### Electronic Filing of UCC Financing Statements

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Electronic filing of Financing Statements was one of the goals of the UCC's Revised Article 9. The “vision” is that all parties to a secured transaction will be in the closing room and the Financing Statements will have been prepared in advance on a third party’s software application. The application will have been programmed with all of the filing requirements for every jurisdiction, but can be changed prior to submission. Once the negotiations are complete and the authorizing Security Agreement has been signed, all relevant changes are made to the Financing Statements and they are transmitted electronically.

In Filing Offices that accept XML (extensible mark-up language), the acknowledgment that the Financing Statement has been received and accepted is returned in a matter of seconds, allowing funds to be released. This is a 24/7 process in most Filing Offices, as the computer systems filing logic is programmed to accept or reject filings based on UCC §9-516. This takes the human element out of not only the rejection process but also the indexing process. The filer’s entry is what is indexed and retained, thereby eliminating the concern of data entry errors by the Filing Office staff.

To assist in making this a reality, the requirement for a signature on the Financing Statement was eliminated in Revised Article 9. There are currently 34 state/central-level Filing Offices using a variety of electronic filing options. All of the offices allowing electronic filing use a “fill in the blank” option on their website. This requires a payment by credit card and a line-by-line...
entry process, often not allowing the filer to cut and paste collateral descriptions, but rather re-enter them with a limited number of characters. These States are: AR, CA, CO, DE, ID, IN, IA, KS, KY, ME, MA, MI, MN, MS, MO, MT, MI, NV, NH, NJ, NM, NY, NC, ND, OH, OK, PA, SD, TX, UT, VT, WA, WI, and WY.

The best option, which is available in 10 states—CA, DE, MS, MO, NH, NM, NY, NC, TX, WA—allows for bulk filing through a third party link. The technology most commonly being used is XML, which is web-based and a simple computer language, not computer jargon. XML is used in nine of the states, with Texas the exception. Texas uses EDI (electronic data interchange), which was developed by the Article 9 Filing Project in the mid-90’s before there was comfort with web-based technology. It is a complicated computer language that is expensive to implement for both the Filing Office and the service provider, and is only capable of handling initial Financing Statements and termination amendments. In mid-2001, a combined effort of the Filing Offices and service providers developed a user guide. It allows the user to access a service provider software application that not only will send the electronic submission to the appropriate Filing Office(s), but also retains the entry for both the current transaction and for future amendments of all types. The only remaining issue is that attachments either are not allowed or must be cut and pasted into the submission instead of simply attaching them to the transmission. Fortunately, in the next few months, Delaware will be releasing a new version that will allow “pdf” attachments to the submission. It is anticipated that other states will follow this example in the near future.

Unfortunately, “local level” Filing Offices (in some counties, town clerk offices and some cities) where real property related Financing Statements are filed, are not currently contemplating electronic filing of UCC Financing Statements. The same software that enables electronic filing allows the service provider to be able to either cut and paste the submission into a Filing Office web based form or print and send to the Filing Office utilizing the more conventional courier/local agent method.

In 2005, several more states will implement this technology using a third-party link. Currently several states and the U.S. Virgin Islands are in various stages of development—AR, ID, IA, KS, ME, MA, OH, PA, RI, VA and WY—and should have this capability by mid-2005. Additionally, the following states plan to have XML available by the end of 2005—AK, AZ, MT, NE, OR, SD. That will mean that the “vision” will become a reality in 27 States by the end of 2005. To stay current on the progress being made in electronic filing nationwide but also a variety of other UCC Filing Office issues, access the “RA9 Quick Reference Guide”, which is updated on a regular basis and available on the web at: www.incspot.com.
Background

The National Conference of Commissioners on Uniform State Laws in 2002 and the American Law Institute in 2003 finally approved amendments to Uniform Commercial Code (UCC) Article 2A. These amendments were approved at the same time as the amendments to UCC Article 2 and for the most part are the same as the amendments to that article. The effort to revise UCC Article 2A: Leases commenced in 1996 and was conducted simultaneously with the revision of Article 2. The charge to the Article 2A drafting committee was to make changes to Article 2A that were appropriate given the amendments to Article 2 and the revision of Article 9. The following is a summary of the substantive changes to the statutory text of Article 2A.

Definitions

As with all of the modern revisions to the UCC, the definition of “good faith” has been revised to accommodate the situation where the lessor has reacquired the goods from another lease. Amended UCC 2A-103(1)(l).

Consumer Rules

A few changes have been made to the consumer rules in Article 2A. A new definition of “consumer” has been added. A “consumer” is a person who leases goods intended primarily for personal, family or household use. Amended UCC 2A-103(1)(e). The definition of “consumer lease” has been amended to use the new definition of consumer. Amended UCC 2A-103(1)(f). While the statute no longer has language allowing for the insertion of a dollar cap as did former Article 2A, the legislative note indicates that states should be free to insert a dollar cap. Section 2A-14 has been amended to change the deference to other consumer law from deference to a “consumer protection statute of this State, or final consumer protection decision of a court of this State existing on the effective date of this article” to deference to a “rule of law that establishes a different rule for consumers.” Amended UCC 2A-104(1)(c).

Conformity with Revised Article 9

Several changes were made to Article 2A in order to better dovetail that article with the provisions of Revised Article 9. To that end, the definition of “buyer in ordinary course of business” is deleted as it is contained in Revised Article 1. Amended UCC 2A-103(1). The definition of “lessee in ordinary course of business” is revised to track the revised definition of “buyer in ordinary course of business.” Amended UCC 2A-103(1)(u). Finally, the choice of law provision concerning certificates of title has been amended to be consistent with UCC 9-303. Amended UCC 2A-105.

Electronic Commerce

Many provisions of Article 2A were amended to accommodate electronic commerce. Throughout Article 2A, the word “writing” was changed to “record.” Amended UCC 2A-107 (signed waivers), 2A-201 (statute of frauds), 2A-202 (parol evidence rule), 2A-208 (no oral modification clauses), 2A-214 (warranty disclaimers), 2A-309 (mortgages and fixtures), 2A-310 (accessions), 2A-401 (demand for adequate assurance), and 2A-406 (notice of acceptance of partial performance). New definitions of the terms “electronic”, “electronic agent”, “electronic record”, “record,” and “sign” were added. Amended UCC 2A-103(1)(h), (i), (j), (cc), and (dd). The definition of “conspicuous” was amended to accommodate that concept in electronic communications. Amended UCC 2A-103(1)(d). These definitions are the same as the definitions in amended Article 2.

Summary of Uniform Commercial Code Article 2A Amendments

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(a) The interaction of electronic agents or the interaction of an electronic agent with an individual may result in contract formation. Amended UCC 2A-204.

(b) The fact that a record or signature is electronic in form or that an electronic record was used to form a contract are insufficient to deny the record, signature, or contract legal effect and enforceability. Amended UCC 2A-222.

(c) A transaction need not be conducted electronically. Amended UCC 2A-222.

(d) An electronic record or electronic signature is attributed to a person if it is that person’s act or its electronic agents acts or otherwise bound under other rules of law. Amended UCC 2A-223.

(e) If receipt of an electronic communication has a legal effect, that effect is not changed merely because no individual is aware of the receipt. Amended UCC 2A-224.

(f) Receipt of an electronic communication does not establish the content of that electronic communication. 2A-224.

Statute of Frauds, Amended UCC 2A-201

The statute of frauds remains the same except for the following substantive changes. First the word “writing” is changed to “record.” Second, the admissions exception is broadened from testimony in court to testimony “under oath.” Third, a new subsection is added to provide that a statute of frauds that requires a writing because the performance is not made within a certain time period is ineffective for a lease transaction covered by Article 2A.

Parol Evidence Rule, Amended UCC 2A-202

The parol evidence rule has been amended in conformity to the amendment to UCC 2-202. First the word “writing” is changed to “record.” Second, a new subsection provides that course of dealing, course of performance and usage of trade evidence are admissible to explain terms in a record without a determination that the term is ambiguous.

Course of Performance

Section 2A-207 on course of performance is deleted for those states adopting Revised Article 1. Revised Article 1 incorporates the idea of course of performance in Revised 1-303.

Warranties

The warranty against interference and the warranty of non-infringement contained in Amended UCC 2A-211 are changed in several different respects. First, a non-finance lessor’s warranty against interference is broadened to include a warranty against all claims or interests in the goods that do not arise from the lessee’s actions. Second, a finance lessor will give a warranty of non-interference against claims or interests in the goods arising from the lessor’s actions. Third, all lessors give a warranty against “a colorable claim to or interest in the goods which will unreasonably expose the lessee to litigation.” In the case of a finance lessor, that warranty only is against colorable claims or interests arising from the lessor’s actions. Fourth, the section provides for a disclaimer of both the warranty of non-interference and the warranty of non-infringement in a new subsection (4).

The implied warranty of merchantability in amended UCC 2A-212 has two changes. In the text, the requirement that the goods be fit for the ordinary purpose is keyed to the description of the goods instead of the “type” of goods. Second, the new official comment 2 provides that the test for product defect in tort and breach of the implied warranty of merchantability should be the same when recovery is sought for injury to person and property.

The disclaimer section, amended UCC 2A-214, contains several changes in conformity with the amendments to UCC 2-316 concerning disclaimers of warranty in consumer contracts. First, in order to disclaim the implied warranty of merchantability in a consumer contract, the disclaimer must be in a record, be conspicuous and include the following language “the lessor undertakes no responsibility for the quality of the goods except as otherwise provided in this contract.” Second, to disclaim the implied warranty of fitness for a particular purpose in a consumer contract, the disclaimer must be in a record, be conspicuous and

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use the following language, “the lessor assumes no responsibility that the goods will be fit for any particular purpose for which you may be leasing these goods, except as otherwise provided in this contract.” Both of those consumer disclaimers will also be effective in a non-consumer lease. Disclaiming warranties in non-consumer leases has not been changed. Third, to disclaim implied warranties by virtue of the lessee’s inspection, the lessor must demand that the lessee inspect. Finally, a new subsection is added providing that remedies for breach of warranty are limited in accord with sections 2A-503 and 2A-504.

**Risk of Loss, Amended UCC 2A-219**

Two changes have been made to the provisions on passage of risk of loss. First, if goods are to be delivered through a bailee and tender is based on notification to the bailee, the bailee must acknowledge to the lessee the lessee’s right to possession. Second, in a non-carrier and non-bailee delivery, the risk of loss passes on the lessee’s receipt of the goods regardless of whether the lessor or the supplier, in a finance lease situation, is a merchant.

**Insecurity, Repudiation, and Excuse**

A few changes are made to UCC 2A-401 through 2A-406. First, in accord with the medium neutral orientation of the amendments, the word “writing” has been changed to “record” in each section in which it appears. Second, repudiation is defined in amended UCC 2A-402 to include language or conduct that makes it apparent that a person will not or cannot perform its obligations under the contract. Third, the terminology in amended UCC 2A-404 and 405 has been changed from obligations regarding “delivery” to obligations regarding “performance.”

**Rejection, Acceptance, and Revocation of Acceptance**

Amended Article 2A continues the rules on rejection, acceptance, and revocation of acceptance of the goods with a few changes. First, the lessee’s right of rejection is explicitly subject to the ability of the parties to modify that remedy by agreement. Amended UCC 2A-509(1). Second, the lessee who has either rightfully or wrongfully but effectively rejected goods is subject to the obligations regarding care of the goods prescribed in amended UCC 2A-509(3), 2A-511, and 2A-512. However, a merchant lessee’s right to indemnity or a commission is limited to the case of a rightfully rejection. Third, the test for rejection in an installment contract is changed from a substantial impairment in value that cannot be cured to a substantial impairment in value to the lessee. Amended UCC 2A-510(1). Fourth, a lessee’s reasonable use of goods post after a rightful rejection or justified revocation of acceptance is not an acceptance of the goods, but the lessee may be obligated to pay the lessor for the value of the use to the lessee. Amended UCC 2A-517(6). Finally, the section provides that, subject to amended UCC 2A-517(6), unreasonable use of the goods inconsistent with the lessor’s or supplier’s rights in the goods is an acceptance of the goods. Amended UCC 2A-515(1)(c).

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**Cure, Amended UCC 2A-513**

The cure section has been completely rewritten in accord with the complete revision of the cure section in Article 2, UCC 2-508. If the lessee rightfully rejects the goods in either a one-shot or installment lease or, in a non-consumer lease, justifiably revoked acceptance because the non-conformity was not discovered prior to acceptance and acceptance was induced by the lessor’s assurances or, in a non-finance lease, by the difficulty of discovery, the lessor or supplier has a right to cure the non-conformity if several conditions are met. First, the lessor or supplier must have performed in good faith. Second, the lessor or supplier must give seasonable notice of the intent to cure. Third, the cure must be at the lessor or supplier’s own expense. Fourth, the lessor or supplier must compensate the lessee for the lessee’s reasonable expenses caused by the breach and subsequent cure. If those conditions are met and if the time for contract performance has expired, the cure by making a tender of conforming goods will be allowed if it is “appropriate or timely under the circumstances.” If those conditions are met and if the time for contract performance has not expired, the cure must be of a “conforming tender of delivery within the agreed time.”

**Notice of Breach**

If a lessee accepts goods, in order to have an action for breach of contract, the lessee must give timely notice of breach to the lessor or supplier.

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Amended UCC 2A-516(3) provides that an untimely notice will bar the lessee’s remedy only to the extent the lessor or supplier are prejudiced by the failure.

To reject goods or to revoke acceptance of the goods, a lessee must give timely notice of rejection or revocation of acceptance. Amended UCC 2A-509(2), 2A-517(4). Former UCC 2A-514 provided that in the case of a rejection, the lessee was precluded from relying on an unstated defect that was ascertainable by reasonable inspection to justify the rejection or to claim a default if the lessor or supplier could have cured the unstated defect or if between merchants, the lessor or supplier had in writing asked for a full statement of defects. Amended UCC 2A-514 continues that rule with the following changes. First, the obligation to state the defect that is ascertainable by reasonable inspection will be required to justify a revocation of acceptance and not merely to justify a rejection. Second, the requirement to state the defect will apply only if the lessor or supplier has a right to cure, not merely the ability to cure the defect. Third, the requirement that the lessor or supplier make the request in “writing” has been changed to allow a request in a “record.” Finally, the failure to state a defect when required by this section will no longer bar the lessee from establishing default although the lessee may be barred from being able to assert a rightful rejection or justifiable revocation of acceptance.

**Liquiﬁed Damages, Amended UCC 2A-504**

Three changes are made to the liquidated damages provision. First, language is added to subsection (1) that the enforceability of a clause limiting remedies is determined under UCC 2A-503. Second, the lessee’s right to restitution of payments already made is expanded to include all circumstances in which the lessor stops performance due to the lessee’s default or insolvency. Third, the statutory liquidated damages provision that required deduction of 20% of the rent due or in a consumer lease, the lessor of that amount or $500, from the breaching lessee’s remedy of restitution is deleted.

**Statute of Limitations, Amended UCC 2A-506**

Unlike the extensive changes to the Article 2 statute of limitations in amended UCC 2-725, the Article 2A statute of limitations is changed in only one respect. The parties are precluded from reduction of the period of limitations in a consumer lease or an action for indemnity.

**Specific Performance, Amended UCC 2A-507A**

The specific performance remedy has been moved from former UCC 2A-521 to amended UCC 2A-507A because the right to specific performance has been expanded to give both the lessor and the lessee the ability to request specific performance. In addition, in a non-consumer lease, the amended statute provides that courts may enforce the parties’ agreement to specific performance unless the sole remaining obligation is to pay money.

**Lessee’s Remedies**

The provisions on the lessee’s remedies have three changes in addition to those described above concerning rejection, acceptance, and revocation of acceptance. First, a comprehensive index of the lessee’s remedies is not provided in amended UCC 2A-508. Second, a lessee has an additional ground for replevin if the goods have been shipped under reservation and satisfaction of the security interest has been made or tendered. Amended UCC 2A-507A. Third, amended UCC 2A-522 allows a consumer lessee to obtain identified goods for which the lessee has paid in whole or part upon keeping good a tender of unpaid rent and security under the lease regardless of whether the lessor is insolvent.

**Lessor’s Remedies**

A comprehensive index of the lessor’s remedies is provided in amended UCC 2A-523. The biggest change is to allow a lessor to obtain consequential damages in addition to direct damages and incidental damages for a lessee’s default in a non-consumer lease. Amended UCC 2A-530. Section 2A-526 is amended to delete the requirement that the goods be a “carload, truckload, planeload, or larger shipments of express or freight” in order for the seller to stop delivery based upon the lessee’s breach. Section 2A-528 is amended to delete the language in the lessor’s lost profit measure of “due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition.”

* See the description of the amendments to Article 2 in the December 2003 Commercial Law Newsletter.
Lending to businesses undergoing reorganization proceedings under U.S. bankruptcy law was for years almost exclusively the province of asset-based and specialty lenders in the U.S. market. Most loans to bankrupt companies were made by the debtor’s pre-petition lender in order to protect its collateral position. Lenders willing to lend to companies in bankruptcy (also known as “debtor-in-possession” or “DIP” financing) earned healthy fees and interest spreads on deals perceived by the market as risky, due to the questionable credit quality of the borrowers (after all, they were in bankruptcy), and general lack of understanding of the bankruptcy process. What many lenders and professionals failed to realize, however, was that the U.S. Bankruptcy Code provides a number of advantages designed to encourage DIP financing, which provides necessary liquidity to cash strapped debtors. In fact, DIP loans can be the safest loans a lender can make.

With the increasing competition among lenders of all types to put money to work, grow portfolios and enhance yields, lending to debtors in bankruptcy has become more common and more competitive. As a result, the DIP financing market has matured with more and more entrants into the market. The U.S. bankruptcy system provides several mechanisms enhancing the ability of lenders to manage the risk of lending to bankrupt debtors, including the ability to layer in new financing as the most senior debt in the capital structure, the ability to efficiently impose liens on collateral, and the creation of streamlined means to realize upon collateral, if necessary.

The primary policy underlying the U.S. business bankruptcy laws is to foster the reorganization of bankrupt companies as a means of enhancing value for all of the stakeholders...
ing contractual terms limiting assignment, and over the objections of the other contracting party. The Bankruptcy Court may choose not to enforce contractual provisions that act as a limitation on assignability, since these provisions are contrary to the over-arching goal of the bankruptcy process – fostering a reorganization and creating value for the debtor’s stakeholders. Consequently, a debtor can enhance its liquidity by assigning valuable contracts and leases as collateral security for its DIP financing.

Finally, the post-petition lender may be protected through streamlined means of enforcing its loan documents and realizing on its collateral. Generally, under U.S. bankruptcy law the debtor is protected against enforcement actions, litigation and other adverse actions by the “automatic stay” that issues upon the commencement of the bankruptcy case, and serves to prevent creditors and other parties from taking such actions without proper notice to other interested parties and approval by the Bankruptcy Court. However, in connection with approval of a DIP financing transaction, the Bankruptcy Court may provide that in the event that the debtor defaults on the loan, the lender need not apply for relief from the automatic stay, but may proceed on limited notice, or even no notice, to enforce its loan documents. Further, the bankruptcy process offers an efficient mechanism for selling the debtor’s assets – a so-called “Section 363 sale.” Sales of assets approved by the Bankruptcy Court can cut off any liens and adverse claims encumbering the assets, grant good title to the purchaser, and even cut off potential successor liability of the purchaser on account of matters arising prior to the bankruptcy. By doing so, the bankruptcy process encourages the sale of assets for the best possible value. Use of the Section 363 sale by a lender as a means to consensually liquidate its collateral can be an efficient means of realizing on the assets of the debtor and exiting a troubled loan.

In recent years, the competition among lenders to grow their portfolios and business lines has resulted in many new entrants into the DIP financing market, including traditional banks, investment banks, hedge funds and other niche lenders in specialty fields, such as retail and healthcare. In addition, many buy-out funds and other investors are actively looking to purchase businesses out of bankruptcy, often providing DIP financing as a step toward acquiring the debtor business. With competition, the DIP financing market has become more efficient, and debtors often benefit with multiple lenders vying for deals, offering larger credit facilities, and cutting fees and interest rates. As the DIP financing market continues to evolve and mature, we can expect lenders to continue to push the envelope in terms of leverage, structure and pricing, relying on the advantages provided by the Bankruptcy Code and the Bankruptcy Courts to manage the risk of lending to these troubled companies.

* This article was previously published in Financier Worldwide Magazine’s Asset Based Lending Supplement
In its most recent legislative session, the Delaware General Assembly enacted changes to the Delaware Statutory Trust Act, 12 Del. C. § 3801 et seq. (The “DST Act”), the Delaware Limited Liability Company Act, 6 Del. C. § 18-101 et seq. (the "DLLC Act"), and Uniform Commercial Code Revised Article 9 as in effect in Delaware (“Delaware RA-9”). (It also enacted revised Uniform Commercial Code Articles 1 and 7, the former retaining the “old” choice of law rule.) The DST Act amendments (effective August 1, 2004) focus on maintenance of separate records for series, restrictions on amendments to governing instruments, provision in governing instruments for penalties or consequences (including forfeiture of beneficial interest), merger and consolidation, conversion, domestication, and transfer or continuance. The DLLC Act amendments (effective August 1, 2004) focus on transfer or continuance, maintenance of separate records for series, conversion, restrictions on amendments to limited liability company agreements, and limits on the expansion or restriction of fiduciary and other duties. The Delaware RA-9 amendments (generally effective January 1, 2005) create a safe harbor collateral description (for use in financing statements) for certain information relevant to some securitization transactions, and attempt to make clearer certain requirements when trusts or trustees are debtors, as well as to lessen or eliminate the consequences of certain types of confusion as between a trust debtor and a trustee debtor.

This article summarizes these amendments to the DST Act (House Bill No. 463, 74 Del Laws 353), the DLLC Act (House Bill No. 411, as amended by House Amendment No. 1, 74 Del Laws 275), and Delaware RA-9 (Senate Bill No. 326, 74 Del Laws 332). To request a copy of any of these bills, send an email to npowell@morrisjames.com and include in the “subject” line a reference to the bill by number.

**DST ACT AMENDMENTS**

The DST Act was amended by House Bill No. 463, 74 Del Laws 353, effective August 1, 2004.

**Provisions Relating to Governing Instrument, Series, Etc.**

Section 3806(b)(8) now states explicitly that a governing instrument may provide rights to any person, including a person who is not a party to the governing instrument (e.g., a lender). A new Section 3806(b) (9) was added, specifying that a governing instrument may provide for the manner in which it may be amended, including by requiring the approval of a person not a party to the governing instrument (e.g., a lender) or the satisfaction of certain conditions (e.g., repayment of indebtedness).

A new Section 3806(i) was added, specifying that a governing instrument may provide that a beneficial owner shall be subject to specified penalties or consequences (including forfeiture of beneficial interest) if such beneficial owner fails to perform or comply with terms as required by the governing instrument, or upon the happening of specified events. Section 3810(d) clarifies that a certificate of trust shall be cancelled upon the dissolution and completion of winding up of the trust, or deemed cancelled upon the filing of a certificate of merger or consolidation if the trust is not the surviving or resulting entity, or upon the filing of a certificate of transfer, or upon the filing of a certificate of conversion to a non-Delaware other business entity.

Section 3804(a) was amended to clarify the manner in which which records and assets are to be maintained in cases where the governing instrument creates one or more series of trustees or beneficial owners.

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Section 3806(b)(3) was amended to clarify that a governing instrument may contain any provision relating to the management of the trust and certain other matters including conversion, merger, and consolidation.


Section 3811 requires that a certificate of merger or consolidation, conversion, transfer and continuance, domestication, or termination, and amendments to any of them, if filed by the trust, must be signed by all trustees or as provided in the governing instrument (subsection (a)(4)). New text in Section 3812(b) clarifies that a certificate of trust shall be cancelled upon the filing of a certificate of transfer or a certificate of conversion to a non-Delaware entity.

A new Section 3815(b)(4) was added requiring that, in the case of a merger in which a statutory trust is the surviving entity, the certificate of merger shall state such amendments, if any, to the certificate of trust to change its name as are desired to be effected. Text was added to Section 3815(e) providing that a certificate of merger setting forth any amendment in accordance with new subsection (b)(4) is deemed an amendment to the certificate of trust, obviating the need for separate amendment under Section 3810, and providing that an agreement of merger or consolidation can be filed in lieu of a certificate of merger or consolidation.

Section 3821, relating to approval of conversion of a statutory trust, has been completely reworked. It sets forth the requirements for a statutory trust to convert to an other business entity, establishing a hierarchy of authorization requirements. If the governing instrument includes a provision specifying a manner of authorizing a conversion, that provision is controlling. If it does not, and the governing instrument does not prohibit conversion, the conversion shall be authorized in the same manner (if any) as is specified for authorizing a merger or consolidation. If that is not specified, and the governing instrument does not prohibit conversion, the conversion shall be authorized by approval of all beneficial owners and all trustees. Thus, this requirement of unanimous approval is the default rule and can be altered by agreement. Unless otherwise agreed, conversion does not require a statutory trust to wind up its affairs, pay its liabilities, or distribute its assets.

Rights or securities of, or interests in, the statutory trust being converted may be exchanged for or converted into cash, property, rights or securities of, or interests in, the other business entity into which the statutory trust is being converted, or exchanged for or converted into cash, property, rights or securities of, or interests in, any other business entity, or may be cancelled. If a statutory trust converts to a non-Delaware business entity, a certificate of conversion to a non-Delaware entity must be executed and filed with the Delaware Secretary of State and must contain specified statements, including the jurisdiction in which the other business entity is organized, formed, or created, and agreement of the trust that it may be served through the Delaware Secretary of State in any action, suit or proceeding for enforcement of any of its obligations. When a statutory trust has been converted to an other business entity, the other business entity shall, for all purposes of the laws of the State of Delaware, be deemed to be the same entity as the statutory trust.

Provisions Relating to Domestication of Non-United States Entities

A new Section 3822 has been added, dealing with domestication of non-United States entities (generally, entities other than those formed under the laws of a state). It generally permits any non-United States entity to become domesticated as a Delaware statutory trust by complying with certain requirements including the filing of a certificate of statutory trust domestication and a certificate of trust. The certificate of statutory trust domestication must state, among other things, the date on which and jurisdiction where the non-United States entity was first formed, incorporated, created, or otherwise came into being, its name immediately prior to

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filing, the name of the statutory trust, the future effective date or time (if any) of the certificate, and the jurisdiction that constituted the seat, siege social, or principal place of business or central administration of the non-United States entity, or its equivalent. Prior to filing of the certificate of statutory trust domestication, the certificate must be approved in the manner provided for by the document, instrument, agreement or other writing governing the internal affairs of the non-United States entity, and a governing instrument for the domesticated statutory trust approved by the same authorization required to approve the domestication. Unless otherwise agreed or as required under applicable non-Delaware law, the domesticating entity shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and the domestication shall not be deemed to constitute a dissolution. If the entity continues to exist under the laws of the foreign jurisdiction, for purposes of Delaware law the statutory trust and such non-United States entity constitute a single entity existing under the laws of Delaware and the laws of such other jurisdiction. Thus, such an entity is not a registered organization for purposes of Delaware RA-9. Following such approval, a certificate of transfer (if the trust’s existence as a Delaware statutory trust is to cease) or a certificate of transfer and continuance (if the trust’s existence as a Delaware statutory trust is to continue) must be executed and filed with the Delaware Secretary of State and must contain specified statements, including the jurisdiction to which the statutory trust shall be transferred or in which it shall be domesticated, and agreement that it may be served through the Delaware Secretary of State in any action, suit or proceeding for enforcement of any of its obligations. Following the effectiveness of a certificate of transfer, the statutory trust ceases to exist as a Delaware statutory trust. Following the effectiveness of a certificate of transfer and continuance, the statutory trust continues to exist as a Delaware statutory trust, and for purposes of Delaware law the statutory trust and the other business entity that came into being as a consequence of the transfer or domestication in a foreign jurisdiction shall constitute a single entity formed and existing under the laws of Delaware and such foreign jurisdiction. Thus, such an entity is not a registered organization for purposes of Delaware RA-9.

DLLC ACT AMENDMENTS

The DLLC Act was amended by House Bill No. 411, as amended by House Amendment No. 1, 74 Del Laws 275, effective August 1, 2004.

Provisions Relating to LLC Agreements, Series, Etc.

Text was added to Section 18-101(7), clarifying as a matter of definition that a limited liability company agreement may provide rights to any person, including a person who is not a party to such agreement (e.g., a lender), to the extent set forth therein. A new Section 18-302(e) was added, stating that if a limited liability company agreement provides for the manner in which it may be amended, including requiring approval of a non-party or satisfaction of certain conditions, it may be

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amended only in such manner or with waiver of such conditions by all persons for whose benefit such conditions were intended.

Section 18-1101(c) has been substantially rewritten, and new Sections 18-1101(d) and (e) added. Section (c) clarifies the extent to which duties, including fiduciary duties, of a member, manager, or other person to a limited liability company, member, manager, or another person party to or bound by a limited liability company agreement may be expanded, restricted, or eliminated by provisions of the limited liability company agreement. It states that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing. Section (d) provides a default rule, alterable by agreement, that a member, manager, or other person shall not be liable to a limited liability company or to another member or manager or another person party to or bound by a limited liability company agreement for breach of fiduciary duty provided the member, manager, or other person relied in good faith on the provisions of the limited liability company agreement. Section (e) permits a limited liability company agreement to provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties, including fiduciary duties, of a member, manager, or other person to a limited liability company or to another member, manager, or other person party to or otherwise bound by a limited liability company agreement, with the proviso that the limited liability agreement may not limit or eliminate liability for bad faith violations of the implied contractual covenant of good faith and fair dealing.

Text was added to Section 18-215(b) relating to series, clarifying that separate and distinct records must be maintained for any series and the assets associated with any such series must be held “in such separate and distinct records” and accounted for “in such separate and distinct records” separately from the other assets of the limited liability company or any other series thereof.

Provisions Relating to Merger, Transfer, Domestication, and Conversion

A new Section 18-209(c)(4) was added, providing that in the case of a merger in which a domestic limited liability company is the survivor, any amendments to the certificate of formation of the surviving entity to change its name shall be set forth in the certificate of merger. Text was added to Section 18-209(e) providing that a name change reflected pursuant to new Section 18-209(c)(4) obviates the need for further action to amend the entity’s certificate of formation under Section 18-202 with respect to such name change.

A new Section 18-213(g) was added, addressing the transfer or domestication of a limited liability company out of the State of Delaware. In such instances, the transferred or domesticated business form is considered the same entity as the limited liability company for all purposes of the laws of the State of Delaware.

Text was added to Section 18-214(i) providing that in connection with a conversion of another business entity to a limited liability company, rights or securities of or interests in the other entity which is converted to a domestic limited liability may be cancelled. Similarly, text was added to Section 18-216(d) providing that in connection with a conversion of a domestic limited liability company to another business form, rights or securities of or interests in the domestic limited liability company which is converted may be cancelled.

New Section 18-216(h) provides that when a limited liability company has been converted to another business form pursuant to this section, the other business form, for purposes of Delaware law, shall be deemed to be the same entity as the limited liability company.

DELAWARE RA-9 AMENDMENTS

Delaware RA-9 was amended by Senate Bill No. 326, 74 Del Laws 332, which generally becomes effective on January 1, 2005.

Trusts and Trustees as Debtors

In the time since Delaware RA-9 took effect, a number of practitioners have observed confusion where trusts and trustees are debtors. It was decided that non-uniform amendments clarifying its requirements and highlighting certain issues would be helpful.

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It was also decided that greater tolerance of certain imprecision was warranted. (For a more complete discussion of filing issues relating to trusts and trustees as debtors, see Filings Against Trusts and Trustees Under Revised Article 9 – Thirteen Variations, 35 UCC L.J. 91 (2002)).

New Section 9-307(k) was added clarifying existing law regarding the location of trusts and trustees. It indicates that a debtor that is a trust and a registered organization is located in such trust’s location as specified in Section 9-307(e) or (f). A debtor that is a trust and not a registered organization is located in such trust’s location as specified in Section 9-307(b)(2) or (b)(3), and a debtor that is a trustee acting with respect to property held in trust is located in such trustee’s location as specified in Section 9-307(b), (e), (f), or (i). Section 9-503(a)(3) has been revised by the addition of parenthetical text intended to clarify its inapplicability to a debtor which is a trust and a registered organization (e.g., a Delaware statutory trust), and to emphasize its applicability to a trustee which, itself, is a registered organization (e.g., a state-chartered or national bank and trust company).

New Sections 9-203(j) and (k) were added dealing with instances in which the debtor is a trust (including a registered organization) or a trustee acting with respect to property held in trust. The former provides that a security agreement is properly authenticated if authenticated in the name of either the trust or the trustee by a person authorized to bind the debtor. The latter states that the debtor’s security agreement creates or provides for a security interest whether in the name of the trust or the trustee. New Section 9-509(f) extends the concept introduced in new Sections 9-203(j) and (k), providing that if the debtor or secured party is a trust (including a registered organization) or a trustee acting with respect to property held in trust, and is otherwise entitled to file a record, authorization to file a record by an authorized person in the name of either the trust or the trustee is effective. New Section 9-516(e) likewise extends the concept, providing that if the debtor is a trust (including a registered organization) or a trustee acting with respect to property held in trust, the information required by Section 9-516(e) likewise extends the concept, providing that if the debtor is a trust (including a registered organization) or a trustee acting with respect to property held in trust, the information required by Section 9-516(b)(5) to appear on a financing statement with respect to the debtor (mailing address, type and jurisdiction of organization) may be provided with respect to either the trust or the trustee.

Financing Statements Describing Certain Information

New Section 9-504A has been added to create a safe harbor for collateral descriptions in financing statements covering certain accounts, chattel paper, instruments, or general intangibles. Such collateral descriptions must meet three requirements. First, they must provide a description of one or more records (such as computer files) in the possession or control of the secured party and which records identify the specific accounts, chattel paper, instruments, or general intangibles constituting the collateral. Second, the financing statement must indicate either (i) that the items are accounts, chattel paper, instruments, or general intangibles, or (ii) the nature of the items by general description or category. Third, the record(s) in the secured party’s possession or control must contain either (i) confidential information (such as credit card, loan, or taxpayer identification numbers) identifying the specific account debtors or obligors, or (ii) a description of 100 or more specific accounts, chattel paper, instruments, or general intangibles.
As I begin my second year as chair of the Uniform Commercial Code Committee, I find myself still marveling over the quality of our membership and the dedication of our leadership. I am really proud of the work of our Committee and thought that I would use this opportunity to highlight three current projects. I selected these projects not only because of their importance to the legal community but also because they exemplify the UCC Committee’s commitment to offering opportunities to our membership to engage in the work of the Committee other than during the Spring and Annual Meetings. Based on membership feedback, it is increasingly clear to me that this is an important part of the evolution of the UCC Committee.

Joint Task Force on Deposit Account Control Agreements

The Task Force is developing a model deposit account control agreement that may be used by market participants (whether from the secured party or the depositary bank perspective) with minimal negotiation. The Task Force has divided itself into smaller working groups that met regularly by phone and/or over the web. Since the Annual Meeting, the smaller work groups have delivered sections of the model agreement to the Task Force chairs, who in turn have combined those work products into a complete working draft of the model agreement. The working draft was vetted at a meeting in New York in late November. Interested parties who were unable to attend the meeting in person were invited to participate by conference call. A second face-to-face meeting will likely be scheduled for February 2005, again in New York City, with a view to having a further revised draft to discuss at the Spring Meeting.

Task Force on Consumer Involvement

The Task Force on Consumer involvement is developing a web resource for consumer lawyers and solo practitioners who find themselves handling UCC cases on an infrequent basis. Since the Annual Meeting, a draft of the web page, which is designed to be used as a UCC research guide, was circulated to the Task Force list serve for comment. The Task Force expects to unveil the web page in time for the Spring Meeting.

UCC Litigation and Payments Subcommittees

The Litigation Subcommittee, working with the Payments Subcommittee, is drafting model jury instructions for UCC articles 3 and 4. Since the Annual Meeting, the co-chairs of this project have identified several litigators who have agreed to produce first drafts of the various instructions. These initial drafts will be circulated to both the Litigation and Payments list serves prior to Spring Meeting for comment. The Litigation Subcommittee is also working on a UCC brief bank which will be hosted on the UCC Committee web site. This project is just getting starting but we expect it to move at a rapid pace. If you have a brief that you would like to include or would otherwise like to get involved, please contact Brian Moffet.

Of course as the UCC Committee shifts some of its focus to membership opportunities and content between meetings, it is important that the quality of our programming at the Spring and Annual Meetings remain strong and innovative. With that in mind, we will hold our first ever “Stump the Chumps” event at the full meeting of the UCC Committee at the Spring Meeting in Nashville. As the title suggests, a panel of brave but perhaps somewhat foolhardy UCC experts will attempt to answer questions posed by the audience. People are encouraged to submit questions in advance to Stephen Sepinuck, but questions may also be presented from the audience during the event.

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The Committee on Leasing, meeting on Monday, August 9th in Atlanta, opened with a talk about tax-exempt leasing law by David H. Fenig, Esq., of the Equipment Leasing Association. Tax laws covering leasing to tax-exempt entities have been revised periodically in the past (e.g., in 1981, 1984 and 1986). The current Congressional bills address so-called sale-in, lease-out (SILO) transactions with tax-exempt entities, limiting tax deductions for such SILOs to the gross income from the lease for the taxable year. Generally exempted from this limitation are transactions that contain (1) no “monetization” of the lessee’s obligation; (2) a minimum 20% owner/lessor equity investment; and (3) only minimal lessee risk. The impact of the bills redefines the spectrum of tax incentivized deals that traditionally have allowed cities to obtain new medical equipment, water treatment facilities, alternative energy projects, intercity rail facilities, as well as improved telephone and other high tech equipment.

True lease definitions in other contexts were then discussed. The Committee heard an analysis of In re Pillowtex, 349 F.3d 711 (3d Cir. 2003), a bankruptcy case where the court relied on UCC criteria to find that a purported equipment lease was in fact a secured financing. The outcome in Pillowtex is correct, notwithstanding the Third Circuit’s erroneous dictum citing the “full payout” character of the transaction as a circumstance weighing against true lease status. The court properly found that the agreement was a security interest, because the purported owner/lessor lacked any meaningful residual interest in the goods. Moreover, the court’s focus on the “economic realities of the underlying transaction” is a correct, traditional analysis, consistent with the statutory language, history and purposes of UCC 1-201(37), which is the same, substantively, as proposed new UCC 1-203 (2003) (“Lease Distinguished from Security Interest”).

The Committee then examined the meaning of UCC 1-203 (2003) in detail. The drafters of the 1987 amendments to this section considered and rejected mathematical formulas for defining a true lease, like those found in accounting standards (see FASB 13) defining the difference between a capital lease and an operating lease. True leases are defined in the

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UCC, instead, by reference to cases and authorities recognizing the importance of the owner/lessor’s entrepreneurial stake in the residual. Thus UCC 1-203 (2003) clarifies the law by setting out a few “bright line” tests, first identifying some circumstances that destroy true lease status (exhausting the full economic life of the goods, or providing options to purchase for nominal additional consideration), and then setting out other circumstances (full payout, net lease, options to purchase or renew at fair market value) that are consistent with true lease status. But the test is ultimately “the facts of each case.” These standards deliberately leave room for creativity, competition and the development of new lease products.

The Committee received copies of the state statutes – enacted in 48 states and the District of Columbia – that support true lease status for TRAC vehicle leases. These state statutes largely mirror federal tax law, 26 U.S.C. 7701(h), and generally accepted accounting principles for TRAC leasing, which is the way that commercial fleets of vehicles are leased in America. TRAC vehicle leasing, and the TRAC/state statutes, were analyzed in light of the teachings of Grant Gilmore, Soia Mentschikoff, and Karl Llewellyn, that support for mainstream commercial practice is among the fundamental purposes of commercial law.

New Official Comments have been added to UCC 2A-Leases, the Committee was told, to spell out more explicitly how and why commercial leasing law differs from sales law. Thus new clarifying Comments on leasing have been added to UCC 2A-101’s Prefatory Note (leasing is distinctive), as well as Sections 2A-201 (statute of frauds), 2A-106 (choice of law/choice of forum in consumer leases), 2A-211 (warranties against interference), 2A-212 (reconciling tort product liability concepts of “defect” with the implied warranty of merchantability in 2A-212), 2A-222 (E-commerce and leasing), 2A-310 (accessions), 2A-405 (excused performance), and 2A-517(f) (lessees’ new statutory right to use goods as “mitigation of damages”). See Leasing Is Distinctive!, 35 UCC LJ. 15 (2003) (explaining the significance and need for these new 2A Comments); ALI 1999 Proceedings (76th Annual Meeting) pp.372-373, 381-382, 906 (spelling out “the need for more user-friendly Comments” throughout Article 2A). These new 2A Comments state (among other things) that “As with original Article 2A, these amendments are intended to reflect the distinctive nature of leasing as a commercial transaction.”

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UCC Subcommittee on Payments

Thank you to everyone who attended the joint meeting of the UCC Subcommittee on Payments and the Banking Law Subcommittee on Payments and Electronic Banking at the ABA Annual meeting in Atlanta in August. We presented a panel discussion entitled “Playing ‘Gotcha’ with UCC 3, 4, and 4A,” which reviewed a number of surprising and problematic provisions of the UCC payments articles, including 3-305, 4-403, 4-406 and 4A-102. Our speakers were Mike Ferry of Gateway Legal Services, Karen Nash-Goetz of T.Rowe Price Associates, Inc., Dennis McGlone of Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC, Bill Henning of the National Conference of Commissioners on Uniform State Laws, and Joe Sommer of the Federal Reserve Bank of New York.

The panelists provided a particularly informative and interesting discussion of the various provisions that highlighted some of the tension between bank and consumer issues. We spent some time on 4-406, the customer’s duty to discover and report unauthorized signatures or alterations, and how bank deposit agreements are shortening the discovery and reporting time period to as little as 14 days.

We also talked about how the holder in due course doctrine may be used to obtain double payment on the same check and how corporate customers can protect themselves against this risk. This situation

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usually occurs when a malfeasant check payee reports a check stolen or missing and requests a second check. The consensus on the panel was that the company should wait (at least 90 days) to issue the second check until they are certain they won’t have to pay twice.

The panel concluded with a discussion of the scope section in Article 4A. Joe Sommer expounded on the exclusivity principle in 4A and how courts are continuously challenged to bring in other state laws. Joe’s proposed solution is to write a new uniform law of bank deposits. This issue sparked so much interest, that we are currently working on a new program on this subject for our next meeting in Nashville this spring.

Stay tuned!

Message from the Chair: Commercial Financial Services

As 2004 draws to a close, the Committee on Commercial Financial Services has much to be proud of and has much to look forward to in 2005. This has been productive yet tragic year.

At our Spring Meeting in Seattle, the Committee sponsored a full list of subcommittee meetings as well as a program titled “Enron’s Lessons for Structured Finance and Derivative Transactions,” our annual, and very popular program on Commercial Law Developments by Jeff Turner, Steve Weise and Teresa Harmon, and a Committee Forum on loan trading and the involvement of the LSTA.

At our August meeting in Atlanta, we sponsored a joint Committee Forum with the Uniform Commercial Code Committee titled “International Transactions: Whose Law is it (Anyway)?” co-chaired by Sandra Rocks and Mike Carsella, and we sponsored a program chaired by Marshall Grodner which focused on the basics of legal opinions in a commercial finance practice.

In November, the Commercial Financial Services Committee met at its annual stand-alone meeting held in conjunction with the annual convention of the Commercial Finance Association in Philadelphia and included a panel of Lynn Soukup, Jim Prendergast and Norm Powell speaking on “Mighty Morphin’ Collateral: Planning for Changes in the Character of Collateral.” Ed Smith, Gary Sampson and Jim Prendergast led a panel titled “Avoiding Double Trouble and other issues of Transfers of Collateral, Mergers and New Debtors,” and Jennifer Hagle and I led a discussion on second lien financings titled “Tranche B or Not Tranche B – That is the Question: Evaluating the Risk Factors in Second Lien Financings.”

Each year, the Committee has the opportunity to provide a program to the Commercial Finance Association, and this year, we presented a program on Friday, November 5th. Malcolm Lindquist acted as the emcee (and someone – I think it might have been Jim Prendergast – was the “letter turner”) in our version of the popular game show, which was appropriately titled “Wheel of Misfortune.” Contestants included Meredith Jackson, Martin Fingerhut and Lynn Soukup. They were “assigned” questions related to traps for asset based lenders. The program was hugely successful, and Malcolm’s and Jim’s costumes were, well, unique.

Material distributed in connection with these substantive programs is available on the Committee’s website. If you were unable to attend any of these programs, please log on

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American Bar Association

Commercial Law Newsletter

Section of Business Law
to the website and download the materials.

The Committee was the focus of a recruitment drive in April and as a result, our membership now exceeds 1,500 lawyers. We are one of the largest committees in the Business Law Section and it is the Committee’s goal to bring current and up-to-date program materials and educational opportunities to all of our members, including members who are not active or do not have the opportunity to attend our Committee meetings.

The Committee is in the process of planning another full slate of programs at our Spring Meeting, which will be held in Nashville, Tennessee from March 31 to April 3, 2005. We are planning a program to be chaired by Gerry Blanchard on recent lender liability developments, with a focus on several new theories such as increasing insolvency and expanding scope of primary party liability under the securities laws. We will once again sponsor our annual Commercial Law Developments programs, and we are planning a committee forum that will focus on securities law and its relevance to lawyers with a commercial finance practice.

A particular bright spot in our subcommittee activities is the renewed focus by Brian Hulse and Jim Prior in the State Laws Surveys Subcommittee. Brian and Jim are updating the surveys currently posted on our website. Check the website, as these surveys will be updated frequently as state surveys are submitted.

A list of the Committee Leadership is published in this newsletter on page 24. We have a number of new leaders and will have open spots for new leaders over the next year. Thanks to all of the new members of our leadership for agreeing to step up to the challenge.

If you have ideas for subcommittee presentations, programs or committee forums to be sponsored by the Committee, if you have any other insights or ideas as to programming or other activities with which you would like to see the Committee involved, or if you would just like to get more involved in the Committee’s activities, please contact me.

Finally, a reflection of the Committee’s activities in 2004 would be incomplete without taking a moment to remember Jeff Turner. As most of you know, Jeff died suddenly on July 17, 2004 and, at the time of his death, was Chair of the Commercial Financial Services Committee. The Committee owes much to Jeff’s visionary leadership, his extraordinary intellect and his unwavering service to our Committee and its members. It is with much thanks and gratitude that we as a Committee, and I personally, remember Jeff and his service to our industry.

CFS Intellectual Property Financing Subcommittee

We had an interesting discussion at the annual meeting about what happens when lenders or lessors want to take an interest in intellectual property, which they can now do under revised Article 9. We presented several documents and walked through them to explain the differences in the expectations that a lender would have and the response it might get from the owner of intellectual property. The differences are based on the nature of the collateral, with a lender expecting that since the company paid for the asset that they would “own” the property and the owner of the intellectual property indicating that this was not exactly the case (see 9-408).

In Philadelphia at the annual meeting of the Commercial Finance Committee, Jim Prendergast moderated a very informative panel on double-debtor issues. One of the topics discussed was the double-debtor problem as it might arise in some technology transfers where both the transferor and the transferee have encumbered their intellectual property.

We look forward to seeing you all in Nashville.

Leianne Crittenden, Co-Chair
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Redwood Shores, California

Tom Ward, Co-Chair
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CFS Loan Workout Subcommittee

The Subcommittee will be presenting the following program at the Spring Meeting in Nashville, on March 31st at 2:30 p.m: "The Loan is not Performing... Now What? Working with advisors to understand your options and set the most sensible course."

This program will look at how you get your arms around all the relevant facts and make appropriate decisions when your borrower is deteriorating. What are the roles and responsibilities of financial advisors, appraisers and consultants and when is it appropriate - or critical - to use them? How should you approach the mountains of documents, financial information, and contracts. Do you understand your collateral and how it performs? Did you get the good stuff? Or the junk? Should the lender throw more money at this? Is there value there to support a waiver and amendment? Is it time to "put the screws on"? To let them borrow from someone else? The interactive panel will feature lenders' counsel and financial advisors.

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CFS Securitization and Derivatives Subcommittee

The Subcommittee last met during the ABA's annual meeting in Atlanta. Steve Whelan of Thacher Proffitt & Wood provided an update of the Avianca litigation, which was challenging the “true sale” nature of an airline ticket receivables securitization. Bob Aicher and Debbie Cotton of Sidley Austin Brown & Wood then reviewed a number of important legal and practice issues concerning letters of credit, guarantees, insurance and swaps that are routinely used to credit-enhance billions of dollars of structured debt. They outlined the often-misunderstood differences between these instruments - differences that have led to results not anticipated by attorneys or their clients.

Our next meeting will take place at 7:30 a.m. on April 1, 2005 in conjunction with the Spring Meeting in Nashville. The first 30 minutes of the meeting will focus on the current status of a number of FASB and SEC initiatives that affect structured finance transactions. We will then discuss several recent cases that have considered whether factoring or securitization transactions constituted the “true sales” they purported to be.

Members of the Commercial Financial Services and UCC Committees who have an interest in securitization and related derivatives products are invited to join the Subcommittee by emailing the Chair. We look forward to seeing you in Nashville.

**Martin Fingerhut**
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The Surveys of Commercial Law Subcommittee is working on a project to prepare a summary of the commercial lending and real estate finance laws of all 50 states, the District of Columbia and Puerto Rico. A volunteer from each jurisdiction is preparing the summary for that jurisdiction. For ease of reference, the summaries are in a substantially uniform format.

As the summaries are completed, they are being posted on the CFS web page. So far, the surveys for fourteen jurisdictions have been posted to the web page.

The subcommittee's goal is to complete the survey project in the first quarter of 2005.

The Lender Liability Subcommittee is looking forward to the Spring meeting in Nashville where we will be putting on a program entitled "The Zone of Insolvency." The program will provide a survey of developments in lender liability over the past several years. We will open with a review of traditional theories of good faith and fair dealing, fraud and breach of fiduciary duty, among others, and then proceed to examine theories such as deepening insolvency and expanded liability under the securities laws, which are now being developed in larger bankruptcy cases, and explore their applicability to smaller transactions. Speakers will include: Jerry Blanchard, retired Associate General Counsel from Bank of America; Hon. Mary Grace Diehl, US Bankruptcy Judge for the Northern District of Georgia; Robert Agler, Associate Chief Counsel for CIT Corporation; Kit Weitnauer, Alston & Bird, Atlanta; Jim Kelley, Neal & Harwell, Nashville and Jesse Austin, Paul Hastings, Janofsky & Walker, Atlanta.

The Real Estate Financing Subcommittee is planning an interesting and exciting subcommittee meeting at the 2005 Spring Meeting in Nashville. It will be a joint meeting with the Business Bankruptcy Committee’s Business Transactions Subcommittee and will include an informative panel discussion regarding issues related to prepayment premiums common in loans secured by real estate. The panel will include renown bankruptcy attorney Margery Reed from Duane Morris LLP’s Philadelphia office and John C. “Jack” Murray of Chicago, a nationally-recognized author and expert on the issue. They will discuss drafting issues, state-law enforceability issues and bankruptcy issues. We hope to see you at the meeting in Nashville.
Joint Task Force on Deposit Account Control Agreements

An inordinate amount of time is spent in practice in putting in place deposit account control agreements in secured lending transactions. Lenders and depositary banks have developed their own forms that clash on allocation of risks and language, resulting in time consuming and protracted negotiations, sometimes on the eve of impending loan closings. In an effort to bring order out of this chaos, the task force is seeking to develop a form or forms of deposit account control agreements that can be entered into by the parties with no or minimal negotiation.

The task force is jointly sponsored by the Banking Law, Commercial Financial Services, Consumer Financial Services and Uniform Commercial Code Committees of the Section. It is composed of a number of in-house and transactional lawyers from a broad base of depositary and lending institutions as well as academicians and other interested parties. The Co-Chair from the Commercial Financial Services Committee is Marshall Grodner, and the Co-Chair from the UCC Committee is Ed Smith.

Given the importance of the subject, the task force has been proceeding at an accelerated pace. Since its initial meeting in Seattle at the Section 2004 Spring Meeting, the task force has met in Atlanta at the 2004 Annual Meeting and at a special Fall 2004 meeting in New York City. Largely based on the work of sub-groups chaired by Marshall Grodner, George Hisert, John Pickering, Roberta Torian, Meredith Jackson, Lynn Soukup, Ed Smith and Alan Christenfeld, the Co-Chairs prepared a working draft of a deposit account control agreement for a transactional deposit account. The working draft was discussed at the Fall 2004 meeting with approximately 50 members of the task force in attendance in New York or participating by telephone. Based on those discussions, it is anticipated that a revised working draft of the agreement will be prepared and discussed at another meeting of the task force to be scheduled for early to mid February in New York City. The task force plans to have the working draft emerging from the February meeting available for discussion at the meeting of the task force in Nashville at the Section 2005 Spring Meeting.

The task force meetings have thus far been very productive. There has been a good deal of dialogue among depositary and lending institutions and a better appreciation by all of the respective concerns of the parties to these agreements. While there is no guaranty that the task force will be successful in its work, the meetings thus far have very encouraging.

There is still plenty of work to be done on this task force. If anyone is interested in joining the task force, please feel free to contact Ed Smith.

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Current as of June, 2004

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<td>Kathleen J. Hopkins</td>
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<tr>
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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 ("NCCUSL") for their help in compiling the information above. These revisions are based on information provided by NCCUSL available as of October 1, 2004.

1. In addition to enactments noted below, all states have adopted the 1995 Official Text of Article 5 of the UCC, other than Puerto Rico (no action) and Wisconsin (no action). Furthermore, all states have adopted the 1994 Official Text of Article 8 of the UCC and the 1998 Official Text of Article 9 of the UCC.
2. New York and South Carolina are the only states that still have the 1951 version of Articles 3 & 4.

The editors wish to express their sincere and belated gratitude to Linda Hayman at Skadden, Arps, Slate, Meagher & Flom, LLP, and her teams of able assistants, for updating and providing the UCC Scorecard for every issue of the Commercial Law Newsletter.

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