agreements, the decision makes clear that ordinary commodity supply contracts that contain real hedging elements, even those not directly linked to or traded on a financial market, can be protected. By permitting such contracts to be covered by the safe harbor provisions, the Court gives substantial additional rights and leverage to those contracting with a

counterparty that later files bankruptcy and makes reorganization substantially more difficult for those companies that need bankruptcy protection.

Background. National Gas Distributors, LLC had entered into numerous contracts to supply natural gas to end users for various periods of time, beginning more than two days after the contract date, and at specified prices and quantities for the terms of the contracts. National Gas later filed bankruptcy. The bankruptcy trustee sought to avoid the contracts as “fraudulent transfers” on the ground that National Gas was insolvent at the time it made the contracts and did not receive reasonably equivalent value for its obligations under the contracts because the contract prices were below market prices.

The Code defines “commodity contract” to include only a futures contract traded on a contract market or board of trade and related agreements and “forward contract” to include a contract (except for a “commodity contract”) for the future purchase of a commodity. “Swap agreement”, however, is defined more broadly to include “a commodity swap, option, future, or forward agreement” (emphasis added). The bankruptcy court held that the supply agreements were not “commodity forward agreements”, because they were not the subject of trading in the financial markets or financially settled but “were directly negotiated between the seller and purchaser and contemplated physical delivery of the commodity”. The bankruptcy court therefore permitted the trustee’s fraudulent transfer action to proceed.

Decision. The Court of Appeals reversed. It concluded that a “commodity forward agreement” need not be traded (or of a kind traded) on an exchange to qualify for the safe harbor protections. Nor does the Code require that a commodity forward agreement be financially settled to qualify. Although the agreements here were simple supply agreements that were to be physically settled, they also had hedging elements, because they involved prices and quantities specified at the time of contracting and therefore were similar to forward contracts that are financially settled as hedges. The hedging elements made these contracts sufficiently similar to those financial markets contracts that Congress intended to protect.

The Court of Appeals did not, however, find that the supply agreements were protected “commodity forward agreements”. Having overruled only the bankruptcy court’s touchstones of trading on financial markets and financial settlement, the Court of Appeals remanded to the bankruptcy court, with some guidance, to decide whether the contracts qualify for safe harbor protection. First, for a commodity supply agreement to qualify, the agreement’s subject must be a commodity, with substantially all performance costs attributable to the commodity cost (as distinguished from other supply contracts that include costs attributable to packaging, marketing, transportation or service). Second, the agreement must be “forward”, that is, for delivery more than two days hence. Third, the agreement must fix not only the price, but also the time and quantity of deliveries. Finally, even though financial market trading is not required for an agreement to qualify, there must be some relationship between the agreement and the financial markets, a relationship that the Court of Appeals did not define but that might be similar to the hedging elements in the contracts at issue in this case, so that the Code’s safe harbor

provisions subordinate the Code's overarching equal distribution policy only when necessary to serve Congress's policy, embodied in the safe harbor provisions, of protecting financial markets.

The Effect of the Decision. The decision should provide substantial protection against bankruptcy risk to a party in a commodity supply relationship with a counterparty who later files bankruptcy, substantially reducing the nonbankrupt party's financial risk. For example, a party may terminate a commodity forward agreement upon the counterparty's bankruptcy, despite the bankruptcy automatic stay, if the price is no longer advantageous. In addition, the party will not be subject to preference recovery for payments received within 90 days before bankruptcy.

The decision will not, however, reduce credit risk. Even though a transaction may be protected from bankruptcy, the transaction remains subject to ordinary counterparty credit risk. Therefore, even the powerful financial contracts safe harbor provisions do not provide complete protection. A counterparty failure can result in transaction disruptions and transaction costs. As a result, bankruptcy safe harbor protection should not be viewed as reducing the need for sound credit analysis that should be a part of any transaction.

LENDER LIABILITY: TAKING STOCK IN AN UNCERTAIN TIME

EUGENE C. KIM & GINA GIANG

I. INTRODUCTION

Despite several years of little activity in the area of lender liability, the unprecedented slowdown in the global economy and continuing unrest in the credit markets may prove to be fertile ground for disputes between lenders and borrowers, guarantors or other third parties. When lending institutions pursued enforcement remedies in response to widespread defaults in the 1980s and 1990s, they were met by a massive upsurge in claims filed against them. Today, the number of lenders taking enforcement actions is once again on the rise, which may result in a corresponding increase in borrowers challenging and courts probing lender practices.

Lender liability refers to a body of law amalgamated from assorted liability theories based in contract, tort, other common law and statutes. The common element that unifies these theories is that they are asserted against lenders, typically large financial institutions. Causes of action under these theories may arise when actions taken or not taken by a lender in connection with a loan directly or indirectly result in losses to a borrower or third party.

Lender liability cases rose to prominence in the mid-1980s, when a series of court decisions fueled a boom in lenders being found liable for enforcing repayment terms under loan agreements.¹ During this period, the courts greatly expanded the theories under which lenders could be held liable and often awarded substantial damages to plaintiffs.² The late 1980s and early 1990s saw a reversal in this trend, where the courts circumscribed some of the more expansive lender liability theories and even reversed high-profile judgments from previous years.³ Despite this curtailment, lender liability cases experienced a resurgence starting in the mid-1990s, due in part to the explosive growth of the second-lien market and more companies carrying debt loads swollen by cheap, easy money. In the current economic climate, borrowers and affected third parties are once again bringing claims against banks and other financial institutions under various lender liability theories, not only to maximize their ultimate recoveries but also to increase leverage in workout negotiations.

¹ *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985) (finding that a lender who terminated a loan in conformity with a loan agreement could nonetheless be sued for lack of good faith and should have notified the borrower prior to termination); *State National Bank v. Farah Mfg. Co.*, 678 S.W.2d 661 (Tex. App. El Paso 1984) (affirming a large jury award against a lender who threatened to terminate a loan under a "change in management" provision to prevent the borrower from rehiring its former CEO) (judgment subsequently set aside, cause dismissed on March 6, 1985).

² *Id.*

³ *Kruse v. Bank of America*, 202 Cal. App. 3d 38 (1988); *Penthouse International, Ltd. v. Dominion Federal Sav. & Loan Asso.*, 885 F.2d 963 (2d Cir. N.Y. 1988).

In light of a fresh spate of contract claims brought by struggling real estate developers, this article will touch on the most common types of lender liability, explore the concepts and theories brought to bear by these recent claims and look at recent developments in this area of law.

II. LEGAL THEORIES

Legal theories of lender liability originate in contract, tort, other common law and statutes.

A. Contract Theories

A lender-borrower relationship is a contractual relationship, which may result in a lender being held liable for breaching written, oral and implied contracts or agreements. Some common breach of contract claims are that a lender failed to (a) lend after a loan commitment became legally binding,⁴ (b) extend a loan, honor loan modification terms or forbear from exercising remedies after promising to do so,⁵ or (c) take actions required under loan documents or interpret loan documents properly.

In breach of contract claims, the courts have considered "course of conduct" between parties as a critical factor in interpreting the language of a contract. In some circumstances, course of conduct may even amend the written terms of a loan document, but only where the parties have consistently deviated from the documented terms. If this is established, a lender's failure to recognize its own course of conduct may result in its inadvertent breach of the "amended" terms of the loan document. However, this does not mean a lender is obligated as a matter of course to comply with all requests made by counterparties to the loan documents.⁶ Rather, a lender is entitled to demand strict compliance with the terms of the loan documents,⁷ but should be mindful that a course of conduct is a fertile source for dispute over the actual meanings of those terms.

Borrowers have also used traditional breach of contract claims to piggyback claims based on the evolving theory of breach of the implied covenant of good faith and fair dealing.⁸ Although good faith liability shares some characteristics with tort liability, it has been

⁴ *LeMaire v. M Bank*, 1989 WESTLAW 30995 (Tex. Ct. App. 1989); *Crystal Springs Trout Co. v. First State Bank*, 732 P.2d 819 (Mont. 1987).

⁵ See *Alaska State Bank v. Fairco*, 674 P.2d 288 (Alaska 1983); *First Nat'l Bank v. Twombly*, 213 Mont. 66, 689 P.2d 1226 (1984).

⁶ *Brighton Dev. Corp. v. Barnett Bank*, 513 So. 2d 1103 (Fla. Dist. Ct. App. 1987)

⁷ *Towers Charter & Marine Corp. v. Cadillac Ins. Co.*, 7008 F.Supp. 612 (S.D.N.Y. 1989).

⁸ In order to bring a claim for breach of implied good faith, the plaintiff must first establish breach of an express provision in the contract. The courts have not recognized a separate cause of action for a good faith breach. See *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990); *Bohm v. Commerce Union Bank of Tennessee*, 794 F. Supp. 158 (W.D. Pa. 1992); *Eaglehead Corp. v. Cambridge Capital Group, Inc.*, 170 F. Supp. 2d 552 (D. Md. 2001).

increasingly accepted by the courts as based in contract.⁹ A covenant of good faith and fair dealing has been recognized to varying degrees by courts in a number of jurisdictions.¹⁰ In these jurisdictions, lenders have been found liable for (a) refusing to release a deed of trust in an effort to pressure the borrower into paying off another loan¹¹ and (b) manipulating the appraisal of the borrower's property to trigger a default and deliberately delaying foreclosure to increase the debt through interest accrual, thereby enabling the lender to take the entire collateral.¹²

One of the earlier cases in this area is *K.M.C. Co., Inc. v. Irving Trust Co.*, where the 6th Circuit affirmed a judgment in excess of \$7.5 million against a lender.¹³ The court found the lender liable for damages resulting from the lender's unreasonable and unilateral refusal to advance funds without prior notice to the borrower.¹⁴ According to the court, the lender's decision not to provide notice violated the implied obligation of good faith inherent in every contract.¹⁵ The court also stated that reasonable notice by the lender to the borrower might have changed the result of the case.¹⁶ However, the court's line of reasoning has since been criticized by more recent holdings.¹⁷

Starting in the late 1990s, the courts have moved toward a more constricted conceptualization of the good faith covenant. The prevailing notion is that the good faith obligation does not compel a lender to refrain from enforcing contract terms as written.¹⁸ Instead, it merely requires that, in exercising its enforcement rights under a contract, a lender perform its contractual obligations in good faith.¹⁹ Thus, there is no breach of a separate duty of

⁹ See, e.g., *Reid v. Key Bank of S. Maine, Inc.*, 821 F.2d 9 (1st Cir. 1987).

¹⁰ Connecticut, New York, Tennessee, Texas and Vermont are among the states whose courts have professed recognition of the covenant of good faith and fair dealing.

¹¹ *Robinson v. McAllen State Bank*, 48 BNA Banking Rptr. 1004 (Tex. Dist. Ct. 1987).

¹² *Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359 (Colo. App. 1994).

¹³ 757 F.2d 752 (6th Cir. 1985). This decision was later rejected by a court stating that a lender who is simply enforcing its contract rights does not necessarily act in bad faith. *Needham v. Provident Bank*, 110 Ohio App. 3d 817 (1996).

¹⁴ *Id.* at 763.

¹⁵ *Id.* at 760.

¹⁶ *Id.* at 763.

¹⁷ *Travel Servs. Network v. Presidential Fin. Corp.*, 959 F. Supp. 135 (D. Conn. 1997); *Needham v. Provident Bank*, 110 Ohio App. 3d 817 (1996).

¹⁸ *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 100 Cal. App. 4th 44 (2002) (holding that there can be no breach of an implied covenant of good faith and fair dealing if the implied covenant is inconsistent with an express term of the contract); *Spectra Plastics, Inc. v. Nashoba Bank*, 15 S.W.3d 832 (Tenn. Ct. App. 1999) (holding that a bank did not act in bad faith because performance under the terms of a contract cannot be bad faith); *Cyprus Copper Marketing Corp. v. Swiss Bank Corp.*, 222 B.R. 213 (S.D.N.Y. 1998) (noting that a bank did not take any action that was not authorized by the terms of the credit agreement).

¹⁹ *Duffield v. First Interstate Bank of Denver, N.A.*, 13 F.3d 1403 (10th Cir. 1993); *Kham & Nate's Shoes No. 2 Inc. v. First Bank of Whiting*, 908 F.2d 1351 (7th Cir. 1990). See *Ultra Fabricators, Inc. v. M C Bank & Trust Co.*, 714 So.2d 210 (La. Ct. App. 1998) (where the court implied that a claim could only be asserted if the lender's actions were ". . . prompted by fraud, ill will, or sinister motivation.").

good faith when a lender acts in accordance with the terms of a lending contract. Some courts have shown even less willingness to impose liability for a good faith breach where no fiduciary or special relationship exists between lender and borrower.²⁰ Moreover, some courts have refused to even recognize claims based upon an implied covenant of good faith in the context of a loan transaction.²¹

In addition to the "implied" covenant of good faith, there are statutory sources of the covenant to act in good faith. For example, the Uniform Commercial Code ("UCC") contains a provision stating that every contract under the UCC implies an obligation of good faith in its performance or enforcement.²² In other words, if the transaction is covered by the UCC, the participants are required to deal with each other honestly. Due to the vagueness of the UCC standard for good faith, however, its application by the courts has proven to be unpredictable.

Damages for a lender's breach of contract are usually limited to compensatory damages, which have generally been defined as the additional costs of obtaining funding elsewhere.²³ Because the covenant of good faith and fair dealing essentially represents a contract term that aims to effectuate the intentions of the parties, compensation for its breach has traditionally been limited to compensatory damages as well. Additionally, most courts will now consider awarding consequential damages in the context of a loan transaction,²⁴ but punitive damages are generally not recoverable.²⁵

B. Tort Theories

Although a wide variety of tort claims may be brought against lenders, this article will briefly discuss those that are most commonly asserted by borrowers: fraud, economic duress, tortious interference with a contract, and negligence.

Generally, a fraud claim may arise when a lender makes a material, false misrepresentation with knowledge of its falsity or conceals a material fact when it has a duty to disclose, in either case resulting in damages to a borrower or third party. Even where the law imposes no obligation upon a lender to answer an inquiry in the first place, the lender's voluntary

²⁰ See *Krondes v. Norwalk Sav. Soc'y*, 53 Conn. App. 102 (Conn. App. Ct. 1999); *Pension Trust Fund for Operating Engineers v. Fed. Ins. Co.*, 307 F.3d 944 (9th Cir. 2002).

²¹ See *Power Equip. Co. v. First Alabama Bank*, 585 So.2d 1291 (Ala. 1991); *Ulrich v. Federal Land Bank of St. Paul*, 192 Mich. App. 194 (Mich. Ct. App. 1991).

²² U.C.C. § 1-203 reads as follows:

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

²³ See, e.g., *Rubin v. Pioneer Fed. Sav. & Loan Ass'n*, 214 Neb. 364 (1983).

²⁴ The prevailing position is that a borrower may recover "special" damages, subject to the general damage rules of foreseeability, avoidability, and certainty of proof. See *Indu Craft, Inc. v. Bank of Baroda*, 47 F. 3d 490 (2d Cir. 1995).

²⁵ But see, e.g., *Robinson v. McAllen State Bank*, 48 BNA Banking Rptr. 1004 (Tex. Dist. Ct. 1987) (awarding \$50 million in punitive damages and \$9.26 million in actual damages where the bank's breach of its good faith obligation ultimately resulted in the borrower going into bankruptcy).

response may trigger a duty to disclose additional, pertinent information in a truthful and complete manner.²⁶ Fraud is usually found in an affirmative representation. However, even where a lender possesses no actual fraudulent intent, constructive fraud may still arise if a relationship of confidence and trust exists between borrower and lender and the lender subsequently breaches its duty to the borrower. Additionally, silent fraud may be found if the lender has a duty to speak but chooses to remain silent. Both actual and punitive damages have been awarded with respect to fraud liability.²⁷

An economic duress claim may arise when a lender threatens a borrower with actions that the lender has no legal right to take or demands more than a borrower is obligated to give, in either case at a time when the borrower has little choice other than to comply with the lender's demands. The courts have drawn a distinction between a lender (a) making inappropriate threats or demands and (b) threatening to do that which it has a legal right to do or refusing to do that which it is not legally required to do.²⁸ Since it is difficult to assess if a lender has made improper use of legitimate rights or remedies, the courts have tended to find liability in cases where the lender's conduct was tainted with some fraud or wrongdoing.²⁹

A claim asserting tortious interference with a contract may arise when a plaintiff has a valid contract with a third party, the lender knows of the contract and intentionally induces the third party to breach the contract or the lender prevents the plaintiff from performing on the contract, and the plaintiff is damaged as a result of such interference. However, lenders who have interfered with contracts through the bona fide exercise of their rights and remedies have been deemed privileged to do so.³⁰ The courts have taken varied approaches with regard to whether malice or an purposeful or improper motive are essential elements to this cause of action. Moreover, some courts have allowed lenders to interfere with contracts between borrowers and third parties if the lenders hold equal or superior interests in the subject matter.³¹ When an interference claim succeeds, lost profits and all other reasonably foreseeable damages may be obtained.

Lenders may also be found liable to borrowers and third parties on a negligence theory. In order to successfully assert a cause of action on a negligence theory, a plaintiff must typically show that the lender owed the plaintiff a duty of care, the lender breached that duty, and the breach proximately caused the plaintiff's injury. The general rule is that a lender owes no duty of

²⁶ *Central States Stamping Co. v. Terminal Equip. Co.*, 727 F.2d 1405 (6th Cir. 1984).

²⁷ *Crystal Springs Trout Co. v. First State Bank*, 732 P.2d 819, on reh'g, 736 P.2d 95 (Mont. 1987) (where the defendant, who repeatedly and knowingly misled the borrower as to the status and availability of interim financing, was held liable for actual and punitive damages).

²⁸ *Marine Midland Bank v. Cafferty*, 174 A.D.2d 932 (1991) (dismissing a borrower's duress claim because the bank had no duty to provide further loan advances).

²⁹ *Continental Ill. Nat'l Bank & Trust Co. v. Stanley*, 606 F. Supp. 558 (N.D. Ill. 1985). See also *Feedlander, Inc. v. NCNB*, 706 F. Supp. 1211 (E.D. Va. 1988); *First Tex. Sav. Ass'n v. Dicker Center, Inc.*, 631 S.W.2d 179 (Tex. Ct. App. 1982).

³⁰ *Felsen v. Sol Café mfg. Corp.*, 24 N.Y.2d 682 (1969).

³¹ *Del State Bank v. Salmon*, 548 P.2d 1024 (Okla. 1976).

care to a borrower when the lender's role in the transaction does not exceed the scope of its conventional role as a mere lender of money.³²

C. Other Common Law Theories

A lender may also be found liable where the lender-borrower relationship deviates from a typical creditor-debtor relationship.

Under the instrumentality theory, a lender may expose itself to direct liability to the borrower and third parties where the lender exercises such control over the borrower's day-to-day operations that, in effect, the lender becomes the borrower.³³ However, merely lending money and monitoring a borrower's business affairs do not impose direct liability under this theory.³⁴ Rather, liability is imposed where the lender's day-to-day involvement in the management and operation of the borrower's business is sufficient to establish actual, participating and total control of the debtor by the creditor.³⁵ Direct liability can also be found where total control of the borrower pursuant to the instrumentality theory does not exist, but the lender exercises substantial control over the borrower such that the lender may be characterized as an agent or principal of the borrower, or the lender's relationship with the borrower is more akin to a partnership or joint venture.³⁶

In addition, a fiduciary relationship between a lender and borrower may arise where an ordinary creditor-debtor relationship is transformed into a "special" relationship based on a lender's excessive control or domination of a borrower or its substantial control over the business affairs of the borrower.³⁷ In one recent decision, the court held that the elements to establish a fiduciary relationship between a bank and a debtor are: (a) the borrower reposes faith, confidence, and trust in the bank, (b) the borrower is in a position of inequality, dependence, weakness or lack of knowledge, and (c) the bank exercises dominion, control, or influence over the borrower's affairs.³⁸ Where a fiduciary duty is found, the lender will owe far greater duties to the borrower than those arising under a loan agreement.

Thus far, courts have declined to expand lender liability to impose regulatory and reporting duties on lenders when borrowers themselves engage in actionable misconduct. The 2nd Circuit and 7th Circuit, in addressing whether lenders should be liable for aiding and abetting improper actions and poor business decisions taken by management of suffering businesses, held

³² *Plata v. Long Beach Mortgage Co.*, 2005 U.S. Dist. LEXIS 38807 (N.D. Cal. 2005).

³³ *McFadden, Inc v. Baltimore Contractors, Inc.*, 609 F. Supp. 1102 (E.D. Pa. 1985).

³⁴ *Id.* at 1105.

³⁵ *Id.*

³⁶ *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1981) (finding that an agency relationship existed between a creditor and debtor where the creditor actively participated in the debtor's operations by making key economic decisions for the debtor and keeping the debtor in existence).

³⁷ E.g., *Deist v. Wachholz*, 678 P.2d 188 (Mont. 1984); *Stewart v. Phoenix Nat'l Bank*, 64 P.2d 101 (Ariz. 1937); *Barnett Bank of West Florida v. Hooper*, 498 So. 2d 923 (Fla. 1986).

³⁸ *Cowan Bros., L.L.C. v. Am. State Bank*, 743 N.W.2d 411 (S.D. 2007).

that where no fiduciary duties exist, lending institutions have no legal obligation to warn third parties as to the borrower's fraudulent acts.³⁹

D. Statutory Theories

Lender liability claims may also be premised on state and federal statutory authorities. As mentioned above, the UCC imposes an obligation of good faith for all contracts within its scope.⁴⁰ Thus if a contract is within the UCC, a borrower may sue for compensatory damages for a lender's breach of good faith without having to prove the existence of a fiduciary relationship.

With respect to federal tax laws, a lender with sufficient control over a borrower may be liable under the Internal Revenue Code ("IRC") for withholding federal taxes.⁴¹ In addition to liability for the actual taxes (plus accrued interest) owed, the IRC authorizes the collection of statutory penalties for the willful withholding of federal taxes.⁴²

Courts have also held lenders liable under the Racketeer Influenced and Corrupt Organizations Act ("RICO") if they engage in activities prohibited thereunder.⁴³ In addition to criminal penalties, RICO provides a private right of action for civil damages whereby individuals or entities injured by the RICO violation may seek treble damages.⁴⁴

Also, a significant amount of lender litigation has occurred under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in relation to lenders exercising a certain degree of control over the day-to-day operational aspects of a borrower's

³⁹ *Sharp International Corp. v. State Street Bank and Trust Co.*, 403 F.3d 43 (2nd Cir. 2005) (where a senior lender was not found liable for aiding and abetting breaches of fiduciary duty or constructive or intentional fraudulent conveyance when it knew of the borrower's fraud and it (1) demanded that the borrower find new sources of financing to repay the senior lender's debt, (2) failed to inform subordinate note holders of the borrower's fraud, and (3) consented to the subordinated financing); *B.E.L.T. Inc. v. Wachovia Corp.*, 403 F.3d 474 (7th Cir. 2005) (where a lender was not liable for failure to disclose its knowledge of the borrower's fraud and money laundering practices even though the lender arranged to be repaid from subsequent loans made to the borrower from other banks).

⁴⁰ U.C.C. § 1-304.

⁴¹ See 26 U.S.C.S. §§ 3402 & 3505 (a lender who finances the wages of a borrower's employees is liable for the taxes required to be deducted and withheld from such wages by the borrower); 26 U.S.C.S. § 6672 (liability is imposed on third parties responsible for the borrower's failure to fulfill withholding tax obligations); *Pac. Nat'l Ins. Co. v. United States*, 422 F.2d 26 (9th Cir. Cal. 1970) (26 U.S.C.S. § 6672 imposes liability on any entity that assumes the function of determining whether or not an employer will pay taxes withheld from its employees).

⁴² See *United States v. Sec. Pac. Bus. Credit*, 956 F.2d 703 (7th Cir. Ind. 1992).

⁴³ See *Brown v. LaSalle Northwest Nat'l Bank*, 820 F. Supp. 1078 (N.D. Ill. 1993) (finding that a bank's practice of leaving certain federally required provisions out of auto financing contracts was sufficient to form the basis for an action under RICO since a business arrangement or referral relationship existed between the bank and the dealer); *Banowitz v. State Exchange Bank*, 600 F. Supp. 1466 (N.D. Ill. 1985) (where plaintiffs who purchased investment notes issued from a financing company alleged a sufficient RICO claim against a bank where the bank misrepresented the financial condition of the financing company and security of its notes).

⁴⁴ 18 U.S.C.S. § 1964.

mortgaged property.⁴⁵ Where a lender is deemed to qualify as an "owner" or "operator" under CERCLA, it can be liable for civil penalties as well as the costs of cleaning up contaminated property.⁴⁶

III. LENDER LIABILITY ISSUES TODAY: TROUBLED DEVELOPERS SUING BANKS

During the housing boom of prior years, builders looked to take advantage of easy financing in order to capitalize on profitable housing developments and rising land values. Now, as land values slide and the housing market shrinks, many developers are filing lawsuits in last-ditch efforts to salvage their projects. In California and Florida (two formerly "hot" real estate markets), several developers have sued construction lenders for alleged misconduct in connection with the lenders' efforts to enforce their rights to repayment.

A sampling of some recent cases is described below:

- In 2008, Regent Hotel, LLC, a developer of a 222-unit hotel and condominium project located in California, sued First Bank, one of its construction lenders, for the bank's failure to fund the last installment of a multi-million dollar construction loan.⁴⁷ In its breach of contract claim, the developer alleged a long-term relationship with the bank extending for over ten years, during which the bank had allegedly established a course of conduct whereby it had never interrupted funding on any of the developer's projects.⁴⁸ The developer also made a fraud claim, alleging that the bank orally represented to the developer its intention to make the remaining loan funds available, but subsequently failed to do so.⁴⁹
- In another California lawsuit filed in 2008, J.P. Eliopoulos Enterprises Inc., the developer of a 900-acre housing development, sued IndyMac Bancorp, Inc., its construction lender, for breach of the implied covenant of good faith and fair dealing. The developer alleged that the bank caused unreasonable delays in the development of the project by conducting an extensive audit, ordering an erroneous appraisal, and subsequently failing to fund disbursements.⁵⁰
- In Florida, another developer brought suit against Wachovia Bank for breach of contract, bad faith and unfair dealing, based on allegations that the bank failed to fully fund its

⁴⁵ See *Kelley v. United States*, 304 U.S. App. D.C. 369 (D.C. Cir. 1994); *Z & Z Leasing v. Graying Reel*, 873 F. Supp. 51 (E.D. Mich. 1995); *Snediker Developers Ltd. P'ship v. Evans*, 773 F. Supp. 984 (E.D. Mich. 1991).

⁴⁶ 42 U.S.C.S. §§ 9607 & 9609.

⁴⁷ Complaint, *Regent Hotel, LLC v. First Bank*, No. 34-2008-00009879 (Cal. Super. Ct. May 1, 2008).

⁴⁸ *Id.* at ¶ 8.

⁴⁹ *Id.* at ¶ 29.

⁵⁰ Michael Corkery, *Builders Sue Banks That Pull Financing as Construction Projects Lie Unfinished*, Wall St. J., July 23, 2008, at C1.

construction loan and made unwarranted setoffs and holdbacks from the developer's draw requests.⁵¹

As of yet, none of the foregoing developer cases have been decided. Even after decisions come down, appeals will likely run for years before any new case law is created. It will likely be years before we know the impact, if any, of these new cases.

IV. CONCLUSION

Since its heyday, lender liability law has been heavily influenced by fluctuations in the economy and financial marketplace. In the 1980s, the body of lender liability law grew to encompass a range of legal theories, including those based in contract, tort, other common law and statutory authority. In breach of contract claims, "course of conduct" has often played a pivotal role in interpreting the terms of a loan contract. The implied covenant of good faith and fair dealing has been widely recognized and accepted within the scope of lending transactions, but the reach of this theory has also been scaled back significantly. Tort theories of liability abound, with the most common being fraud, economic duress, tortious interference with a contract, and negligence. The courts have also recognized other common law claims based on instrumentality theory or breach of fiduciary duty, as well as statutory claims alleging violations of the UCC, IRC, RICO or CERCLA.

Today, in response to the continuing tightening of the credit markets and concurrent devaluation of real property, many construction lenders are starting to exercise their enforcement remedies upon defaults by struggling developers. Instead of idly standing by, however, many developers are fighting back with lender liability claims, most of which are based in contract. These new claims bring up familiar issues, such as course of conduct and the covenant of good faith and fair dealing. However, because these cases have only begun to be filed in the past year, they presently offer nothing in the way of precedent, making it difficult to predict which path lender liability law will take in the future.

Eugene C. Kim
T 213.617.5404
F 213.443.2777
ekim@sheppardmullin.com

Gina Giang
T 213.617.5484
F 213.443.2752
ggiang@sheppardmullin.com

Sheppard Mullin Richter & Hampton LLP
333 South Hope Street
48th Floor
Los Angeles, CA 90071-1448

⁵¹ *Developer Sues Wachovia for more than \$1M*, South Fla. Biz. J., August 18, 2008.

ABA Section on Business Law

Spring 2009

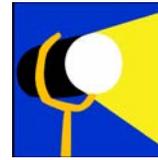
Synergy Group

**Neal Kling & Kathleen Hopkins,
ComFin Representatives**

The inter-bar association Synergy Group representatives Neal Kling and Kathleen Hopkins, working with the ABA Real Property Trusts and Estates committee, have submitted a proposal to co-sponsor a CLE for Sunday morning August 2nd at the ABA Annual Meeting: “*Creative Financing for Troubled Times.*” The program will address the use of non-traditional financing structures in the current troubled economic times and recent developments regarding these structures. Topics will include Delaware statutory trusts, mezzanine financing, and tenant in common financings. The program will also address limitations on REMICs in negotiating workouts. A preview discussion on this topic will be conducted at the BLS Spring Meeting of ComFin Real Estate Financing Subcommittee’s meeting, Saturday April 18th, at 12:30 - 2:00 p.m.

SPOTLIGHT

March 2009



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

Summit Resource Group, Inc. v. JLM Chemicals, Inc.,
2008 U.S. Dist. Lexis 104569 (E.D. Mo. 2008)

In this case Summit Resource Group caused the issuance of a standby letter of credit for the benefit of JLM Chemicals to support Summit's obligations to pay invoices issued by JLM for the sale of chemicals. There followed a dispute between Summit and JLM as to whether certain purchase orders placed by Summit had been cancelled. JLM threatened to draw down on the letter of credit to obtain payment for those orders, and Summit sought and obtained a TRO against such a draw. The reported decision is on the motion by Summit to convert the TRO into a preliminary injunction. In its decision on the preliminary injunction, the court very nicely went through the non-letter-of-credit requirements for an injunction, such as Summit's probability of success on the merits, the threat of irrevocable harm absent an injunction, and the balancing of the harm to the parties. The court then concluded that Summit had met its burden of proof and granted a preliminary injunction against JLM drawing on the letter of credit.

What is missing from the opinion is any mention whatsoever of Uniform Commercial Code Article 5 which has been adopted in all 50 states, including Missouri. Under UCC Section 5-109, on the facts as set forth in the court's opinion, the result should have been a denial of the preliminary injunction. The dispute between Summit and JLM appears to be a garden variety contract dispute, with no hint of the type of "material fraud" which is a prerequisite to the issuance of an injunction against honor of a letter of credit under Section 5-109. Usually it is the parties' responsibility to bring relevant law to the attention of the court. It is unclear from the opinion whether counsel did so. But the court should have discovered Article 5 on its own initiative even if counsel did not brief the point.

One of the main functions of a letter of credit is to put the proceeds of the letter of credit in the hands of the beneficiary while any dispute between the applicant and the beneficiary in the underlying contract is resolved separately. The only time that that mechanism should be enjoined is in the case of material fraud of the kind described in Section 5-109. Although the usual standards for the issuance of an injunction are still applicable in the letter of credit context (indeed they are set forth in clauses (1) and (4) of Section 5-109(b)), the primary issue is whether there has been material fraud by the beneficiary on the issuer or applicant.

ABA Section of Business Law

Spring 2009

[Agricultural and Agri-Business Financing](#)

R. Lawrence Harris, Chair
Drew Theophilus, Vice Chair

Our Spring Meeting presentation is entitled:

*What Goes Up, May Come Down:
Managing Commodity Price Risk in Uncertain Times*

A primer on the use of forward contracting and other hedging strategies as a means to mitigate risk for throughput facilities and other users of agricultural commodities. The program will focus on the challenges that agricultural commodity consumers, including ethanol producers, recently encountered in dealing with unprecedented fluctuations in commodity prices.

Speakers:

Michael R. Stewart, Faegre & Benson LLP, Minneapolis, Minnesota
Lachlan S. Coburn, Cargill Limited, Vancouver, British Columbia

ABA Section of Business Law

Spring 2009

[Subcommittee on Aircraft Financing](#)

Michael K. Vernier, Chair

Peter B. Barlow, Vice Chair

The Aircraft Financing Subcommittee has planned an exciting program for the meeting this April in Vancouver. We will have a presentation on airline liquidity problems and solutions in the current market. We also plan to have an assessment of the current worldwide leasing market from the perspective of operating lessors. A chairman emeritus of Aviation Law from the International Bar Association will discuss aviation terrorism, its history, relevant international agreements and enforcement, as well as the latest legal proceedings scheduled to commence in April in the Lockerbie matter. We will have an update on Cape Town International Registry issues from our representatives on the International Registry Advisory Board and a discussion of FAA and Cape Town filing and registration issues from Oklahoma City counsel. Additional sessions will focus on other financing alternatives for today's turbulent market.

Traditionally, our Subcommittee dinners have provided a generally relaxed venue for camaraderie — and we expect that April's dinner will hew to that tradition. We currently are finalizing plans for the Subcommittee Dinner to be held on Thursday evening, April 16th, at a conveniently located restaurant. We encourage all members and friends of the Subcommittee to "save the date" for what should be a very delightful evening.

ABA Section of Business Law

Spring 2009

[Creditors' Rights](#)

Shannon Lowry Nagle, Chair

Elizabeth Bohn, Vice Chair

The Subcommittee on Creditors' Rights will meet jointly with Bankruptcy Litigation at the Spring Meeting in Vancouver. The program will discuss options available to creditors in cross-border insolvencies, focusing on recent cases and developments in the United States and Canada. The program will cover advantages and disadvantages, from the perspective of creditors, of a Chapter 15 ancillary proceeding in the United States compared with a plenary Chapter 11 bankruptcy proceeding in the United States in conjunction with a concomitant plenary proceeding in Canada. Topics considered will include the use of protocols between the U.S. and Canadian courts, claims and distribution procedures, recovery of assets and pursuit of claims in each jurisdiction, avoidance actions, and protection of local creditors. The speakers for this program are Peter A. Cal of Sherman & Howard LLC, who represents the Canadian foreign representative in the Chapter 15 proceeding In re Ernst & Young, Inc., as Receiver of Klytie's Developments, Inc., et al., currently pending in the United States Bankruptcy Court for the District of Colorado; and David Gruber of Blakes, who has been involved in a number of significant cross-border insolvency matters.

ABA Section of Business Law

Spring 2009

[Cross-Border and Trade Financing](#)

Daryl Clark, Blake, Cassels & Graydon LLP, Chair
Jonathan Cooper, Goldberg Kohn, Vice Chair

At the Spring Meeting in Vancouver, our committee will present two topics of interest. The first topic will be an overview of the *UN Guide to Secured Transactions* and its effects on cross-border debt finance. The second topic will be the recent changes to the Canadian Bankruptcy and Insolvency Act and how those changes impact the priority interests of a secured lender.

ABA Section of Business Law

Spring 2009

[Intellectual Property Financing](#)

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

The Intellectual Property Financing Subcommittee of the Commercial Finance Committee is scheduled to hold a meeting on Friday, April 17, 2009, from 3:00 - 4:30 p.m. at the Spring Meeting of the Business Law Section in Vancouver. The tentative topic of the meeting is "Enforcing Liens Against IP Collateral." Speakers and topic details are in the process of being finalized.

ABA Section of Business Law

Spring 2009

[Lender Liability Subcommittee](#)

Jeffrey W. Kelley, Troutman Sanders LLP, Chair
Mathew S. Rotenberg, Blank Rome LLP, Vice Chair

The Subcommittee on Lender Liability will meet at the Spring Meeting in Vancouver on Thursday, April 16th, from 4:00 p.m. to 5:30 p.m. Subcommittee Chair Jeff Kelley, Subcommittee Vice Chair Mat Rotenberg and one of our Canadian colleagues will discuss recent lender liability and related cases of interest.

As always, if you are aware of cases or other developments that would be of interest to the subcommittee, please contact Jeff (jeffrey.kelley@troutmansanders.com) or Mat (rotenberg@blankrome.com).

ABA Section of Business Law

Spring 2009

[Loan Documentation](#)

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

The Subcommittee on Loan Documentation will present a program at the Spring Meeting at 1 p.m. on April 16th titled “In-Transit Inventory Financing–Loan Documentation and Practical Considerations.” This specific area of commercial finance law is only the beginning of what a practitioner needs to know to protect the interests of clients involved in financing inventory arriving in the U.S. from a foreign country. The panel will consist of practitioners who have represented various parties in a sometimes complicated and uncertain field of commercial law. The program will cover, among other documentation issues, eligible in-transit inventory provisions for loan agreements and custom brokers’ agreements and will discuss the handling of documents of title by various parties in the inventory chain.

ABA Section of Business Law

Spring 2009

[Real Estate Financing](#)

Kathleen Hopkins, Chair

Ed Lester, Vice Chair

The topic for our Spring meeting will be **Real Estate Loan Workouts**. We will conduct a facilitated roundtable discussion among our members to discuss what is really going on: *what lenders and borrowers want and need*. Our panel includes attorneys working in both securitized and portfolio real estate financing world. Our vice-chair Ed Lester will moderate our discussion and the panel will include Tim Boyce from Dechert, Cindy Thomas from Real Property Law Group, Andrea Clay from Allen Matkins and Joe Lynyak from Venable.

We hope you will join us at the Vancouver BC Convention Exhibition Centre on **Saturday, April 18, 2009** from 12:30 - 2:00 p.m. in Room 122, Level One for our meeting titled: **Real Estate Financing & Workouts in Interesting Times**. We hope you can join us in person for the meeting. If you are unable to travel to Vancouver but wish to listen in, please watch our subcommittee website. We will provide call-in instructions prior to the meeting.

We look forward to seeing you in beautiful Vancouver!

ABA Section of Business Law

Spring 2009

Syndications and Lender Relations Subcommittee

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

The Syndications and Lender Relations Subcommittee has planned a busy agenda for the upcoming Spring Meeting in Vancouver.

The Subcommittee will be one of the sponsors of a program entitled "Current State of the Syndicated Loan Markets in the United States and Canada" on Thursday, April 16th at the Spring Meeting. The program is a joint presentation with the Syndicated Bank Financing Subcommittee of the Developments in Business Financing Committee. This joint program has quickly become an annual tradition at Spring meetings and will explore "cutting edge" current developments in the syndicated lending market. In the midst of the current financial crisis, there is likely to be a lively discussion on defaults under syndicated facilities, debt-buybacks and other related issues. The program will be held from 10:30AM to 12:30PM in Room 110, Level One, of the Convention Center.

Also, the Subcommittee's Model Intercreditor Agreement Task Force has planned another drafting session at the Spring Meeting to address the provisions of the form Intercreditor Agreement dealing with the right of second lien lenders to purchase the outstanding first lien obligations, DIP financing and other topics. The meeting will be held on Friday, April 17th from 12:30PM to 2:00PM in Room 122, Level One, of the Convention Center.

Finally, the Subcommittee will be holding a meeting of the task force for the drafting of an updated chapter on loan syndications for the widely-used treatise "Asset Based Financing" edited by Howard Ruda. Christine Gould Hamm, Vice Chair of the Subcommittee, and Scott Lessne are the chairs of this task force. The meeting will be held on Saturday, April 18th from 1:00PM to 3:00PM in Rooms 103 and 104, Level One, of the Convention Center.

ABA Section of Business Law

Spring 2009

Model Intercreditor Agreement Task Force

Gary D. Chamblee, Chair

Alyson B.G. Allen, R. Christian Brose, Richard K. Brown,

Robert L. Cunningham, Jr., Jane Summers, and Randall Klein, Vice Chairs

The Model Intercreditor Agreement Task Force will hold a meeting and drafting session at the Spring Meeting in Vancouver to address the provisions of the form Intercreditor Agreement dealing with the right of second lien lenders to purchase the outstanding first lien obligations, DIP financing and other topics. The meeting will be held on Friday, April 17th from 12:30 p.m. to 2:00 p.m. in Room 122, Level One, of the Convention Center.

The Model Intercreditor Agreement Task Force was formed to develop a market-based form of intercreditor agreement for intercreditor arrangements between first and second lien creditors holding liens on common collateral. The Task Force has over 180 members and there has been active participation by members in discussions of the evolving drafts of the Model Agreement. Information about the Task Force and the latest draft of the Model Agreement is posted on the Task Force [website](#).

ABA Section of Business Law

Spring 2009

[Surveys of State Commercial Laws Task Force](#)

Brian D. Hulse, Chair

James H. Prior, Vice Chair

Jeremy S. Friedberg, Vice Chair

The Surveys of State Commercial Laws Task Force is in the process of compiling a comprehensive overview of the commercial lending laws of all 50 states plus the District of Columbia and Puerto Rico. It will be published in book form by the ABA later this year and will address, among many other topics, state regulation of lending transactions, real and personal property secured lending, usury laws and guaranties. Volunteer authors from each of the 52 jurisdictions have now completed their individual chapters and they are in the process of being edited by the ABA. The task force, with the terrific assistance of Susana Darwin in the ABA publications division, is targeting the book for release in the Summer of 2009.

ABA Section of Business Law

Spring 2009

[Syndications Chapter for ABL Treatise Task Force](#)

Scott A. Lessne and Christine Gould Hamm, Co-Chairs

The Syndications Chapter for ABL Treatise Task Force was organized to draft a syndications chapter for the Matthew Bender Asset Based Financing treatise edited by Howard Ruda. We will meet at the Spring Meeting in Vancouver on Saturday, April 18th, from 1:00 p.m. to 3:00 p.m. Please join us for an update on the work of the task force and to plan the task force's future activities.

ABA Section of Business Law

General Provisions and Relations to Other Law Subcommittee

Kristen David Adams, Chair

and

Sale of Goods Subcommittee

Candace Zierdt, Chair

Spring 2009

At the upcoming Spring 2009 Business Law Section Annual Meeting in Vancouver, the General Provisions and Relations to Other Law Subcommittee and the Sale of Goods Subcommittee will meet jointly on Thursday, April 16th at 1:30 p.m., for the purpose of exploring the concept of notice as it appears throughout the Uniform Commercial Code. The concept of notice, which is defined in 1-202, is applied in a wide variety of contexts. In Article 2, for example, notice is found in 2-508 (Cure), 2-607 (Breach and Vouching In), 2-608 (Revocation), and 2-706 (Seller's Resale). In Articles 3 and 4, notice is part of 3-119 (Vouching In), 3-302 (Holder in Due Course), 3-307 (Breach of Fiduciary Duty), 3-503 (Notice of Dishonor), and 4-303 (When Items are Subject to Notice, etc.). Of all of the UCC Articles, Article 9 makes notice most prominent: The concept is found in 9-209 (Duties of Secured Party after Notification of Assignment), 9-406 (Notification of Assignment), 9-611 (Notification before Disposition), 9-612 (Timeliness of Notification), 9-613 (Form and Content of Notification Generally), 9-614 (Form and Content of Notification in a Consumer Transaction), and 9-621 (Notification of Proposal to Accept Collateral). This meeting, which will consist of a panel discussion featuring experts in Articles 2, 3 and 4, and 9, will explore the common threads – and also the differences – in the ways in which notice is used in each of these Articles.

ABA Section of Business Law

[International Commercial Law \(Uniform Commercial Code\)](#)

Spring 2009

Kate A. Sawyer, Chair

At the Spring Meeting in Vancouver we will meet jointly with the Cross Border and Trade Financing subcommittee of the Commercial Finance section on Thursday April 16th at 9:30 a.m. We plan to discuss briefly the following topics: (i) the UN Secured Transactions Guide and its effects on cross border financings, (ii) recent changes to Canadian insolvency laws and their impact in creating priorities that prime a secured lender and (iii) customer rights to collateral posted to banks in the event of a bank insolvency - a brief view of the relative treatment of such customers of U.S., English, French, German and Swiss banks.

ABA Section of Business Law

[Subcommittee on Article 2A Leasing](#)

Spring 2009

Teresa Davidson, Chair

Ruthanne Hammett, Vice Chair

The 2A Leasing Subcommittee will meet in Vancouver on Thursday, April 16 from 9:30 a.m. to 10:30 a.m. Marlin Horst of Cassels, Brock and Blackwell, LLP will provide a presentation entitled “*What U.S. lawyers need to know about leasing in Canada*” and open a discussion on current leasing issues (in Canada or otherwise). If there are other topics of interest or if you would like to speak on a topic or recent case at the meeting, please contact Teresa Davidson or Ruthanne Hammett. We are also soliciting member input on long-range planning and projects and annual meeting topics and hope to discuss those at the Spring and annual meetings.

ABA Section of Business Law

Letter of Credit Subcommittee of UCC Committee

Spring 2009

George Hisert, Bingham McCutchen LLP, San Francisco, Chair
Tony Callobre, Bingham McCutchen LLP, Los Angeles, Vice Chair

Our Subcommittee will be meeting on Thursday, April 16, from 12:30 - 1:30 p.m. Our agenda is driven by the events of the last 6 to 12 months and the impact of the national financial crisis on banks and their letter of credit operations. Generally we will be discussing three issues, all related to current market conditions:

1. The impact of the financial situation upon the wording of syndicated loan documents with respect to rights and responsibilities of the letter of credit issuer under a letter of credit sub-facility. Discussion will include beefed up defaulting lender provisions, mechanics for dealing with defaulting lenders, the expansion of the definition of defaulting lenders, and related issues.
2. Steps that the beneficiary can take if the financial condition of the issuer declines. In the past, receiving a letter of credit from a respectable large money center bank often would minimize the risk of issuer insolvency. The events of the last six months have undermined that assumption. Beneficiaries now need to develop strategies to address the risk of issuer insolvency.
3. Procedural issues in connection with attempts to enjoin payment on a letter of credit. As the economy worsens and deals sour, we anticipate that more applicants will seek to enjoin payment on letters of credit. We will focus on procedural issues such as: who are the necessary parties? what is a proper venue? what portion does the issuer take in what is essentially a dispute between the applicant and the beneficiary?

We look forward to seeing you in Vancouver.

[UCC Payments Subcommittee](#)

Sarah Howard Jenkins, Chair
Greg Cavanagh, Vice Chair

SPRING MEETING JOINT MEETING OFFERINGS

The Payments Subcommittee will jointly sponsor two outstanding meetings at the Spring Meeting in Vancouver with the Payments and Electronic Banking Subcommittee of the Banking Law Committee and Electronic Payments and Financial Services Subcommittee of the Cyberspace Committee. Below are brief descriptions of the planned meetings to whet your interest. Plan to attend both meetings for cutting edge analysis and insight on the rapidly evolving status of Payments laws.

Thursday, April 16, 2009 ~ 10 to 11 a.m. PDT
Stephen T. Middlebrook & Sarah Jane Hughes, meeting chairs
Co-Chairs, Electronic Payments and Financial Services
Cyberspace Law Committee

The European Union's Payment Services Directive and What It Means for the United States and Canada By Stephen T. Middlebrook & Sarah Jane Hughes

This presentation will cover the European Union's Directive on Payment Services and the Single Euro Payments Area. The Directive on Payment Services, known by the acronym "PSD," has multiple aims. Among them are:

- establishing a "modern and comprehensive set of rules applicable to all payment services" in the European Union;
- facilitating cross-border payments within the European Union that are "as easy, efficient, and secure" as "national payments" within a Member State;
- improving competition by opening up payments markets in the European Union to new entrants in order to foster greater efficiencies and cost reductions; and
- establishing the necessary legal platform for the Single Euro Payments Area (SEPA).

The PSD contains numerous features of interest to payments and other transactional lawyers in the United States and Canada as well as those inside the European Union. These include features such as

- regulating equality of charges for payments and payer information in cross-border payments in Euros;
- e-invoicing pursuant to an interim report issued on January 27, 2009; and
- e-signatures and e-identification pursuant to an action plan approved on December 2, 2008.

The presentation will provide an overview of the PSD and SEPA and will highlight topics of concern to payments lawyers in the United States and Canada whose clients send and receive payments to Europe. Attendees will hear a distinguished, multi-national panel of experts, including Tom Brown of O'Melveny & Myers (San Francisco); Robert Burns of MacRoberts LLP (Glasgow, Scotland); Joe Alexander of The Clearing

House Association (New York City) whose expertise includes the Clearing House's new International Payments Network; and Peter Moller Jensen of Visa Europe (Brussels) (invited but not confirmed as of February 27th). The panel organizers thank Lisa Lifshitz, Partner, Gowlings (Toronto) & Co-Vice Chair, Cyberspace Law Committee (lisa.lifshitz@gowlings.com) and Broox W. Peterson, Esq. (Sandwich, MA) & Member, Cyberspace Law Committee (broox@bwplawyer.com), for their assistance in recruiting Messrs. Brown, Burns, and Jensen.

Please join us for what promises to be an exceptional panel on topics that relatively few US lawyers have addressed and that serves as a potential model for other cross-border payments.

Friday, April 17, 2009 ~ 12:30 to 1:30 PDT
Sarah Howard Jenkins, Greg Cavanagh, and Rob Hunter, meeting chairs

NCCUSL-ALI Study Committee on Payments
By Sarah Howard Jenkins

Fred Miller and Linda Rusch, respectively chair and reporter for the recently appointed NCCUSL-ALI Study Committee on Payments, will discuss the Committee's charge, its issues, and its past and future activities. Substantial time has been allotted for a Q & A with the meeting attendees. Bring a list of your concerns and desired clarifications in existing domestic Payments laws. Observe that this presentation will conflict, in part, with the Section luncheon.

ABA Section of Business Law

Joint Meeting of the
[Secured Lending Subcommittee](#) of the Commercial Finance Committee and the
[Secured Transactions Subcommittee](#) of the UCC Committee

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

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

We will be hosting a program entitled Article 9: What's New (Revision Committee) and What's Hot (Remedies) at the spring meeting in Vancouver. The panel presentation (moderated by Ellen Friedman of Friedman Dumas & Springwater LLP) will address some of the potential liabilities involved in exercising Article 9 remedies, including risks lurking behind the Part 6 statutory provisions and the interplay between the tort of conversion and the exercise of Article 9 remedies. Professor Stephen Sepinuck of Gonzaga University School of Law will also present a brief update on the Article 9 Revision Committee's work. The meeting is scheduled for Saturday, April 18 from 8:30 to 10 a.m. Please plan to join us.

ABA Section of Business Law

Spring 2009

Joint Task Force on ADR in Commercial Finance Transactions

Thomas J. Welsh, Chair

The leadership of the Subcommittee is now planning for a series of joint meetings of the Task Force and the DRS Subcommittee, including invited experts and other knowledgeable guests (such as representatives of the College of Commercial Finance Lawyers and College of Commercial Arbitrators), to discuss these topics. A major area of discussion will involve consideration of the discussion draft of the Model Supplementary Rules, both to spark discussion of the issues and concerns of the various constituencies and to determine whether a final set of Model Supplementary Rules can and should be prepared and published for the benefit of attorney practitioners and the commercial finance industry. The first joint meeting of the Subcommittee and the BLS Task Force is now being scheduled for **March 17, 2009 at the offices of the AAA, at 1633 Broadway, 10th Floor, New York, New York 10019-6708**. Notices for this meeting have been sent to the leadership of the affected committees of the Business Law Section interested parties and Subcommittee and BLS Task Force members.

At the first joint meeting we intend to discuss these issues and set a schedule for additional meetings to complete our discussions and a final report. Our goal will be to complete a joint report of the Task Force and the DRS Subcommittee at or prior to the ABA Annual Meeting in August of 2009. We will also discuss the need to hold additional informational meetings or input sessions in several regions in the United States, either before or after the completion of the final report, and recommended follow-up actions that the Task Force, the DRS Subcommittee and the two ABA Sections should take to continue this work.

Finally, we anticipate that the results of these meetings and additional ‘colloquium’ papers on this topic will be submitted to the ABA Press for publication as a product of the joint committees and the College of Commercial Finance Lawyers.

ABA Section of Business Law

[Joint Task Force on Commercial Finance Terms](#)

Carl S. Bjerre and Meredith Jackson, Co-Chairs

For our in-progress dictionary, the Joint Task Force on Commercial Finance Terms has compiled a list of over 2000 useful, interesting or at least amusing terms – and now it's time to start writing equally useful, interesting and amusing definitions for them! Please join us at the Spring Meeting and let us know your particular practice areas, so that we can assign the terms for definition by people who might actually know what they mean. Let's get the "definitive" phase of the project under way.

ABA Section of Business Law

Spring 2009

[Filing Office Operations and Search Logic Task Force](#)

Paul Hodnefield and Jim Prendergast, Co-Chairs

The ABA Joint Task Force on Filing Office Operations and Search Logic will hold a panel discussion on Saturday afternoon, April 18th, from 3:00 to 4:30 p.m. to consider the filing office operations of the PPSA filing offices in common law Canada, with particular emphasis on British Columbia, and the filing office procedures in civil law Quebec. Attention will be directed to the major differences and similarities between the Canadian filing offices and the requirements of filing office operations under the Uniform Commercial Code. To add a bit of humor and to highlight non-uniform procedures under the Uniform Commercial Code, the filing office of the District of Columbia will also be discussed. Practitioners and service providers with extensive knowledge of the respective filing offices will comprise the panel.

ABA Section of Business Law

Joint Meeting of the
[Secured Lending Subcommittee](#) of the Commercial Finance Committee and the
[Secured Transactions Subcommittee](#) of the UCC Committee

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

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

We will be hosting a program entitled Article 9: What's New (Revision Committee) and What's Hot (Remedies) at the spring meeting in Vancouver. The panel presentation (moderated by Ellen Friedman of Friedman Dumas & Springwater LLP) will address some of the potential liabilities involved in exercising Article 9 remedies, including risks lurking behind the Part 6 statutory provisions and the interplay between the tort of conversion and the exercise of Article 9 remedies. Professor Stephen Sepinuck of Gonzaga University School of Law will also present a brief update on the Article 9 Revision Committee's work. The meeting is scheduled for Saturday, April 18 from 8:30 to 10 a.m. Please plan to join us.

Useful Links and Websites

Compiled by Carol Nulty Doody, Uniform Commercial Code Committee Editor

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

1. The UCCLAW-L listserv, which is sponsored by West Group, publisher of the "UCC Reporting Service." To subscribe to the UCCLAW-L listserv, go to <http://lists.washlaw.edu/mailman/listinfo/ucclaw-l>.
2. U. Penn's archive of NCCUSL final acts and drafts can be accessed at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm>.
3. Pace University's database of CISG decisions can be accessed at <http://cisgw3.law.pace.edu>.
4. Gonzaga University's new Commercial Law Center has a variety of links to useful sites and can be accessed at <http://www.law.gonzaga.edu/About-Gonzaga-Law/Commercial-Law-Center/default.asp>.
5. The International Association of Commercial Administrators (IACA) maintains links to state model administrative rules (MARS) and contact information for state level UCC administrators. That information can be accessed at <http://www.iaca.org>.
6. The Uniform Law Commissioners maintains information regarding legislative reports and information regarding upcoming meetings, including Joint Review Committee for Uniform Commercial Code Article 9. You can access this information at <http://www.nccusl.org/Update/>.

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

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



COMMERCIAL FINANCE COMMITTEE

Section of Business Law
American Bar Association

LEADERSHIP ROSTER

SPRING 2009

COMMERCIAL FINANCE COMMITTEE LEADERSHIP ROSTER

ComFin Committee

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

¹ Terms expire following Annual Meeting in the indicated year.

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

Subcommittees and Taskforces

Agricultural and Agri-Business Financing

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

Aircraft Financing

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

Colloquium on ADR in Commercial Finance Disputes(Taskforce)

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

Commercial Finance Terms (Joint Taskforce with UCC Committee)

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

Creditors' Rights

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

Cross Border and Trade Financing

Position	Contact Information	Term Expires
Chair	Daryl E. Clark Blake, Cassels & Graydon LLP 595 Burrard Street P.O. Box 49314 Suite 2600, Three Bentall Centre Vancouver BC V7X 1L3 Canada Direct: 604.631.3357 Fax: 604.631.3309 E-mail: daryl.clark@blakes.com	2010
Vice Chair	Jonathan M. Cooper Goldberg Kohn 55 East Monroe, Suite 3300 Chicago, IL 60603 Direct: 312-201-3980 Fax: 312-863-7480 Jonathan.cooper@goldbergkohn.com	2011

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

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

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

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

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

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

Intellectual Property Financing

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

Lender Liability

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

Loan Documentation

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

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

Loan Workouts

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

Maritime Financing

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

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

Model Intercreditor Agreement Taskforce

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

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

*Planning and Communications*³

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

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

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

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

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

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

Real Estate Financing

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

Secured Lending

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

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

Surveys of State Commercial Laws Taskforce

Position	Contact Information	Term Expires
Co-Chair	Brian D. Hulse Davis Wright Tremaine LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101 Direct: 206-757-8261 Fax: 206-757-7261 E-mail: brianhulse@dwt.com	N/A
Co-Chair	Jeremy S. Friedberg Leitess Leitess Friedberg + Fedder P.C. One Corporate Center 10451 Mill Run Circle, Suite 1000 Baltimore, MD 21117 Direct: 410.581.7403 Fax: 410.581.7410 E-mail: jeremy.friedberg@lfff.com	N/A
Co-Chair	James H. Prior Porter Wright Morris & Arthur, LLP 41 South High Street Columbus, OH 43215 Direct: 614-227-2008 Fax: 614-227-2100 jprior@porterwright.com	N/A

Syndications and Lender Relations

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

Syndications Chapter for ABL Treatise Taskforce

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

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

Liaisons

Diversity

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

Educational Programming

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

Meetings

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

Membership

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

Pro Bono

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

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

Website Management and Technology

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

Photo Directory



Bobbi Acord



Alyson Allen



Katherine Simpson Allen



Peter B. Barlow



Carl J. Bjerre



Elizabeth M. Bohn



Christian Brose



Richard K. Brown



Mark J. Buhler



Anthony R. Callobre



Gary D. Chamblee



Daryl E. Clark



Jonathan M. Cooper



Robert L. Cunningham



Jeremy S. Friedberg



Michael S. Greco



R. Marshall Grodner



Christine Gould Hamm



R. Lawrence Harris

Marvin D. Heilesen



Paul Hodnefield



Kathleen J. Hopkins



Brian D. Hulse



Oliver I. Ireland



Meredith Jackson



Matthew W. Kavanaugh



Jeffrey W. Kelley

Randall Klein



Neal J. Kling



Scott Lessne



Edgel C. Lester, Jr.



Malcolm C. Lindquist



Eric Marcus



John E. Murdock, III



Shannon Lowry Nagle



John D. Pickering



Leslie J. Polt



Norman M. Powell



James D. Prendergast



James H. Prior



Cathy L. Reece



Christopher J. Rockers



Mathew S. Rotenberg



James C. Schulwolf



Steven L. Schwarcz



Edwin E. Smith



Stephen B. Soll



Wansun Song



Heather Sonnenberg



Lynn A. Soukup



Cheryl Stacey



Jane Summers



Drew K. Theophilus



Susan M. Tyler



Michael K. Vernier



Stacey Walker

Lauren Wallace



Thomas J. Welsh



David McI. Williams

**ABA BUSINESS LAW SECTION
UCC COMMITTEE**

LEADERSHIP DIRECTORY

Spring 2009



UCC COMMITTEE LEADERSHIP

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

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

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



Stephen L. Sepinuck



Penelope Christophorou



Mario J. Ippolito



Kristen Adams



Kate Sawyer



Meredith S. Jackson



Teresa Davidson



Brad Gibson



Ruthanne C. Hammett



George A. Hisert



Anthony R. Callobre



Sarah H. Jenkins



Greg Cavanagh



David K. Daggett



Candace Zierdt



Pauline Stevens



Thomas E. Plank



Anthony Schutz



Russell A. Hakes



Robyn Meadows



Carol Nulty



Keith A. Rowley



Cindy J. Chernuchin



Paul Hodnefield



Gail Hillebrand



Mike Ferry



Carl Bjerre



Jeremy S. Friedberg



Darrell W. Pierce



John A. Beckstead



COMMERCIAL FINANCE COMMITTEE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AGRICULTURAL AND AGRI-BUSINESS FINANCING

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

Chair – R. Lawrence Harris rlharris@mhsllaw.com

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

AIRCRAFT FINANCING

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

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

COLLOQUIUM ON ADR IN COMMERCIAL FINANCE DISPUTES TASKFORCE

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

Chair – Thomas J. Welsh TJWelsh@BrownWelsh.com
Colloquium Chair – Michael S. Greco michael.greco@klgates.com
<http://www.abanet.org/dch/committee.cfm?com=CL190021&edit=1>

COMMERCIAL FINANCE TERMS TASKFORCE (JOINT WITH UCC COMMITTEE)

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

Co-chair – Carl Bjerre cbjerre@law.uoregon.edu
Co-chair – Meredith Jackson mjackson@irell.com
<http://www.abanet.org/dch/committee.cfm?com=CL190040>

CREDITORS' RIGHTS

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

Chair – Shannon Lowry Nagle snagle@omm.com
Vice Chair – Elizabeth M. Bohn EB@jordunusa.com
<http://www.abanet.org/dch/committee.cfm?com=CL190006>

CROSS BORDER AND TRADE FINANCING

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

Chair – Daryl Clark daryl.clark@blakes.com

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Co-chair – Paul Hodnefield phodnefi@cscinfo.com

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

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

INTELLECTUAL PROPERTY FINANCING

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

Chair – Matthew W. Kavanaugh mkavanaugh@buchalter.com

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

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

LENDER LIABILITY

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

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

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

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

LOAN DOCUMENTATION

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

Co-Chair – Bobbi Acord bacord@phrd.com

Co-Chair – Scott Lessne slessne@capitalsource.com

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

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

LOAN WORKOUTS

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

Chair – Steven B. Soll ssoll@oshr.com

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

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

MARITIME FINANCING

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

Chair – David McI. Williams DMWilliams@GandWlaw.com

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

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

MODEL INTERCREDITOR AGREEMENT TASKFORCE

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

Chair – Gary D. Chamblee gchamblee@wcsr.com

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

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

REAL ESTATE FINANCING

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

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

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

SECURED LENDING

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

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

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

SURVEYS OF STATE COMMERCIAL LAWS TASKFORCE

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

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

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

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

SYNDICATIONS AND LENDER RELATIONS

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

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

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

SYNDICATIONS CHAPTER FOR ABL TREATISE TASKFORCE

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

Co-Chair – Scott Lessne slessne@capitalsource.com

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

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

2009 SPRING MEETING SCHEDULE

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

AS OF March 24,2009 Please Check Program Book for Meeting Rooms and Changes in Schedule
CLE Events highlighted in YELLOW

TIME	COMFIN		UCC	Legal Opinions/PFD/SSF/BF	
			(12:30 – 1:30) <i>Topic:</i>		
1:00-1:30pm	Subcommittee Meeting: Creditors' Rights (Joint with Bankruptcy Litigation Subcommittee) (1:00-2:30) <i>Topic: Options Available to Creditors in Cross-border Insolvencies, Focusing on Recent Cases and Developments in the United States and Canada</i>	Subcommittee Meeting: Loan Documentation (1:00-2:30) <i>Topic: In-Transit Inventory Financing – Loan Documentation and Practical Considerations</i>	Subcommittee Meeting: Letters of Credit (cont'd)		
1:30-2:00pm	Subcommittee Meeting: Creditors' Rights (cont'd)	Subcommittee Meeting: Loan Documentation (cont'd)	Joint Subcommittee Meeting: General Provisions / Sales (1:30 – 2:30) <i>Topic:</i>		
2:00-2:30pm	Subcommittee Meeting: Creditors' Rights (cont'd)	Subcommittee Meeting: Loan Documentation (cont'd)	Subcommittee Meeting: Aircraft Financing (1 of 2) (2-5:30) <i>Topic:</i>	Joint Subcommittee Meeting: General Provisions / Sales (cont'd)	

AS OF March 24,2009 Please Check Program Book for Meeting Rooms and Changes in Schedule

CLE Events highlighted in YELLOW

TIME	COMFIN		UCC	Legal Opinions/PFD/SSF/BF	
2:30-3:00pm	Subcommittee Meeting: Loan Workouts (2:30 – 4:00) <i>Topic:</i>	Subcommittee Meeting: Aircraft Financing (1 of 2) (cont'd)	Program (2:30pm-4:30pm) <i>Topic: Non-uniformity: Is it the Spice of Life or a Recipe for Disaster?</i>	SSF Program (2:30pm-4:30pm) <i>Topic: Anatomy of a Canadian/U.S. Cross-Border Securitization Transaction</i>	PFD Committee Meeting (2:30 – 4:30) <i>Topic:</i>
3:00-3:30pm	Subcommittee Meeting: Loan Workouts (cont'd)	Subcommittee Meeting: Aircraft Financing (1 of 2) (cont'd)	Program (cont'd)	Program (cont'd)	PFD Committee Meeting (cont'd)
3:30-4:00pm	Subcommittee Meeting: Loan Workouts (cont'd)	Subcommittee Meeting: Aircraft Financing (1 of 2) (cont'd)	Program (cont'd)	Program (cont'd)	PFD Committee Meeting (cont'd)
4:00-4:30pm	Subcommittee Meeting: Lender Liability (4:00-5:30) <i>Topic: Lender Liability: Recent Developments</i>	Subcommittee Meeting: Aircraft Financing (1 of 2) (cont'd)	Program (cont'd)	Program (cont'd)	PFD Committee Meeting (cont'd)
4:30-5:00pm	Subcommittee Meeting: Lender Liability (cont'd)	Subcommittee Meeting: Aircraft Financing (1 of 2) (cont'd)			
5:00-5:30pm	Subcommittee Meeting: Lender Liability (cont'd)	Subcommittee Meeting: Aircraft Financing (1 of 2) (cont'd)			

AS OF March 24,2009 Please Check Program Book for Meeting Rooms and Changes in Schedule
CLE Events highlighted in YELLOW

TIME	COMFIN		UCC		Legal Opinions/PFD/SSF/BF	
5:30-6:00 pm						
	Subcommittee Dinner: Aircraft Financing					
7 – 10 pm JOINT UCC/ComFin Committee Dinner (Ticketed Event)						
Friday, April 17						
8:00-8:30am	Subcommittee Meeting: Agricultural and Agri-Business Financing (8-9:30) <i>Topic: What Goes Up, May Come Down; Managing Commodity Price Risk in Uncertain Times</i>					
8:30-9:00am	Subcommittee Meeting: Agricultural and Agri-Business Financing (cont'd)			Subcommittee Meeting: Investment Securities (8:30 -10) <i>Topic:</i>	Legal Opinions Committee Meeting (8:30 -10:30) <i>Topic:</i>	
9:00-9:30am	Subcommittee Meeting: Aircraft Financing (2 of 2) (9:00-12:30) <i>Topic:</i>	Subcommittee Meeting: Agricultural and Agri-Business Financing (cont'd)		Subcommittee Meeting: Investment Securities (cont'd)	Legal Opinions Committee Meeting (cont`d) <i>Topic:</i>	
9:30-10:00am	Subcommittee Meeting: Aircraft Financing (2 of 2) (cont'd')			Subcommittee Meeting: Investment Securities (cont'd)	Legal Opinions Committee Meeting (cont`d)	SSF Committee Meeting (9:30 -10:30) <i>Topic:</i>
10:00-10:30am	Subcommittee Meeting: Aircraft Financing (2 of 2) (cont'd')					SSF Committee Meeting

AS OF March 24,2009 Please Check Program Book for Meeting Rooms and Changes in Schedule
CLE Events highlighted in YELLOW

TIME	COMFIN		UCC	Legal Opinions/PFD/SSF/BF	
					(cont`d)
10:30-11:00am	Program (10:30-12:30) Topic: Hands Across the Borders: Comparative Insolvency Regimes in the United States, Canada and Mexico	Subcommittee Meeting: Aircraft Financing (2 of 2) (cont'd)		Legal Opinions Joint Program with Securities Regulation (10:30-12:30) Topic: Update on Negative Assurance	SSF Program (10:30-12:30) Topic: Back to the Future II: What Lies Ahead for Asset Securitization and Structured Finance
11:00-11:30am	Program (cont'd)	Subcommittee Meeting: Aircraft Financing (2 of 2) (cont'd)		Program (cont'd)	Program (cont'd)
11:30am -12:00pm	Program (cont'd)	Subcommittee Meeting: Aircraft Financing (2 of 2) (cont'd)		Program (cont'd)	Program (cont'd)
12:00-12:30pm	Program (cont'd)	Subcommittee Meeting: Aircraft Financing (2 of 2) (cont'd)		Program (cont'd)	Program (cont'd)
12:30-1:00pm	Taskforce Meeting: Model Intercreditor Agreement (12:30 – 2) <i>Topic:</i>		Subcommittee Meeting: Payments (12:30-1:30) <i>Topic: New ULC Study of Payments Law</i>		
1:00-1:30pm	Taskforce Meeting: Model Intercreditor Agreement (cont'd)		Subcommittee Meeting: Payments (cont'd)		
1:30-2:00pm	Taskforce Meeting: Model Intercreditor Agreement (cont'd)		UCC Committee Meeting (1:30 -2:30) Topic: Stump the Chumps and Presentation of UCC Award of Exceptional Service		
2:00-2:30pm			UCC Committee Meeting (cont'd)		

AS OF March 24,2009 Please Check Program Book for Meeting Rooms and Changes in Schedule
CLE Events highlighted in YELLOW

TIME	COMFIN	UCC	Legal Opinions/PFD/SSF/BF
2:30-3:00pm		Program (2:30-4:30) <i>Topic: How Well Do You Know Your Neighbor? What's New and What's Different about Canadian Secured Transactions</i>	BF Program (2:30pm-4:30pm) <i>Topic: 27th Annual Review of Developments in Business Financing</i>
3:00-3:30pm	Subcommittee Meeting: Intellectual Property Financing (3:00 – 4:30) <i>Topic:</i>	Program (cont'd)	Program (cont'd)
3:30-4:00pm	Subcommittee Meeting: IP Financing (cont'd)	Program (cont'd)	Program (cont'd)
4:00-4:30pm	Subcommittee Meeting: IP Financing (cont'd)	Program (cont'd)	Program (cont'd)
4:30-5:00pm	ComFin Leadership Meeting (4:30 – 5:30)	UCC Committee Leadership Meeting (4:30-5:30)	
5:00-5:30pm	ComFin Leadership Meeting (cont'd)	UCC Committee Leadership Meeting (cont'd)	Legal Opinions Reception (5:00-7:00)
5:30-6:00pm			Legal Opinions Reception (cont'd)
6:00-6:30pm			Legal Opinions Reception (cont'd)
6:30-7:00pm			Legal Opinions Reception (cont'd)
Saturday, April 18			
8:00-8:30am			
8:30-9:00am	Joint Subcommittee Meeting: Secured Lending (ComFin) and Secured Transactions (UCC) (8:30-10:00) <i>Topic: What's New (Article 9 Revision Committee) and What's Hot (Remedies)</i>		
9:00-9:30am	Joint Subcommittee Meeting: Secured Lending and Secured Transactions (cont'd)		
9:30-10:00am	Joint Subcommittee Meeting: Secured Lending and Secured Transactions (cont'd)		
10:00-10:30am	Joint Taskforce Meeting: Commercial Finance Terms (10-10:30) <i>Topic:</i>		

AS OF March 24,2009 Please Check Program Book for Meeting Rooms and Changes in Schedule
CLE Events highlighted in YELLOW

TIME	COMFIN		UCC	Legal Opinions/PFD/SSF/BF
10:30-11:00am	Program (10:30 – 12:30) <i>Topic: Commercial Law Developments</i>			
11:00-11:30am	Program (cont'd)			
11:30am-12:00pm	Program (cont'd)			
12:00-12:30pm	Program (cont'd)			
12:30-1:00pm	Subcommittee Meeting: Real Estate Financing (12:30-2:00) <i>Topic: Real Estate Financing & Workouts in Interesting Times</i>			
1:00-1:30pm	Subcommittee Meeting: Real Estate Financing (cont'd)	Taskforce Meeting: Syndications Chapter (1:00-3:00)	Program (1-3) <i>Topic: What Every Commercial Lawyer Needs to Know about the Restatement (Third) of Restitution and Unjust Enrichment</i>	
1:30-2:00pm	Subcommittee Meeting: Real Estate Financing (cont'd)	Taskforce Meeting: Syndications Chapter (cont'd)	Program (cont'd)	
2:00-2:30pm		Taskforce Meeting: Syndications Chapter (cont'd)	Program (cont'd)	
2:30-3:00pm	Taskforce Meeting: Syndications Chapter (cont'd)		Program (cont'd)	
3:00-3:30pm	Joint Taskforce Meeting: Filing Office Operations and Search Logic (3 – 4:30) <i>Topic:</i>			
3:30-4:00pm	Joint Taskforce Meeting: FOOSL (cont'd)			
4:00-4:30pm	Joint Taskforce Meeting: FOOSL (cont'd)			