MESSAGE FROM THE CHAIR:
COMMERCIAL FINANCIAL SERVICES
COMMITTEE

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

The Committee continues to use electricity and its more modern progeny to great advantage. Dave Willenzik, together with Brian Hulse and Jim Prior, is working incredibly hard to add content to our new Survey of Commercial Law. It will contain, among other items, a survey of the law of all 50 states, covering (i) special state laws on notification to a governmental account debtor, (ii) forms of general releases suitable in each state, (iii) a survey of Canadian Law on secured transaction issues, (iv) perfection of life insurance assignments, and (v) what a judgment or tax creditor must do in each state to become a “lien creditor” as defined in UCC 9-301. If any of you have additional suggestions for topics please advise me by email with a copy to David, Brian or Jim.

The Spring Meeting Dinner either will be held (or has already been held) in Mitchell’s Steak House in Columbus. We either will have or did have a great time there. Tickets are still available and there are still a few

MESSAGE FROM THE CHAIR:
UNIFORM COMMERCIAL CODE COMMITTEE

By Linda J. Rusch
Hamline University School of Law
St. Paul, MN

As I write this update, the Spring Meeting, March 23-26, 2000 in Columbus Ohio has been planned and planning is well underway for the Annual Meeting in New York City and London. At the Spring Meeting, along with a full slate of subcommittee and task force meetings where a host of interesting subjects will be discussed, the UCC Committee will be sponsoring or co-sponsoring the following programs:

♦ “International Marketing and Sales of Goods” on Friday March 24 from 8:00-10:00 a.m.

♦ “The ABCs of Uniform Computer Information Transactions Act and Uniform Electronic Transactions Act: The Alphabet Soup of Electronic Commerce” on Saturday March 25 from 8-10:00 a.m.

♦ “Commercial Law Developments 1999” on Saturday March 25 from 10:30-12:30 a.m.

At the UCC Committee meeting on March 23 from 2-4 p.m. we will be having a short presentation on “Consumers and Business Law Legislation: The Big Themes.” The Committee will also be having
Message from the CFS Chair, Con't.
cows running around that we can eat. Our hotel in Columbus will be the Hyatt.

Please be sure to visit our web site (http://www.abanet.org/buslaw/cfs-ucc/home.html) and the Business Law Section site. There you can register for meetings, download the handout material from prior meetings (we have started this service with the meeting last fall in Toronto) and check on the status of subcommittee happenings.

Steve Weise and I again thank Kathi Allen and Kathleen Hopkins for their efforts in putting this newsletter together. In addition, of course the ABA personnel have been, as always, quite helpful and supportive to the leadership of CFS, and we thank all of them for their help.

Message from the UCC Chair, Con’t.

its annual joint dinner with the Commercial Financial Services Committee on Thursday March 23. Look for a mailing from the section office to make your reservations.

The pages that follow will tell you more about what is happening at the various subcommittee and task force meetings in Columbus. You may also want to take a look at the UCC Committee Web site at http://www.abanet.org/buslaw/cfs-ucc/home.html for more information. At that location, you can also receive instructions for signing up for the UCC Committee’s list serv.

The UCC Committee is a large committee with approximately 1200 members. Mailings to that large a group are costly and time consuming. To maintain timely and cost effective communication to the members of the committee, we need to be able to effectively use the electronic tools we have available. The web site was the first step and the committee wide list serv is the second step. I encourage all UCC Committee members to sign up for the list serv and to make sure that the ABA Section office has your email address. In addition, make it a habit to take a look at the web site for updated information. I am interested in hearing ideas about other ways in which electronic tools could be used to facilitate the work of the Committee, so please contact me with your ideas at Lrusch@gw.hamline.edu.

SEE YOU IN COLUMBUS!

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, 424 Church Street, Suite 1800, Nashville, Tennessee 37219, kallen@fwar.com or Kathleen J. Hopkins, Tousley Brain PLLC, 56th Floor, Key Tower, Seattle, Washington 98104-5056, khopkins@tousley.com, with any comments or suggestions.
LICENSE TO SELL: AT&T DOESN'T NEED YOUR EXPRESS APPROVAL TO USE YOUR PRIVATE INFORMATION IN MARKETING SERVICES.

By Marina I. Adams
Federal Reserve Bank of New York

An initiative to protect customer privacy in the information age was thwarted in a recent opinion from the Tenth Circuit Court of Appeals, which ruled that the Federal Communications Commission (“FCC”) violated the First Amendment by requiring telecommunication carriers (“carriers”) to obtain express approval from their customers prior to using or disclosing customer proprietary network information (“CPNI”). U.S. West v. FCC, No. 98-9518 (10th Cir. filed August 18, 1999). The two judge majority agreed with petitioner U.S. West in holding that the FCC regulation promulgated to implement the provisions of the Telecommunications Act of 1996 (“Act”) restricted free speech without presenting a clearly identifiable state interest, and, that even if there was a substantial state interest, the regulation was not narrowly tailored to serve that state interest.

The relevant provision of the Act, entitled “Privacy of customer information,” requires a carrier to obtain customer approval when it wishes to use, disclose, or permit access to CPNI. 47 U.S.C. § 222. In response to requests for guidance from the telecommunications industry on the means of obtaining customer approval, the FCC sought to clarify this provision by requiring affirmative rather than tacit approval by the customer prior to the use of CPNI for marketing purposes.

After noting that deference to an agency’s ruling is inappropriate when it raises serious constitutional questions, the majority in U.S. West turned to the test elucidated in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y., 447 U.S. 557 (1980), which protects commercial speech concerning lawful activity if the speech is not misleading. Under Central Hudson and its progeny, the government may only restrict this type of speech if it proves that (1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest.

“Although we may feel uncomfortable knowing that our personal information is circulating in the world, we live in an open society where information may usually pass freely.”

The FCC argued that the CPNI regulation would protect customer privacy and promote competition; the two stated purposes of the Act. The majority in U.S. West, however, opined that it is insufficient to assert a general state interest in protecting privacy without showing that the failure to protect this interest would result in specific and significant harm to individuals. The harm that Congress had implicitly recognized in the Act apparently was not enough for the majority:

Although we may feel uncomfortable knowing that our personal information is circulating in the world, we live in an open society where information may usually pass freely. A general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial state interest under Central Hudson . . . .

U.S. West slip op. at 8.

The majority also did not think that promoting competition was a substantial state interest that could justify the regulation because Section 222 deals specifically with privacy, which, based on the U.S. West majority’s interpretation of legislative history, may actually be an interest contrary to the interest of competition. The CPNI regulations sought to
diminish anticompetitive barriers by reducing the possibility that a carrier could easily convert its existing customers to a new product. Apparently, the U.S. West majority was unable to conceive how both interests could be served by the same regulation, even one aimed at leveling the playing field among competitors by restricting their ability to use non-public information.

The U.S. West court then turned to the second prong of Central Hudson under which the government must show that the harm sought to be protected against is real and that the regulation will actually alleviate the harm to a material degree. Because the FCC failed to provide any statistical or empirical data on how disclosure of CPNI would occur, the court held that the FCC failed in its burden of showing the harm. Presumably, this prevented the court from even considering whether the FCC met the standard in the original language of Central Hudson, of showing that the regulation advanced the government’s interest.

Finally, under the third prong of Central Hudson, the court ruled that the FCC’s regulations were not narrowly tailored to their desired objectives of protecting privacy and promoting competition. The court held that the FCC failed to adequately consider what was, in the court’s mind, an obvious and substantially less restrictive alternative, the opt-out strategy, whereby customers would be deemed to approve the disclosure of CPNI if they did not actively request that it be protected.

Of course the majority in U.S. West did not establish the substantial state interest test. The Supreme Court, in the Central Hudson case, required this type of inquiry which has been criticized over the years for being vague and easily manipulated. Since the decision in Central Hudson, the Court has vacillated between different levels of scrutiny depending on the governmental interest being asserted, which has done little to establish a consistent standard for commercial speech jurisprudence.

It appears that in this case, however, the court in U.S. West could have profitably adopted the approach of the dissent – determining whether a regulation enacted by a government agency to implement legislation was proper. Thus, the first order of inquiry should have been whether the FCC construed the statute in a reasonable manner. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). It is only after reviewing the challenged regulation under Chevron, that the court should have turned to the constitutional challenge. Rust v. Sullivan, 500 U.S. 173 (1991). Furthermore, a court should only refuse to defer to an agency’s interpretation of a statute if grave constitutional concerns are raised. Williams v. Babbit, 115 F.3d 657 (9th Cir. 1997), cert. denied, 118 S.Ct. 1795 (1998).

In defining the scope of “approval,” the FCC looked to the plain meaning of the word as connoting knowledge and the exercise of discretion after knowledge. Black’s Law Dictionary at 102 (6th ed. 1990). The FCC considered several methods of obtaining customer approval, including express and implied approval. It then determined that the best way to ensure a deliberate and informed response was by requiring express approval because otherwise a customer’s mere failure to read and object to a written notice would be construed as approval of the use of their CPNI information for marketing purposes. This does not appear to be a patently unreasonable implementation of the statute, although it

The decision in U.S. West is troubling because of the precedent it sets for the review of agency regulations regarding privacy... In the information age, the incentive for companies to collect and sell personal data, and the ease with which this may be accomplished, is simply too overwhelming to be ignored.
certainly makes it more difficult for the telecommunications industry to use CPNI.

Turning to the constitutional challenge, the court concluded that the FCC failed to narrowly tailor its regulation to the harm it sought to protect against. After finding it “difficult, if not impossible to conduct a full and proper narrowing analysis” the majority ruled that the FCC insufficiently justified its express approval approach and thus the regulation was not narrowly tailored.

*U.S. West* slip op. at 10.

The dissent forcefully argued that the restrictions on commercial speech arose more from the statute than the FCC’s regulation and that, because the constitutionality of the statute was not properly before the court, the First Amendment challenge should have been rejected. The dissent argued that the FCC’s selection of express approval rather than implied approval did not sufficiently restrict expressive activity as to raise a constitutional issue.

The decision in *U.S. West* is troubling because of the precedent it sets for the review of agency regulations regarding privacy. Contrary to the court’s view that we live in an open society where a general level of discomfort with the disclosure of our personal information is to be expected and accepted, there is increasing concern in every industry about the disclosure and use of consumer information. In the information age, the incentive for companies to collect and sell personal data, and the ease with which this may be accomplished, is simply too overwhelming to be ignored. When Congress passes a law that explicitly restricts the use of CPNI, it is reasonable to expect a court to review an agency’s reasoned implementation of that law with more deference.

* The views expressed in this article do not necessarily reflect the views of the Federal Reserve Bank of New York or any other component of the Federal Reserve System.

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**See the UCC Scorecard on pages 20 - 21 for an update on the status of Revised Article 9, UETA, UCITA and other UCC legislation in all 50 states!**
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INTERNET SITES OF INTEREST

♦ ABA Business Law Section: www.abanet.org/buslaw

♦ ABA Joint Committee on Electronic Financial Services: www.abanet.org/buslaw/efss/home.html

♦ UCC Revisions Drafts: www.law.upenn.edu/library/ulc/ulc.htm

♦ NCCUSL Home Page: www.nccusl.org

♦ Series of Papers on UCITA Issues: www.nccusl.org/pressrel/UCITAQA.HTM

♦ NCCUSL Meeting Schedule: www.nccusl.org/meetings.html

♦ Uniform Electronic Transactions Act: www.abanet.org/nccusl/home.html

♦ UNIDROIT and UNCITRAL web pages for ongoing international commercial law projects are located at www.unidroit.org/ and www.unictral.org/.

MAILBAG AND MISCELLANY

COMMITEE JOINT WEBSITE

The UCC Committee and the Commercial Financial Services Committee share a joint Home Site on the Web at www.abanet.org/buslaw/cfs-ucc/home.html. Extensive information is available through the homesite about the organization, activities and leadership of both committees.

By direct link from the joint homesite, members of the Committees can have on-line access to various editions of the Commercial Law Newsletter, and can find out about meetings and agendas of the Committees and their respective subcommittees and task forces, projects underway, leadership of the Committee and its subcommittees, publications, and a host of other information. This is an easy way to keep abreast of committee activity.

Business Law Today

Remember that you can contribute articles simultaneously to the Commercial Law Newsletter and to Business Law Today. The submission to the magazine must meet the BLT guidelines. For the details on what those guidelines are, go to the Business Law Today website.

Still have questions?

E-mail Meg Milroy at MLMilroy@aol.com

Brown Bag Video Programs

The ABA has videotapes available to serve as centerpieces of Brown Bag Programs. The programs are easy to produce; you can hold them for attorneys in your area or in your firm. The recent presentation by Steve Weise and Ed Smith of an overview of Revised Article 9 is timely and popular. Contact Sue Daly, suedaly@staff.abanet.org for the guidelines for sponsoring a Brown Bag Program.
**CFS COMMITTEE LISTSERV**

The Commercial Financial Services Committee only communicates with its members through a Listserv. 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:

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subscribe bl-cfsc [your email address]
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[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:  
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who bl-cfsc.
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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.

**UCC COMMITTEE LISTSERV**

The Uniform Commercial Code Committee focuses on all areas of commercial law, whether directly covered by the UCC (e.g. sales, leasing, payments, letters of credit, documents of title, investment securities or secured transactions) or tangentially covered (e.g. software contracting, suretyship, international commercial transactions and electronic money). The Committee monitors commercial law developments affecting commercial interests and actively participates in statutory reform efforts in commercial law. For more detailed information about the work of the various subcommittees, see our web site http://www.abanet.org/buslaw/cfs-ucc/home.html.

This list is to be used to publicize committee events and to let people know about the work of the various subcommittees of the UCC Committee. Please use the list to give short announcements or to request volunteers for projects. Given the size of the UCC Committee and the diversity of topics addressed by the various subcommittees, please do not use the list to discuss substantive work. If a group needs a list for a substantive law discussion, the ABA Business Law Section Technology Manager, Joanne Harrison, will be able to help you set up a Listserv for that purpose. Her email is harrisoj@staff.abanet.org. If you need help to subscribe or unsubscribe or need to change your email address, please contact Joanne Harrison and she will be able to help you.

**WEST GROUP--UCCLAW-L LISTSERV**

For discussion of substantive issues, many 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.) This is the place to discuss and debate cutting-edge UCC issues.

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:

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subscribe UCClaw-L [your name]
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You will receive a welcome message and additional instructions.
The Subcommittee on Article 1 is looking forward to a full and provocative agenda at its next meeting, which will be in Columbus on Friday, March 24, at 11:00 a.m. during the spring meeting of the Business Law Section. The chair hopes to conclude the discussion of the right to jury trial and move into the next major issues facing the Subcommittee the UCC’s displacement of other law and the inclusion of an unconscionability-provision on Article 1.

The Subcommittee has already invested a substantial amount of time on the jury trial question. Margaret Moses wrote a report on the issue with the collaboration of David Snyder, and Paul Turner drafted a provision that attempts to defuse the constitutional issue. The differing views of committee members Margaret Moses and James E. Byrne are argued in two law review articles, The Uniform Commercial Code Meets the Seventh Amendment: The Demise of Jury Trials Under Article 5?, 72 Ind. L.J. 681 (1997), and Revised UCC Section 5-108(e): A Constitutional Nudge to the Courts, 29 UCC L.J. 419 (1997). For an overview of subcommittee debate over Paul Turner’s draft, see Commercial Law Newsletter, Fall 1999. With the benefit of the report, the draft, and the debate, the chair hopes that the Subcommittee will be able to reach a conclusion.

The Subcommittee also plans to address the UCC’s preemptive effect and its relation to other laws. Both current section 1-103 and its latest revision (as of November 1999) provide that principles of law and equity supplement the Code "unless displaced by [its] particular provisions." As section 1-103 simultaneously states rules of preemption and supplementation, the extent of displacement has been an unavoidable issue. Not only are there questions about abrogation of common-law and equitable rules; there are other issues such as the coordination of consumer protection statutes with UCC, the integration of international commercial law norms reflected in the CISG and the UNIDROIT principles.

The revision draft appears to move toward more preemption and less supplementation. Currently, official comment 1 to section 1-103 preserves other law unless "explicitly displaced" by the UCC. On the other hand, a reporter’s note to the November draft states that "unless a specific provision of the Code provides otherwise," the UCC "preempts other state law that is inconsistent with either its provisions, or its purposes and policies." Conceivably such a note could allow an argument that the presumption, and underlying policy, has shifted under the revision, although the wording of the statutory text is barely changed. The agenda for the spring meeting will include this and other issues relating to the applicability of supplemental principles of law.

Time permitting, the Subcommittee will also take up the issue of unconscionability, which promises to be at least as thorny as the other topics. Please join us for what promises to be an interesting meeting. Revision drafts are available for review at http://www.law.upenn.edu/library/ulc/ulc.htm. For additional information or for an application for subcommittee membership, contact Sarah Jenkins <shjenkins@ualr.edu> Fred Miller <fmiller@ou.edu> or David Snyder <david.snyder@law.csuohio.edu>.
The August, 1999 Payments Subcommittee meeting was held jointly in Atlanta with the subcommittee on Payments and Electronic Banking of the Banking Law Committee. The meeting’s principal topic, which might have been called “Basic Intellectual Property Law for Payment System Lawyers,” fascinated the attendees and was followed by a review of a number of ambiguities in UCC Article 4A.

The March 25, 2000 meeting in Columbus will also be a joint meeting with the Payments and Electronic Banking Subcommittee. Jane Larimore, the General Counsel of the National Automated Clearing House Association (NACHA) will discuss recent changes in the NACHA rules, and that discussion will be followed by a program on today’s electronic bill presentment and payment (“EBPP”) environment.

In the EBPP environment, three models currently compete with each other: (i) the biller-direct model gives the payor access to the biller’s web site to obtain and pay bills on line; (ii) the customer consolidation model gives the billers access to the payor’s or a third party’s web site; and (iii) the third party service provider consolidator model consolidates the bills of multiple billers for access by the payors at the service provider’s web site.

EBPP offers potentially huge savings to both billers and payers. The cost to billers of an EBPP transaction is approximately $.10, as compared to the estimated internal cost of bill preparation of between $.70 to $1.00.

Bankers hope that cyberbilling will give them a toehold on the Internet. The speakers at the Columbus program will consider the point of view of billers, consolidators, bill payers and banks and highlight the legal issues that are likely to arise as EBPP develops into a significant new business in the United States.

The recently formed Joint Task Force on Revised Article 9 Enactment Process is jointly sponsored by the CFS and UCC Committees and by the American College of Commercial Finance Lawyers. The mission of the Task Force is to assist state legislators, Uniform Law Commissioners, bar groups and other interested parties in the enactment of the Uniform Official Text of Revised Article 9 of the UCC, with the view to Revised Article 9 becoming effective in each state or other UCC jurisdiction on the statute's uniform effective date of July 1, 2001. The Task Force consists of members in each state and the District of Columbia who are working to ensure universal and timely enactment of Revised Article 9 on a uniform basis.

The Task Force has prepared a UCC Article 9 Enactment Guide, which is posted on the CJS/UCC Committee joint website on the ABA Network, http:\/www.abanet.org/buslaw/cfs-ucc/ucc/article9/home.html. The Enactment Guide has been distributed by NCCUSL to the Commissioners in the various states.

The Task Force has also begun to post on the website surveys received from task force coordinators in the various states. The form of survey is posted at the website as well.
The Chairs of the Task Force, the regional coordinators and the state coordinators all serve a clearinghouse function and respond to issues raised in states considering revised Article 9 for enactment. This information sharing function enables the Task Force to address, on a consistent and uniform basis, coordination with other laws, local filing and other issues that need to be addressed in each state in the preparation of Revised Article 9 legislation. The Task Force also monitors the enactment process and serves as a resource to respond to questions and issues that arise as a part of that process.

The Task Force has scheduled a meeting to be held at the 2000 Spring Meeting in Columbus on Friday, March 24 from 1 to 2 p.m. to discuss the status of the Revised Article 9 enactment process and the efforts of the Task Force in each state. If you are interested in learning more about the status of Revised Article 9 or assisting in the Task Force’s efforts to see that Revised Article 9 is enacted in all jurisdictions by the uniform effective date, please attend.

PROGRAMS AND SEMINARS SUBCOMMITTEE – EXCITING PLANS FOR COLUMBUS!

Christopher J. Rockers
Husch & Eppenberger, LLC
Kansas City, MO

Commercial Financial Services has a great line-up for the Spring Meeting in Columbus, Ohio. We are sponsoring a program to be held Friday, March 24 from 10:30 a.m. to 12:30 p.m. titled “Surfing the Law: Real Time Business Applications of New Intellectual Property Laws.” This program is chaired by Jim Schulwolf and Peter Munoz, and will focus on the proposed Federal Intellectual Property Security Act, the Uniform Computer Information Transactions Act and the “Quick Fix” to the Avalon problem. This program promises to be of great benefit to commercial finance lawyers looking to stay current on proposed legislation affecting the way we handle transactions involving intellectual property.

On Saturday, March 25, from 10:30 a.m. to 12:30 p.m., the Committee will once again co-sponsor, with the UCC Committee, “Commercial Law Developments.” This series, which has become the one of the most popular and well attended programs at the Spring Meeting, will once again feature Steve Weise and Jeff Turner taking us for a two hour tour through significant commercial law and related developments in 1999.

ALERT: For the first time, the CFS Committee will move the full Committee meeting from Saturday morning to Friday afternoon. The meeting will be expanded to cover a significant substantive topic currently of interest to anyone practicing commercial finance law. From 4:00 to 5:30 pm, Meredith Jackson, Jeff Turner, Steve Weise and Bob Zadek will present a Committee Forum titled “Stuff to Do Now to Get Ready for New Article 9”. This Committee Forum will provide practical advice on provisions which should go into transaction documents, when to start filing financing statements in the jurisdiction where the debtor is incorporated and other relevant information necessary to keep you ahead of the pack.

Almost all of our Subcommittee’s will be holding substantive meetings again this year, and we should have some very exciting and informative presentations. Among others, Loan Workouts will be presenting a program on secret liens, Agricultural and Agri-Business Financing will be presenting a discussion on long-term marketing and grower contracts, and Intellectual Property Financing and Loan Documentation will be holding a joint meeting which will detail the financing issues relating to intellectual property held by a hypothetical
company as it passes through stages of
development and solvency.

Beginning this summer at the Annual Meeting
in New York, the Committee plans to roll out a
series of programs and forums on
fundamentals of specific aspects of commercial
finance transactions. If you have any topics
you would like to see addressed, please
contact me.

**LOAN DOCUMENTATION SUBCOMMITTEE**

Robert P. Handler, Co-Chair
NationsCredit Commercial Funding
Chicago, IL

Jeffrey M. Rosenthal, Co-Chair
Reed, Smith, Shaw, McClay
Princeton, NJ

The Loan Documentation Subcommittee’s
presentation at the annual meeting in Atlanta
was extremely well received and timely, to say
the least. Approximately 100 people heard a
panel discussion called: *How The Internet
Changes Everything: Financing In The “.Com”
World or, “How to avoid incoming .coms”.*

Warren Agin of Swiggart & Agin LLC of
Boston, Leianne Crittenden, Managing
Counsel of Oracle Corporation and Gerald L.
Jenkins of Goldberg, Kohn, Bell, Black,
Rosenbloom & Moritz, Ltd., Chicago presented
a thorough and lively review of issues and
documentation suggestions for financing
companies whose sole or primary asset
consists of a web site. In addition to the
voluminous materials, the panel went to great
lengths in reducing a web site to its component
parts as well as providing a due diligence and
documentation road map for lenders and their
counsel. It was the general consensus among
the attendees that that presenters did an
excellent job highlighting the new lines of
inquiry counsel should take in order to fully
understand the workings of a web-based
company.

The Subcommittee’s next meeting is scheduled
during the Spring meeting in March in
Columbus, Ohio. Continuing with the theme
set in August, we are combining our meeting
with the Intellectual Property Subcommittee
and presenting a panel discussion where we
will retell the fictional financial life a company
that meets the web. Our panelists will consider
the variety of issues that face borrowers and
lenders as a company grows and shrinks while
it markets its products through the web as well
as provide due diligence and documentation
tips. Our meeting is scheduled for March 23,
9:00 a.m. until noon, at the Hyatt Regency.
We look forward to seeing you!

**LOAN WORKOUT SUBCOMMITTEE**

Caroline Galanty, Vice-Chair
Bank of America, N.A.
Los Angeles, CA

Subcommittee Chair Lawrence Peitzman and
Vice-chair Caroline Galanty, Assistant General
Counsel with Bank of America, N.A., will chair
this Spring’s subcommittee meeting, which will
be conducted during the Business Law Section
Midyear Meeting in Columbus, on Friday,
March 24, 2000, at 1:00 p.m. The topic for
discussion will be “Secrets & Liens: How
PACA, RICO, IRS, Hot Goods and Other
Hidden Interests Can Ruin Your Workout, and
What You Can Do About It.” Peter S. Clark of
Reed Smith Shaw & McClay, and Douglas
Edwards of First Union Corporation Legal
Division will discuss recent legislative and
case-law developments that could affect
restructurings, workouts and bankruptcies.
INTELLECTUAL PROPERTY FINANCING SUBCOMMITTEE

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

Peter S. Munoz, Co-Chair
Crosby Heafy Roach & May
San Francisco, CA

Our subcommittee will lead two exciting programs at the Section Spring Meeting in Columbus as we continue to navigate the ever-changing waters of intellectual property finance law. First, on Thursday, March 23, from 9 a.m. to 12 noon, we will meet jointly with the Subcommittee on Loan Documentation to discuss The Curious Case of Microzon.com. Our distinguished panel will cover the lifecycle of a business whose principal assets are intellectual property and will examine, among other things, types of financeable intellectual property, due diligence and underwriting issues, documentation techniques, lien and perfection issues, special situations (including cross-border, licensing and embedded software issues), acquisition financing issues and workout and bankruptcy concerns. A copy of the "fact pattern" is available at the Commercial Financial Services Committee website. Panelists include James C. Chadwick (Patton Boggs LLP, Dallas), Bobbi A. Gomez (Parker, Hudson, Rainer & Dobbs, Atlanta), Timothy E. Grady (Porter, Wright, Morris & Arthur, Columbus), Ron Marshall (Fraser Milner, Toronto) and Douglas P. Taber (Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Chicago). The panel will be moderated by James C. Schulwolf (Pepe & Hazard, Hartford).

On Friday, March 24th, from 10:30 a.m. to 12:30 p.m. we will lead a Program entitled Surfing the Law -- Real-Time Business Applications of New Intellectual Property Laws. This Program will focus on two areas of proposed legislation -- (1) proposals to "rationalize" the perfection of liens in intellectual property, including FIPSA, the "AFMA Alternative", and various "quick Fix" approaches to the Avalon problem, and (2) UCITA -- by looking at practical applications should they become law, practical issues raised by the proposals, and potential solutions to those issues. Our outstanding panel includes Prof. Jean Braucher (Univ. of Arizona), Lorin E. Brennan (Grey Matter, LLC, Newport Beach), O. Gordon Pence (Caterpillar) Jeffrey S. Turner (Brobeck, Phleger & Harrison, Los Angeles), and Prof. Thomas Ward (Univ. of Maine). The Program will be moderated by James C. Schulwolf (Pepe & Hazard, Hartford). Both programs will feature lively discussion and an opportunity to learn about topics of high current interest. We invite you to join us in Columbus.

CFS SURVEYS SUBCOMMITTEE

David S. Willenzik
McGlinchey Stafford
New Orleans, LA 70130

The Subcommittee Co-Chairs, Brian Hulse, James Prior, and David Willenzik have nearly completed our State-by-State Survey of seven general commercial law questions. At press time, they were only awaiting the responses for Colorado, Iowa, D.C., Oklahoma and Canada (which were expected to be received by the end of January, 2000).

The Subcommittee has begun the process of requesting updates to the Assignment of Claims Survey. Barry V. Freeman and Kenneth P. Berger compiled the original survey, which was presented at the CFS Loan Documentation Subcommittee meeting in August of 1995. The Subcommittee expects to have this up on the website in a few months. As an additional feature to this survey, Brian Hulse is compiling typical “general release” forms used in each state that, hopefully, members will be able to download from the website for use.
The Subcommittee is also looking into updating a 50-state non-UCC agricultural and other lien survey from 1993.

**COMMERCIAL FINANCE CALENDAR SUBCOMMITTEE**

*Michael F. Maglio, Chair*
*Robinson & Cole LLP*
*Hartford, CT*

The "Master Commercial Finance Calendar" will be set up as a feature to the CFS/UCC Committee Home Page. The Calendar will post meetings, seminars and other events of interest to commercial finance attorneys, providing as much lead time as possible. In addition to a "calendar" page that will list the event in the appropriate date box(es), the plan is for the Calendar to also feature an "expanded page" option that will enable the reader to view an event "details" screen which will contain detailed information about the event and, to the extent available, a direct link to the event/seminar sponsor's web site for more information and/or on-line registration. A further enhancement under study is an "automatic notification" feature to the membership of any new events or changes to scheduled events.

In order to make the Calendar as comprehensive and useful as possible, the Subcommittee welcomes suggestions from the membership, including identification of organizations (be they business, professional or CLE; national, regional or local) and events for Calendar inclusion. You may respond to me privately by e-mail at mmaglio@rc.com or by telephone at (860)275-8274.

**REAL ESTATE FINANCING SUBCOMMITTEE**

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

*Steven D. Fleissig, Vice Chair*
*Friedman Siegelbaum*

*Roseland, New Jersey*

The Real Estate Financing Subcommittee had another successful meeting at the Annual ABA Meeting in Atlanta in August. Laurel Lockett, of the Tampa office of Carlton Fields, conducted a discussion concerning the use of environmental liability insurance and other legal and practical solutions in dealing with actual or potential environmental liability once contamination is discovered in the process of loan closing due diligence.

Our Subcommittee will be meeting at the Business Law Section meeting in Columbus in March. The topic of our presentation in Columbus will be "Top 10 Errors Made Regarding Insurance in Real Estate Closings," to be presented by Herbert Wolman, President of the Insurance Office of Central Ohio, Inc. Should any Subcommittee members also wish to present short reports concerning current case law in Columbus, or have any topics you would like addressed at the Annual Meeting in New York this summer, please contact Tom Snow at (813)229-4201 or via e-mail at tsnow@carltonfields.com.

**SECURED LENDING SUBCOMMITTEE**

*Jeffrey S. Turner, Co-Chair*
*Brobeck LLP Finance Group*
*Los Angeles, CA*

*Meridith Jackson, Co-Chair*
*Irell & Manella LLP*
*Los Angeles, CA*

The Secured Lending Subcommittee will meet in Columbus on Friday, March 24, 2000, from 2pm until 3:30 pm. Harry Sigman will discuss important issues relating to the transition rules of New Article 9. Pete Carson will discuss emerging issues relating to security interests in deposit accounts under New Article 9, and Meredith Jackson will discuss securitization of deposit accounts under New Article 9. The
subcommittee meeting will lead into the 3:30 forum on "Stuff to Do Now to Get Ready for New Article 9." We'll see you there.

CREDITORS’ RIGHTS SUBCOMMITTEE

Catherine E. Bauer
Bank of America Office of General Counsel
Los Angeles, CA

The Creditors’ Rights Subcommittee met in San Francisco on October 8, 1999 in conjunction with the Annual Meeting of the National Conference of Bankruptcy Judges.

We had the pleasure of hearing from William J. Weir, Esq., a member of Luce, Forward, Hamilton & Scripps LLP's San Francisco office regarding recent developments in the lender liability area. Mr. Weir is a recognized expert in lender liability, and he was kind enough to share with us recent cases and trends in the field. He also was very gracious in answering questions from both sides of the aisle. The meeting seemed to be evenly divided between those who represent creditors and those who represent plaintiffs.

And, as an added bonus, Paul Singerman, Esq. of Berger, Davis & Singerman, P.A. in Miami described the order directing incarceration of a debtor that he recently obtained from Judge Cristol in the Stephan Jay Lawrence case. As always, Mr. Singerman was thoroughly engrossing and proved again that truth is always better than fiction (or that lawyers don't get out enough). We hope to hear an update on the case at our next meeting.

Our next meeting will be in July at the Annual Meeting in New York. Our topic will be “Asset Protection Planning” and we have absolutely fabulous speakers lined-up. Hope you can join us then!

AGRICULTURAL FINANCE AND AGribusiness SUBCOMMITTEE

Brooke Schumm, Chair
Daneker McIntire Davis Schumm
Baltimore, MD

Phillip Kunkel, Vice-Chair
Hall & Byers
St. Cloud, MN

The next meeting of the Agricultural Finance and Agribusiness Subcommittee will be at 7:30 a.m. on Friday, March 24 at the Business Law Section’s spring meeting. Having completed our intellectual terrorism campaign of last spring’s meeting “Cold Comfort and Thin Blankets: Priming the Lender’s Blanket Security Interest,” we turn this spring to another hot and intricate area of practice: “Agricultural Marketing and Production Contracts: Whose Ox is Really Gored?” These contracts are becoming the linchpin of fruit and vegetable growers’ and processors’ businesses, as well as being an integral part of U.S. meat production. The contracts present complex executory contract problems in a multi-party context. We will examine financing, workout, and bankruptcy issues. Our program will be led by Phil Kunkel, our vice-chair from St. Cloud, MN, Steve Turner from Omaha, and Paul Strandberg, an attorney with the Minnesota Dept. of Agriculture.

Linda Sartin of Dallas, and Chris Rockers of Kansas City along with Brooke Schumm, our chairman from Baltimore, presented the CFS program at the Commercial Finance Association based on the Ag Finance Subcommittee’s Spring, 1999 meeting program. The program focus was on non-possessory liens, especially “secret” liens, that can prime lender’s blanket security interests, including federal and state tax liens, Article 2 security interests, and PACA with its powerful tracing provisions. For those misled by the Committee name, rest assured the programs are crafted to use agricultural contexts and problems to enlighten attendees on legal issues of broader application, particularly as they affect traditional financing transactions.
At our fall, 1999, meeting in New Orleans in conjunction with the American Agricultural Law Association, we received accolades from the AALA attendees and leadership for three programs the Subcommittee and its members either presented or assisted: “Treating the Sick Sow: Dealing with the Distressed Integrated Operation”, “Getting Ready for Article 9 Revisions,” “Article 2 Priorities over Blanket Security Interests,” and “Section 1631 and Article 7 Developments.” Our sincere thanks to Gordon Tanner of Seattle, Drew Kershen of the Univ. of Okla. Law School, Keith Meyer of the Univ. of Kansas Law School, Gary Koch of New Ulm, MN, and Larry Harris of Waconia, MN for their participation and contributions.

LIAISON REPORT: SECURED CREDITORS SUBCOMMITTEE OF THE BUSINESS BANKRUPTCY SECTION

Bruce J. Borrus
Riddell Williams, P.S.
Seattle, WA

The Secured Creditors Subcommittee of the Business Bankruptcy Section will present a luncheon program at the Spring Meeting in Columbus on Thursday, March 23 at 12:30 pm. The subject of the program is “Section 506(c) of the Bankruptcy Code”. The principal speakers will be Eric Brunstad and Bob Brownlee, the opposing counsel in Hartford Underwriters Insurance v. Magna Bank, a case currently pending before the Supreme Court. They will be joined by Professor Margaret Howard, Kay Standridge Kress and David Weinstein. The panel discussion is sponsored jointly by the Secured Creditors Subcommittee, chaired by David Sykes, and by the Trustees and Examiners Subcommittee, chaired by David Weinstein.
ARTICLE 1 - GENERAL PROVISIONS

Latest Draft: November, 1999
Status: Drafting Committee’s next meeting is not scheduled.
UCC Committee Contact: Sarah Howard Jenkins (501) 324-9937 or Fred Miller (405) 325-4699.

ARTICLE 2 – SALES AND ARTICLE 2A-LEASES

Status: Drafting Committee’s next meeting February 4-6, 2000.
UCC Committee Contact: Thomas J. McCarthy (302) 892-7906.

ARTICLE 5 - LETTERS OF CREDIT

Latest Revision 1995. Revised Article 5 has been adopted by 44 states.
UCC Committee Contact: James G. Barnes (312) 861-2854.

ARTICLE 7 - DOCUMENTS OF TITLE

Latest Draft: No draft.
Status: NCCUSL has asked the Article 7 Task Force to prepare a report on a revision and the Article 7 Task Force hopes to have a report to NCCUSL by Summer 2000.
UCC Committee Contact: Drew L. Kershen (405) 325-4784.

ARTICLE 8 – INVESTMENT SECURITIES

Latest Revision 1995: Revised Article 8 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 CHATTEL PAPER

Latest Revision 1999: Revised Article 9 is being presented to the states for adoption. It has been adopted in at least 7 states, and introduced in at least 18 states.
UCC Committee Contact: Steven O. Weise (213) 244-7831.

UNIFORM ELECTRONIC TRANSACTIONS ACT

Final Version 1999: UETA was approved by NCCUSL in July 1999 and has been adopted by at least two states.
UCC Committee Contact: C. Robert Beattle, (612) 607-7000

UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT

Final Version 1999: UCITA was approved by NCCUSL in July 1999 and is available to the states for adoption.
UCC Committee Contact: Donald A. Cohn (302) 773-3521.

UNIFORM CONSUMER LEASES ACT

Latest Draft: September 1999
Status: Last meeting was September 1999. Drafting Committee’s next meeting not yet scheduled.
UCC Committee Contact: Michelle Hughes (757) 499-8800.
♦ **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 comprehensive and easy to use subject index. (Priced from $17.95 to $29.95, depending on the number of copies.)

♦ **The Portable Bankruptcy Code 2000**, edited by Sally M. Henry

This compact, up-to-date reference will provide you with quick and easy access to relevant Code and Bankruptcy Rule provisions, U.S. Trustee Guidelines, Selected Rules of Civil Procedure and Federal Rules of Evidence. (Priced from $17.95 to $29.95, depending on the number of copies.)

♦ **The New Article 9**, edited by Corinne Cooper; Steven O. Weise and Edwin E. Smith, contributing authors.

This timely, handy guide provides a clear, in-depth explanation of Revised UCC Article 9, with the full 1998 text and Official Comments, along with the complete text of current Article 9 (1995) for comparison. With chapters by Steven O. Weise, the ABA Advisor to the Revised Article 9 Drafting Committee, and Edwin E. Smith, a member of the Drafting Committee, this book has all you need, including: a plain-English overview of Revised Article 9, a checklist of issues to consider as you move to the new rules, a detailed analysis of the complex transition provisions (set out in timelines), extensive charts comparing significant provisions of current and Revised Article 9, and a comprehensive index, with particular attention to new terms and new rules.

♦ **The ABCs of the UCC**, Series edited by Amelia Boss

These primers on the UCC articles are written for both practitioners and students. Each book avoids footnotes and convoluted discussions and explains just the basic UCC concepts and operation of the Code, in a simple, straightforward style. ($29.95 each for Business Law Section members; $14.95 for students.)

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**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. Boss

**Article 8: Investment Securities**, by Sandra M. Rocks and Carl S. Bjerre

**Article 9: Secured Transactions**, by Russell A. Hakes

♦ **Related and Supplementary Consumer Law**, by Fred H. Miller and Cindy Hastie

♦ **A Commercial Lawyer’s Take on the Electronic Purse: An Analysis of Commercial Law Issues Associated with Stored-Value Cards and Electronic Money**, by Stephanie Heller, Thomas Baxter, Jr. and the Task Force on Stored Value Cards

♦ To order, call the ABA Service Center at 1-800-285-2221
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**Notes:** The Scorecard format has been changed to allow UETA and UCITA to be included.

Dates are enactment dates, and do not necessarily reflect the effective dates. Please refer to the applicable statute for the relevant effective date. For UETA and UCITA, the only action is as noted.

South Dakota has adopted only 1987 Official Text of Article 2A without the 1990 Amendments.

States that have repealed Article 6 are identified by indicating "Repeal"; states adopting the revisions suggested in Alternative B to the 1989 Official Text are identified by indicating "Revise".

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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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 **January 21, 2000**.
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