MESSAGE FROM THE CHAIR:
COMMERCIAL FINANCIAL SERVICES COMMITTEE

By Robert A. Zadek
Buchalter, Nemer, Fields & Younger
San Francisco, CA

Lots of stuff going on with the Committee. We have formed a new Subcommittee dealing with International Commercial Financial Transactions; Mike Carsella and Marcy Cohen will be co-chairs. Please advise me by email if you wish to join and I will have you appointed.

George Fogg is moving along with postings of our State Law Survey to the home page - no date yet for the initial draft but it should be soon.

The Annual Meeting will be in Atlanta. The ABA has mailed out registration forms. Our hotel is the Atlanta Hilton and Towers, downtown.

We will meet in Toronto on November 3, 1999 in connection with the Annual Convention of the Commercial Finance Association. The Convention and our meeting will be at the Sheraton Center (or is it Centre?) Hotel. Usually rooms go pretty fast so be sure to register early.

Please check the Committee home page for all material concerning each meeting.

MESSAGE FROM THE CHAIR:
UNIFORM COMMERCIAL CODE COMMITTEE

By Edwin E. Smith
Bingham Dana LLP
Boston, MA

The 1999 Annual Meeting will be my last meeting as Chair of the Uniform Commercial Code Committee. With my four-year term expiring in August, Linda Rusch will be succeeding me as Chair.

In building upon the work of predecessor Chairs, such as Amy Boss and Fred Miller, and in working with all of you, I have found it both a pleasure and an honor to serve as Chair of the Committee. The projects tackled by the Committee during this four-year period have been many and varied, and the successes have been the result of hard work by the broad Committee leadership and the active members of the subcommittees and task forces.

But there is still much work to be done. There are the mature projects that need the guidance of the Committee. UCC Revised Article 9 is being introduced in legislatures throughout the country to meet the July 1, 2001, uniform effective date deadline. Revisions to UCC Articles 2 and 2A are scheduled to be approved in July by the National Conference of Commissioners on Uniform State Laws, as is the much anticipated Uniform Electronic Transactions Act. The Uniform Computer
JOIN THE UCC COMMITTEE AT THE 1999 ANNUAL MEETING IN ATLANTA, AUGUST 6-10, 1999

By Linda Rusch, Chair-Elect
Professor of Law
Hamline University School of Law

The UCC Committee has a full schedule of meetings on Saturday, Sunday and Monday at the ABA Annual Meeting in Atlanta. Come and learn about what is happening in the UCC, as we approach the end of the revisions that have been taking place over the course of the last decade. Revised Article 9 was finished in 1998 and is currently being presented in the states. Revised Articles 2 and 2A have received final approval from the ALI and are up for final approval at the Annual Meeting of NCCUSL in July 1999. Former Article 2B, now the Uniform Computer Information Transactions Act, and the Uniform Electronic Transactions Act are also slated for final approval at the NCCUSL Annual Meeting this summer. Article 1 is still in the revision process and is scheduled for completion in the next year or two.

Mindful of the upcoming turn of the century/millennium and Year 2000 issues, Stephanie Heller has arranged for Thomas Baxter, Federal Reserve Bank of New York, to present a short program on “Y2K and the UCC: What Every Commercial Lawyer Should Know” during the UCC Committee meeting on Saturday, from 2:30-4:00 p.m. In addition, the following programs are sponsored by the UCC Committee:

♦ Sunday: 2:30-4:30 p.m. Commercial Finance Annual Appellate Argument (co-sponsored by Commercial Financial Services, American College of Commercial Finance Lawyers, Business Bankruptcy and Uniform Commercial Code)

♦ Monday: 8-10 a.m. Revised Article 2: Major Changes and Their Significance

♦ Monday: 2:30-4:30 p.m. Overcoming 10 Potential Pitfalls of Electronic Contracting

The UCC Committee is also sponsoring a first timer’s reception on Sunday from 5-6 p.m. This is a great time to connect with old friends and make some new friends. So come and join in the fun in Atlanta. I look forward to seeing you there.

Message from the UCC Chair, Con’t.

Information Transactions Act will also be considered by the National Conference this summer and may also meet with Conference approval. Moreover, the United States Senate may consider the UNIDROIT Factoring Convention and the UNIDROIT Convention on International Financial Leasing.

There are also the projects that are nearing completion and for which the Committee’s input remains as crucial to the success of the legislation. These include revisions of UCC Article 1, the Consumer Leases Act, the Federal Intellectual Property Security Act, the UNIDROIT Convention on international security interests in mobile equipment and the UNCITRAL Convention on cross-border receivables.

And there are the projects that are in the minds of many of us as worthy of a statutory focus. The creative energies and leadership of this Committee in the area of commercial law should never be underestimated.

So, with gratefulness to my predecessor Chairs, the Committee leadership and all of you, with some pride in the accomplishments of the Committee during these last four years and with great expectations for future work of the Committee, I will turn the leadership over to Linda. I have every faith the Linda will make a superb Chair for the years ahead.
ISP98: NEW STANDBY RULES

By Professor James E. Byrne*
Montgomery Village, MD

After more than five years of preparation, the International Standby Practices (ISP98) became effective on 1 January 1999. Designed specifically for the US$700 billion standby market, ISP98 addresses issues which have long caused unnecessary negotiation and drafting and have led to litigation and unexpected loss. ISP98 is endorsed by the International Financial Services Association (formerly the USCIB) and the Commission on Banking Technique and Practice of the International Chamber of Commerce (ISP98 has been designated ICC Publication no. 590). ISP98 is expected to be used widely, and indeed, standbys have already been issued subject to it. It has already received international acclaim for the manner in which it resolves long-standing issues in standby practice and there are widespread reports that the language of ISP98 is already being used not only in standbys but even in commercial LCs.

Need For Separate Rules. In the course of the discussions surrounding the formulation of the UN Convention on Independent Guarantees and Stand-by Letters of Credit, it became apparent that there was a serious lack of understanding in many parts of the world of standby practices and of the potential uses of standbys. Despite the fact that many standbys are issued subject to the Uniform Customs and Practice for Documentary Credits (UCP), it was only of minimal help. Its focus is upon commercial letters of credit and many of its provisions are inappropriate for standbys (as is implied in UCP 500 Article 1) and it is varied regularly. For example:

♦ UCP Article 17 (Force Majeure) is unacceptable to most standby beneficiaries who are not prepared to bear the risk of unexpected issuer closure on the expiry date.

♦ While the requirement of UCP Article 21 that documents be not inconsistent with one another is sensible for commercial credits, it is not sensible under standbys where there is less reason to expect that documents will be consistent.

♦ The attempt to allude to standbys in UCP Article 41 (Installment Shipments/Drawings) by adding the term “drawings” introduces difficulties since the failure to make one of a series of available drawings under a standby is not expected to result in the unavailability of future drawings.

♦ The UCP Article 43 provisions on latest date for shipment protects against stale documents of title but, in a commercial standby, the documents are typically expected to be stale.

♦ Transfer of commercial credits often involves multiple partial transfers but is expected to occur only once, whereas the typical transferable standby contemplates multiple transfers but no partial transfers.

* Professor Byrne is Director of the Institute of International Banking Law & Practice, Inc. P.O. Box 2235, 20405 Ryecroft Ct., Montgomery Village, MD 20886. Tel. (301) 869 - 9840, Fax. (301)926 - 1265, e-mail: jbyrne@iiblp.org. Professor Byrne served as Reporter for the ISP Project and Chairs the Council on International Standby Practice. Further information on materials discussed in this article and others is available on the ISP’s website: www.isp98.com, or directly from the Institute of International Banking Law & Practice, Inc.
More significantly, many of the issues which trouble standby practice are not even addressed in the UCP, such as:

♦ Terms commonly used in connection with standbys such as “evergreen”, “automatic”, “clean”, and “unconditional” want clarification.

♦ There is no standardization of requirements regarding typical documents presented.

♦ It is unclear whether a demand to extend or pay should be treated as a documentary presentation requiring examination and notice of discrepancies.

♦ It is often unclear what is required when a standby calls for indications of sincerity or truthfulness (solemnity, certification & affirmation) of statements contained in documents.

♦ It is often unclear to an applicant that an issuer expects to be able confidentially to disclose confidential applicant financial information without permission in participating out a standby. It may also be unclear that a participation does not affect the rights of the beneficiary.

♦ It is often unclear whether a standby which recites or contains the text of an underlying independent local guarantee which it backs up also requires a determination of compliance with the independent guarantee or whether the documents presented under it must be examined if they are forwarded.

♦ It is not uncommon for a legal successor to a named beneficiary of an untransferred and untransferable standby to make a drawing in its own name and not that of the named beneficiary, but there is no guidance for such a situation.

♦ While standbys are frequently syndicated or participated out, there is no delineation of various obligations and rights in such situations.

♦ There is no indication as to the limitations upon the obligation of banks regarding an assignment of proceeds.

As a result of the absence of rules that adequately address these common standby situations and others, considerable time and energy are unnecessarily wasted negotiating provisions, drafting language, correcting oversights and errors, and litigating disputes. Many of these difficulties could be avoided or reduced by standard rules. Even where the parties choose to vary them, such rules would provide a starting point for negotiations.

The argument that standbys are too complex to admit of such rule making or standardization flies in the face of experience. Commercial credits and the documents presented under them are far more varied and complex than even a complicated financial standby and yet standardized rules have evolved which simplify the practice associated with them.

*The ISP Project.* Since there was no effort underway to formulate standby rules and the ICC Banking Commission had decided not to make any of the adjustments for standbys requested by the U.S. letter of credit community in the UCP 500 revision, the U.S. Department of State requested the U.S. letter of credit community coordinated by the International Financial Services Association (formerly the U.S. Council on International Banking, Inc.) and the Institute of International Banking Law & Practice, Inc. to take the lead in formulating standby rules in consultation with letter of credit communities throughout the world. In addition, the project has been sponsored by Citibank, N.A., The Chase Manhattan Bank, N.A., ABN AMRO, Baker & McKenzie, and the National Law Center for Inter-American Free Trade. The process which followed actively sought the participation of every segment of the letter of credit community including bankers, users, attorneys, regulators,
rating agencies, government officials, international agencies, and academics. While the project began in the United States, the place of origin of the standby, it assumed a truly international character. Banks and banking associations from all parts of the world met and provided comments and advice on the various drafts. Furthermore, the participation of the UNCITRAL Secretariat provided an important link to non U.S. legal systems. Widespread participation and support led by the U.S. standby community assures ISP98 a strong base from the outset. The extensive participation of other countries opens the possibility of a truly international system which, while not strictly speaking necessary, would be highly desirable. With the formation and work of the ICC Ad Hoc Task Force under the leadership of Gary Collyer, Vice President, Midland Bank (London), the experience and wisdom of the Banking Commission of the International Chamber of Commerce was applied to the finalization of the draft. At the recommendation of its Task Force, the Banking Commission endorsed the ISP in March 1998.

ISP98. The present result of these efforts is ISP98. ISP98 seeks to assure for standby practice the same integrity from these self-standing rules as is provided for commercial credits under the UCP and independent guarantees under the URDG. ISP98 establishes generally accepted norms for standbys which can either be accepted or modified, using them as a starting point for negotiations. Where different approaches exist under standby practice, the ISP follows the most widely accepted approach. Where the UCP contains a rule, the ISP was designed to follow the UCP approach unless standby practice required a different result. Even where the ISP rule tracks the UCP, however, it is often drafted with more detail to address situations which have been problematic under standbys. The ISP also utilizes a style, phraseology, and vocabulary which differs from that of the UCP.

This approach reflects the need for standby rules which past muster before rating agencies, insurance commissioners, investment bankers, government procurement officers, and sophisticated corporate parties and their counsel. As a result, the ISP is more precise in
its language than the formulary language of the UCP and addresses matters in a more systematic fashion. For example, although it is assumed that the document required under a commercial LC is to be an original unless the LC states otherwise, the UCP does not expressly so provide. The ISP begins with this fundamental proposition and then addresses the problem of copies.

ISP98 is organized to correspond with the processing of a standby. It begins with General Provisions which contain information on scope, general principles, and definitions. Part 2 addresses obligations including issuance, nomination, and amendment. Parts 3, 4 and 5 include rules on presentation, examination, and notice, respectively. The other parts address transfer, assignment of proceeds, transfer by operation of law, cancellation, reimbursement, timing, and syndication/participation.

ISP98 is intended to supplement local law. While local law, of course, controls, it typically defers to standard international practice on many of these issues. Two examples are Revised UCC Sections 5-112 and 5-114, which relate to transfer and assignment.

ISP98 resolves the problems caused by the UCP provisions intended for commercial LCs. For example, ISP98 Rule 3.14 provides for an automatic 30 day extension if the place for presentation is closed on the last business day for presentation and permits the issuer to designate another reasonable place for presentation.

ISP98 also addresses standby issues not treated in the UCP. In the case of merger or name change of the issuer or confirmor, for example, ISP98 Rule 4.14 permits the beneficiary to use either name in any required document. ISP98 Rules 4.16 - 4.19 provide norms for specific documents including demands, statements of default, negotiable documents, and legal or judicial documents.

Ongoing oversight will be provided by a permanent Council on International Standby Practices which will be charged with formulating official responses to queries and with revising the Rules.

**Implementing ISP98.** With the adoption of ISP98, it is necessary for banks, governments, and corporate users to formulate a plan before using it. While it will be necessary to determine whether ISP98 is preferred (involving operational and legal consideration), it is also necessary to decide whether it is acceptable and, if used, what provisions should be modified. Even if determined not to be desirable, other parties (e.g., the issuer, the beneficiary, or the applicant) may insist upon it. For example, even if a corporation should decide to wait using it, they may be the beneficiary of standbys issued subject to it or their major bank may make a policy decision to use it. In that case, the company will need to determine whether to accept its use and seek modifications or to resist it. In either case, familiarity with ISP98 is essential. Others who work with standbys (e.g., attorneys) will need to acquaint themselves intimately with the ISP.

The Official Commentary to ISP98 has been written and published by the Institute of International Banking Law & Practice, Inc. At more than 300 pages, it provides detailed insights into the rules of ISP98, their origin, and the principles by which they are to be interpreted and applied. The Institute also conducted seminars throughout the US, Europe and Asia in Fall 1998, with talks given by a team of a banker and an attorney who were involved in drafting ISP98 and are intimately familiar with its provisions.

**Conclusion.** The formulation of the ISP marks the coming of age of standby practice. ISP98
will increase the standardization of clauses and typical documents, decreasing the need for lengthy negotiations over common provisions.

Already S.W.I.F.T. has initiated efforts to create standard message types for standbys. All told, these developments will lead to greater certainty and availability of standbys which, in turn, will lead to greater use in markets and circumstances where there is a need for a dependable means of payment.

UNIFORM ELECTRONIC TRANSACTIONS ACT

By C. Robert Beattie
Oppenheimer, Wolff and Donnelly
Minneapolis, Minnesota

The Uniform Electronic Transactions Act (UETA) is expected to be finalized this summer and readied for consideration by state legislatures in the upcoming legislative season. The drafting committee completed its work this spring and is presenting a final draft of the act for approval at the annual meeting of the National Conference of Commissioners on Uniform State Laws (NCCUSL) in Denver in late July.

The UETA is an enabling act, primarily procedural in nature, designed to foster broad acceptance of electronic signatures and records in commercial and governmental settings. The act’s principal provision states that a record, signature or contract may not be denied legal effect or enforceability solely because it is in electronic form or was formed using electronic means. If a law requires a record or signature to be in writing, an electronic record or signature satisfies that law.

The UETA is by its nature an "opt in" statute. No party is required to do business electronically, although an agreement to do so may be determined from the context sand
circumstances surrounding the transaction, including conduct of the parties.

The scope of the act is broad, applying to the use of electronic records and signatures relating to any transaction other than those governed by laws relating to the creation of wills, codicils and testamentary trusts, or other laws, if any, to be specifically identified by state legislatures.

In keeping with NCCUSL’S charge that the UETA be consistent with and not duplicative of the Uniform Commercial Code (UCC), the act will not apply to transactions subject to certain portions of the UCC, notably those articles dealing with the payment system (3, 4 and 4A) and documents of title (7), and those articles which have recently been revised and already address issues of commerce in media neutral terms (5, 8 and 9). The UETA will also not apply to transactions subject to revised articles 2 and 2A of the UCC or the Uniform Computer Information Transactions Act (formerly known as Article 2B of the UCC) when those acts are adopted.

The legal consequences of use of electronic records and signatures are generally left to other law. The UETA contains only a limited number of provisions that are substantive in nature. The UETA gives guidance on satisfying in an electronic manner requirements of other law as to the form of sending or displaying information. It also sets forth rules on attribution and effect of electronic records, which look primarily to the circumstances surrounding creation of the signature or record. The act gives no special weight to any particular form of electronic signature or record, but clearly authorizes the use of electronic agents (those computer programs or other means of contracting that do not require review by an individual) in the formation of contracts.

The UETA contains provisions dealing with changes or errors in electronic records, affording parties some degree of protection if security procedures designed to detect errors or changes are employed, and allowing individuals to undo “inadvertent” electronic transactions as long as the individual has not received the benefit of the consideration received and takes prompt steps to notify the other party to the transaction and to return or destroy any consideration received.

In other provisions, the UETA:

♦ allows for electronic notarization;

♦ permits the conversion of written records to electronic records and the destruction of the underlying written records, if the conversion produces an accurate result that can be accessed for later review;

♦ allows the use of electronic records and signatures for evidentiary purposes even if they are not originals or in their original form;

♦ provides rules for determining when an electronic record is sent and received;

♦ permits the use of transferrable electronic notes or documents of title, if the means exist both to demonstrate the party who has control of the transferable record, and to allow identification of the original record and preclude revision of the original without the consent of the party having such control;

♦ establishes a regimen for the use and acceptance of electronic records and signatures by government agencies.

The latest draft of the UETA can be found at the NCCUSL website for drafts of uniform and model acts at www.law.upenn.edu/library/ulc/ulc.htm.
E-COMMERCE LAW PROJECTS SEEK PARTICIPANTS

By Jane K. Winn
Southern Methodist University
Dallas, Texas

Two working groups of the Electronic Commerce Subcommittee of the Cyberspace Law Committee of the Business Law Section have projects underway that may be of interest to those looking to learn more about cutting edge e-commerce applications and the commercial law issues they raise. The work of these working groups will be conducted largely by means of participation in e-mail listserv discussions, with reference to works-in-progress posted to temporary websites until the output of the projects are finalized. Information about all the Cyberspace Law Committee activities is available at the Committee’s website at: http://www.abanet.org/buslaw/cyber.

Electronic Negotiable Instruments. The Transferability of Electronic Assets Working Group is working on a white paper provisionally titled "Can an electronic negotiable instrument be created by contract?" This issue will be relevant if, as expected, the Permanent Editorial Board soon appoints a study group to consider whether further revisions are needed to UCC Article 3 to permit the use of electronic checks and promissory notes. Some informed observers believe that a master trading partner agreement or clearinghouse agreement should be sufficient to establish the electronic equivalent of a negotiable instrument. Other informed observers point to the language in the comment 2 to §3-104, which states: "Although a writing cannot be made a negotiable instrument within Article 3 by contract or conduct of its parties..." The working group hopes to have a draft of the white paper completed by the Annual Meeting, and looks forward to a lively and informed debate of these issues there.

Professor Jane Winn of SMU Law School in Dallas, Texas and Professor Paul Shupack of Cardozo Law School in New York are the co-chairs of this working group. Anyone interested in joining the listserv once it has been set up should contact Joanne Harrison by email at HarrisoJ@staff.abanet.org for instructions on how to subscribe. Subscribers to the discussion group list will be given instructions by e-mail for finding the website for the draft white paper once it has been posted. Professor Paul Shupack will be the moderator of the e-mail discussion group and can be reached by email at shupack@ymail.yu.edu. Professor Jane Winn will be the webmaster for the work-in-progress website.

Electronic Contract Clause Bank. The Electronic Contracting Practices Working Group is working on a "clause bank" that will assist attorneys working to update existing form contracts to take into account new electronic contracting practices. The Working Group plans to collect model contract provisions, or if none can be found, to draft model contract provisions and annotate them, to assist attorneys in determining under what circumstances it might be appropriate to use a particular clause. Examples of contract clauses that might need to be updated include integration clauses, provisions governing signatures, provisions governing amendment or modification of electronic contracts, standards for conspicuous notice in electronic contracting, determination of the location of parties to electronic contracts, ownership of information captured from electronic transactions and privacy issues, or data storage requirements.
Professor Jane Winn of SMU Law School in Dallas, Texas and Professor Christine Kunz of William Mitchell Law School in Minneapolis are the co-chairs of this working group. Anyone interested in joining the listserv once it has been set up should contact Joanne Harrison by email at HarrisoJ@staff.abanet.org for
instructions how to subscribe. James Bryce Clark of Spolin & Silverman LLP in Santa Monica, California is the moderator of the listserv and will be webmaster for the work-in-progress website. James Clark can be reached by email at jbc@newlaw.com.

MAILBAG AND MISCELLANY

The CFS Committee provides several corrections to its Leadership List as published in the March 1999 issue of The Commercial Law Newsletter, as follows:

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Please note the following additional changes and corrections:

- Catherine Bauer’s new e-mail address is: catherine.e.bauer@bankofamerica.com
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INTERNET SITES OF INTEREST

- TRADES Regs. Walter Eccard reports that the U.S. Treasury Department’s Bureau of the Public Debt’s website (located at www.publicdebt.treas.gov/cc/cc Trades.htm) includes an article on Recent Developments with respect to Treasury’s “TRADES” Regulations. The article summarizes and explains the TRADES (Treasury/Reserve Automated Debt Entry System) regulations, for securities held in the commercial book-entry system. It also contains citations for the similar regulations adopted by various government-sponsored enterprises (such as Fannie Mae and Freddie Mac). There is also a helpful list of the 50 states (and other jurisdictions) that Treasury has determined have adopted versions of revised UCC Article 8 of the UCC that are “substantially identical” to the uniform version.

- ABA Business Law Section: www.abanet.org/buslaw
- ABA Joint Committee on Electronic Financial Services: www.abanet.org/buslaw/efss/home.html
- UCC Revision Drafts: www.law.upenn.edu/library/ulc/ulc.htm
- UCC Revised Article 2: www.law.upenn.edu/library/ulc/ulc.htm#ucc2
- UCC Revised Article 9: www.law.upenn.edu/library/ulc/ucc9/ucc9woc.htm
- UCITA Drafts www.2bguide.com
- NCCUSL Meeting Schedule: www.nccusl.org/meetings.html
- UNCITRAL draft convention on cross-border receivables assignments: www.abanet.org/ftp/pub/buslaw/home.html
- Uniform Electronic Transactions Act Drafts: www.abanet.org/nccusl/home.html
- UNIDROIT and UNCITRAL web pages for the ongoing international commercial law projects: http://www.unidroit.org/ and http://www.uncitral.org/
CFS COMMITTEE LISTSERV

The Commercial Financial Services Committee only communicates with its members through a List Serve. If you are a member of the Committee, and not a member of the list, you should join immediately, by sending the following email message to listserv@abanet.org:

subscribe bl-cfsc [your email address] [Do not include the brackets.]

The List is the only way members can get last minute meeting information, information about openings in Committee Leadership, requests for speakers and presenters, and other time sensitive communications.

If you want to know if you are a member, send the following message to the listserv: who bl-cfsc. Within a few minutes you will receive a list of all subscribers, in no particular order. Just search the list (using your email search logic) for your email address.

WEST GROUP--UCCLAW-L LISTSERV

The UCC Committee does not yet have an official ABA listserv like the CFS Committee does, but many UCC Committee members subscribe to the UCCLAW-L listserv (sponsored by West Group, Publisher of the Uniform Commercial Code Reporting Service, with assistance from WashLawWEB) and moderated by the editors of the UCC Bulletin/UCC Reporting Service.

To subscribe to the list, send an e-mail message to listproc@assocdir.wuacc.edu, leaving the subject line blank and including only the following message: subscribe UCCLaw-L[your name]

You will receive a welcome message and additional instructions.

BUSINESS LAW TODAY

Got a great idea for a cutting edge story? Did you know that you can simultaneously contribute an article to the Commercial Law Newsletter and to Business Law Today? It is permissible so long as the submission to the magazine meets the BLT guidelines. For the details on what those guidelines are, go to the Business Law Today web site.

Still have questions?

E-mail Meg Milroy at MLMilroy@aol.com.

NOTE:

This Newsletter is published by the Uniform Commercial Code Committee and the Commercial Financial Services Committee of the American Bar Association’s Section of Business Law. The views expressed are the views of the authors only, and are not necessarily those of the ABA, the Section or either Committee. Please contact Katherine S. Allen, Farris Warfield & Kanaday, PLC, Nashville, kallen@fwar.com or Steven O. Weise, Heller Ehrman White & McAuliffe, Los Angeles, sweise@hewm.com with comments.
At its Spring Meeting in San Francisco, the Subcommittee on UCC Article 1 deliberated extensively the preemptive goals of the Uniform Commercial Code as reflected in Sections 1-102, 1-103, and 1-104 and the impact these goals should have in the revision, if any, of Section 1-103. While the mere existence of Section 1-103 may not defeat the preemptive goals reflected in current Section 1-102, the Subcommittee debated whether the language of the text of current Section 1-103 and its comment were harmonious with these preemptive goals. Furthermore, a question was raised on whether the limited purpose of Section 1-104, prohibiting implied repeal of the Act by subsequent legislation, was proper authority to support any revision of Section 1-103 to limit supplementation of the Act by principles of common law and equity.

After much discussion of the policies expressed in Section 1-102 and the value of the 50 years of experience under the Act, the Subcommittee focused on the revision of Section 1-103 in the September 1997 draft. Revised Article 1 merges the texts of current Sections 1-102 and 1-103.

SECTION 1-102. CONSTRUCTION OF ACT TO PROMOTE ITS PURPOSES AND POLICIES; APPLICABILITY OF SUPPLEMENTAL PRINCIPLES OF LAW.

(a) [The Uniform Commercial Code] must be liberally construed and applied to promote its purposes and policies, which are:

(1) to simplify, clarify, and modernize the law governing commercial transactions;

(2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and

(3) to make uniform the law among the various jurisdictions.

(b) Principles of law and equity may be used to supplement [the Uniform Commercial Code], except to the extent that those principles are inconsistent with

(1) either the terms [Alternative A -- or the purposes and policies of] [Alternative B -- of, or the principles embodied by,] a particular provision of [the Uniform Commercial Code]; or

[(2) the purposes and policies identified in subsection (a)].

Although approving, in general, the clarification of the role of supplemental law, the designation of supplementation as permissive rather than mandatory and the inclusion of factors for determining if supplementation is appropriate, the Subcommittee concluded that substituting the term “inconsistent” for “displaced” and then deleting the illustrative examples of supplemental law, especially “law merchant,” created newer and perhaps more complicated problems.

Finally, the Subcommittee addressed the relationship, if any, between Section 1-103 and international commercial law. Given the stated purposes and policies of the UCC (1) to simplify, clarify and modernize the law governing commercial transactions and (2) to permit the continued expansion of commercial
practices through custom, usage and agreement, the Subcommittee debated the need, if any, to facilitate resort through Section 1-103 to law merchant, especially to international law initiatives such as the UNIDROIT Principles.

For an elaborate discussion of these and other issues pending before the subcommittee, watch for the Spring 2000 symposium issue of the SMU Law Review, Part I, dedicated to articles on Revised Article 1, or visit the Subcommittee during the Annual Meeting of the ABA in Atlanta, Georgia. The Subcommittee will convene on Saturday, August 7, 1999. A read through of the July-August 1999 draft of Revised Article 1 will be the sole agenda item. Location of the meeting as well as copies of the draft may be obtained from the Subcommittee website before the meeting. For additional information or to obtain an application for subcommittee membership, contact Sarah Jenkins at shjenkins@ualr.edu or Fred Miller at fmiller@ou.edu or visit the Sub-committee website: www.abanet.org/buslaw/cfs-ucc/ucc/subcommframe.html

SUBCOMMITTEE ON PAYMENTS

Stephanie A. Heller, Chair
Federal Reserve Bank of New York
New York, NY

Paul S. Turner, Vice Chair
Los Angeles, CA

Thanks to everyone who attended the Subcommittee meeting at the Spring Meeting in San Francisco. I think everyone will agree that the panel discussion on intangible instruments was extremely timely and informative. The discussion considered whether it is possible to have true intangible negotiable instruments and, if it is possible, how the UCC would need to be revised to accommodate such instruments. If, as has been rumored, NCCUSL establishes a drafting committee to consider revisions to Articles 3 and 4 to address intangible instruments, the Subcommittee will establish a work group to provide feedback to the drafters.

At the Annual Meeting of the ABA in Atlanta, the Subcommittee has invited a guest speaker to discuss the ways in which intellectual property rights can affect the development of new payment systems. Developments in intellectual property law in recent years, particularly in the area of patent law, make it essential that every payments lawyer be aware of fundamental IP principles. One needs only to look at the Wachovia check image patents and the Financial Service Technology Consortium e-check patent to know that intellectual property issues affect all of us involved in the development of new payment products as well as the development of new business methods for delivering established payment products.

If time permits, Paul Turner, Vice Chair of the Subcommittee, will identify ambiguities in the liability provisions of Article 4A and solicit the views of the Subcommittee on the need to resolve these ambiguities. One of these is the conflict between an apparently enforceable reporting provision in a funds transfer agreement (e.g., the customer must report fraudulent transfers within 30 days) and nonvariable liabilities of the bank under Article 4A (e.g., the bank is liable for fraud when it has not complied with an agreed-upon security procedure). Another issue is whether a bank can enforce a disclaimer of liability for its own errors. A draft of a proposed PEB commentary addressing these issues and illustrations of these and other Article 4A ambiguities will be

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posted to the Committee website prior to, and distributed at, the Subcommittee meeting.

The Subcommittee Meeting is scheduled for August 8, 1999 at 10:00 am.

If there are any members of the Subcommittee on Payments or the Uniform Commercial Code Committee that have new projects or issues that they wish the Subcommittee to entertain, please contact Stephanie Heller at 212-720-8198.

**SUBCOMMITTEE ON LETTERS OF CREDIT**

*James E. Byrne, Chair*

*Montgomery Village, MD*

The International Standby Practices (ISP98), a new set of rules of practice specifically designed for standbys, has been the focus of recent meetings of the Letter of Credit Subcommittee and of a program at the recent San Francisco Business Law Section Spring Meeting. Now that the rules are in place, the attention of the Subcommittee has shifted to a general interest in developments in the field.

The session at the August Annual Meeting will feature a presentation by former Chair, James G. Barnes of Baker & McKenzie (Chicago), on the problem of what constitutes an original document. Since the UK decision in Glencore, there has been debate and confusion as to whether or not documents presented must be stamped "original" under UCP500 Article 20(b). Subsequent UK decisions have added to the confusion. To address the situation, the International Financial Services Association (the trade association of major banks involved in LCs) has issued a paper outlining its practice. In addition, the Technical Adviser to the International Chamber of Commerce Banking Commission has proposed an approach to the problem, which was recently discussed at the Banking Commission meeting in April 1999. Jim Barnes will take the Subcommittee through the various permutations of the problem and proposed solutions and discuss practical steps to avoid problems under the current regime.

In addition, the Subcommittee will discuss the status of Revised UCC Article 5 (including the non-conforming amendments and the status of the revision in New York), implementation of the ISP and U.S. adoption of the UN Convention on Independent Guarantees and Stand-by Letters of Credit. With the year well underway, cases to be considered for the Annual Survey for *The Business Lawyer* also require attention and several current cases will be discussed.

**SUBCOMMITTEE ON UCC LITIGATION**

*Jill S. Gelineau, Chair*

*Schwabe, Williamson & Wyatt*

*Portland, OR*

*Thanks to Michael Ferry.* At our last Subcommittee meeting, held at the Business Law Section Spring Meeting in San Francisco, we had a great presentation by Michael Ferry from St. Louis, Missouri on the recently adopted Standards and Guidelines for Litigating and Settling Consumer Class Actions, adopted by the National Association of Consumer Advocates. For those of you who could not attend, I have a couple of extra copies of the Guidelines with a very interesting commentary in my office and would be happy to forward one to anybody that is interested.
Upcoming Meeting in Atlanta. The Business Law Section meets at the Annual Meeting in Atlanta on August 7 through 10. The UCC Subcommittee on Litigation does not meet but the UCC Committee as a whole has some interesting programs which will be of value to those who are interested.

Thanks to Steve Sanford. Every other year the editors of The Business Lawyer ask a litigator from our subcommittee to prepare the UCC Litigation Survey for The Business Lawyer. This year, Steven Sanford in Sioux Falls, South Dakota, prepared the article, which will be a survey of important UCC litigation cases that have been published in the last two years. Keep an eye out for an upcoming edition of The Business Lawyer to see Steve’s article.

Ideas for other Projects. Much of the efforts of the UCC Committee of the Business Law Section has been devoted to drafting revisions to various articles of the Uniform Commercial Code. However, that work is coming to an end and there will be more focus on other aspects of the Uniform Commercial Code, and especially litigation. If any readers have any ideas for projects or ways we can use the skills of our subcommittee, please give me a call.

Task Force on Stored-Value Cards

Thomas C. Baxter, Jr., Reporter
Federal Reserve Bank of New York

At the Spring Meeting in San Francisco, the Task Force on Stored Value Cards held its final meeting. The Task Force, which was sponsored by the UCC Committee’s Subcommittee on Payments, the Banking Law Committee’s Subcommittee on Payments and Electronic Banking, and the Committee on Cyberspace Law, was established to study the commercial law issues associated with stored value products. The primary objective of the Task Force was to consider the extent to which the commercial law of the United States may be applied to stored value products, assuming that no contracts or regulations would govern the new payments products. In February 1997, the Task Force issued a report addressing this issue, A Commercial Lawyer’s Take on the Electronic Purse: An Analysis of Commercial Law Issues Associated with Stored-Value Cards and Electronic Money, 52 Bus. Law 653 (Feb. 1997).

Since the publication of the initial Task Force Report, the Task Force considered the need for a second report on the commercial law issues associated with multifunction stored value cards. Due to the continuing evolution of these products, the consensus of the group was that a second report would be premature at this time. The Task Force believes that the issues and principles articulated in the first report are as relevant for multiapplication cards as they are for single function stored value cards.

Over the past two years, the Task Force has: (1) served as a clearinghouse for information concerning stored value products; and (2) provided input on state and federal law stored value initiatives. In this regard, the Task Force devoted part of each of its meetings to a roundtable discussion of stored value developments. The Task Force also provided NCCUSL with its views concerning the need for a new uniform state law on stored value products, the need for a rule on how stored value escheats, and the appropriate parameters with respect to stored value of a uniform law on money transmitters.
At its meeting in Atlanta, the Task Force concluded that, given the current level of activity in the stored value area, there was no longer a need to keep the Task Force active. I would like to take this opportunity to thank everyone who participated in Task Force meetings and projects.
The next meeting of the Creditors’ Rights Subcommittee will be in Atlanta on Saturday, August 7, 1999 from 2:00 to 3:30 in Salon A of the Hilton Towers and Convention Center. This will be a joint meeting with the Bankruptcy Litigation Subcommittee of the Business and Corporate Litigation Committee chaired by Philip Warden of Pillsbury, Madison & Sutro LLP, San Francisco, CA.

We have a distinguished panel discussing "Hot Topics in Bankruptcy." Our panelists will be the Honorable Stacey Cotton, Chief Judge, U.S. Bankruptcy Court, Northern District of Georgia, the Honorable Margaret A. Mahoney, Chief Judge, U.S. Bankruptcy Court, Southern District of Alabama, R. Neal Batson of Alston & Bird LLP, Atlanta, and H. Elizabeth Baird, Assistant General Counsel, Bank of America, S.A.

The Supreme Court’s recent decision in the 203 La Salle Partnership case and the hotly-debated bankruptcy legislation will be amongst our discussion topics.

All who are interested are invited to attend!

Catherine E. Bauer, Chair
Bank of America
Los Angeles, CA

Philip Warden, Vice-Chair
Pillsbury, Madison & Sutro
San Francisco, CA

Peter Munoz, Co-Chair
Crosby, Heafey, Roach & May
San Francisco, CA

James Schulwolf, Co-Chair
Pepe & Hazard
Hartford, CT

The Intellectual Property Financing Subcommittee held a successful meeting in San Francisco on April 15,1999 at the Spring Meeting of the Business Law Section of the ABA. Over 100 attorneys attended. The topics included:

♦ The Practical Issues of Lender Monitoring, Preserving and Recovering on a Website, Warren E. Agin (Swiggart & Agin, Boston, MA);

♦ Software Financing Issues, Leianne S. Crittenden, (Senior Corporate Counsel, Oracle Corporation);

♦ A report on the status of legislation dealing with security interests in intellectual property, John Muller (Brobeck Phleger & Harrison, San Francisco, CA); and

♦ An update on In re Catapult Entertainment, Inc. by Peter S. Munoz (Crosby Heafey Roach & May, San Francisco, CA).

Copies of the program materials on topics 2, 3, and 4 are available on the Subcommittee’s website. Due to copyright issues, Warren Agin’s program materials could not be posted, but he is willing to provide a hard copy via "snail mail," and can be contacted at (617) 742-0110 or WAgin@agin.com. The Subcommittee is planning on conducting another meeting in Atlanta at the Annual ABA meeting. One of the topics will cover further
 developments in federal legislation to deal with the *Avalon* and *Peregrine* decisions.

**SECURED LENDING SUBCOMMITTEE**

Jeffrey S. Turner, Chair  
*Brobeck, Phleger Harrison LLP*  
Los Angeles, CA

Meredith Jackson, Chair  
*Irell & Manella LLP*  
Los Angeles, CA

At the Joint Meeting of the Secured Lending Subcommittee of the Commercial Financial Services Committee and the Secured Transactions Subcommittee of the Uniform Commercial Code Committee in San Francisco, four dynamic panelists revealed their insights into the changing credit environment in light of the recent market volatility.

Paul Phaneuf, Head of High Yield for Credit Lyonnais Securities, Elizabeth Reno, Senior Business Development Officer for Fleet Capital, Eric Swanson, Co-Head of Senior Debt Origination for Donaldson, Lufkin & Jenrette Securities Corporation, and Perry White, heading the west coast Syndicated Finance Group at Nationsbanc Montgomery Securities LLC were co-presenters. Considering the parameters for different financing vehicles, the convergence of the capital markets, the changing identities of purchasers who buy various financial products and the structures of the deals that get done, the panelists addressed the credit crunch, the extent of revitalization of the market and the resulting changes.

The Subcommittees intend to continue following recent developments in the secured lending arena.

**SUBCOMMITTEE ON REAL ESTATE FINANCING**

Thomas A. Snow, Chair  
*Carlton Fields*  
Tampa, FL

The Real Estate Financing Subcommittee held a very successful Spring Meeting in San Francisco this past April. Our featured speakers were Jim Chadwick of Patten Bond, Dallas, Nancy Little of McGuire Woods in Richmond, and Jack Murray, Vice President and Special Counsel for First American Title Insurance Company of Chicago. Our panelists discussed the legal and practical issues involved in “synthetic leasing.”

Our next meeting will be held on Saturday, August 7, Noon-2:00 p.m. at the annual ABA meeting in Atlanta. The topic of our presentation in Atlanta will be the use of environmental liability insurance and other legal and practical solutions to dealing with actual or potential environmental liability once contamination is discovered in the process of loan closing due diligence. Our discussion will be led by Laurel Lockett, of the Tampa office of Carlton Fields.

Should any subcommittee members also wish to present short reports concerning current case law, please contact Tom Snow at (813)229-4201 or via e-mail at tsnow@carltonfields.com.

Remember the UCC/CFS Committee Joint Website:  
[http://www.abanet.org/buslaw/cfs-ucc/home.html](http://www.abanet.org/buslaw/cfs-ucc/home.html)
UCC SCORECARD -- REVISIONS

ARTICLE 1 - GENERAL PROVISIONS

Latest Draft: September, 1997
Status: Drafting Committee's next meeting not scheduled.
UCC Committee Contact: Sarah Howard Jenkins (501) 324-9937 or Fred Miller (405) 325-4699.

ARTICLE 2 – SALES

Latest Draft: Annual Meeting Draft July 1999
Status: ALI approved draft at annual meeting, May 1999. Up for final approval at NCCUSL July 1999 annual meeting.
UCC Committee Contact: David J. Frisch (302) 477-2119.

ARTICLE 2A – LEASES

Latest Draft: Annual Meeting Draft July 1999
Status: ALI approved draft at annual meeting, May 1999. Up for final approval at NCCUSL July 1999 annual meeting.
UCC Committee Contact: Lawrence F. Flick, II (215) 569-5555.

ARTICLE 5 - LETTERS OF CREDIT

Latest Revision 1995. Revised Article 5 is being presented to the states for adoption, and has been adopted by at least 38 states.
UCC Committee Contact: James G. Barnes (312) 861-2854.

ARTICLE 7 - DOCUMENTS OF TITLE

Latest Draft: No draft.
Status: The Article 7 Task Force has been reactivated. NCCUSL has asked the Task Force to prepare a report on the issues that an Article 7 revision would likely address. The Task Force is open to anyone who wants to participate. The Task Force hopes to have a report to NCCUSL by Summer 2000.
ARTICLE 8 – INVESTMENT SECURITIES

Latest Revision 1995: Revised Article 8 is now being presented to the states for adoption, and has been adopted by all states other than Rhode Island and South Carolina.
UCC Committee Contact: Sandra M. Rocks (212) 225-2780.

ARTICLE 9 – SECURED TRANSACTIONS; SALES OF ACCOUNTS AND CHATTLE PAPER

Status: Revised Article 9 is approved and is being presented to the states for adoption. It has been introduced in ten states.
UCC Committee Contact: Steven O. Weise (213) 244-7831.

UNIFORM ELECTRONIC TRANSACTIONS ACT

Status: Up for final approval at NCCUSL Annual Meeting, July 1999
UCC Committee Contact: C. Robert Beattie, (612) 607-7000

UNIFORM CONSUMER LEASES ACT

UNIFORM CONSUMER LEASES ACT Latest Draft: April 1999
Status: Drafting Committee’s next meeting not scheduled.
UCC Committee Contact: Michelle Hughes (757) 499-8800.

UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT

(Formerly UCC Article 2B.)
Status: Up for final approval at NCCUSL Annual Meeting, July 1999
UCC Committee Contact: Donald A. Cohn (302) 773-3521.
The Portable UCC: Second Edition
edited by Corinne Cooper

The Portable UCC is in a compact, convenient size, and includes the complete text of the UCC as amended through 1995, including revised Articles 5 and 8. Best of all, it has an extremely comprehensive and easy to use subject index. (Priced from $17.95 to $29.95, depending on the number of copies ordered.)

♦ The ABCs of the UCC
Series edited by Amelia Boss

These primers on each article of the UCC are written for both practitioners and students. Each book cuts out the footnotes and convoluted discussions that often accompany legal literature to provide just the basic UCC concepts and operation of the Code -- in a simple, straightforward style. (Each costs $29.95 for Business Law Section members and $14.95 for students.)

Article 1: General Provisions, by Fred H. Miller and Kimberly J. Cilke
Article 2: Sales, by Linda J. Rusch and Henry D. Gabriel
Article 2A: Leases, by Amelia H. Boss and Stephen T. Whelan
Article 3: Negotiable Instruments and Article 4: Bank Deposits and Collections, by Stephen C. Veltri
Article 4A: Funds Transfers, by Thomas C. Baxter, Jr. and Stephanie A. Heller
Article 5: Letters of Credit, by James G. Barnes, James E. Byrne and Amelia H. Boxx
Article 8: Investment Securities, by Sandra M. Rocks and Carl S. Bjerre
Article 9: Secured Transactions, by Russell A. Hakes

New:
Related and Supplementary Consumer Law, by Fred H. Miller and Cindy Hastie


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# UCC SCORECARD

## 50 State Survey of Adoptions of Revised Official Text of the UCC

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Please note that the Enactment Date does not necessarily reflect the effective date. Please refer to the applicable statute for the relevant effective date.

Our thanks to John McCabe and Katie Robinson at the National Conference of Commissioners on Uniform State Laws for their help in compiling the information above. These revisions are based on the information available as of May 3, 1999.

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<sup>1</sup> South Dakota has adopted only 1987 Official Text without the 1990 Amendments.

<sup>2</sup> States which have repealed Article 6 are identified by indicating "Repeal" next to the state name; states adopting the revisions suggested in Alternative B to the 1989 Official Text are identified by indicating "Revise" next to the state name.

<sup>3</sup> In addition to the enactments noted, Puerto Rico has only adopted the following Articles: Article 1, Article 4A, the original versions of Article 5 and Article 7, and the 1972 version of Article 9.
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