In its legislative session ended June 30, 2005, the Delaware General Assembly enacted changes to the Delaware Limited Liability Company Act, 6 Del. C. § 18-101 et seq. (the "DLLC Act"), the Delaware Revised Uniform Limited Partnership Act, 6 Del. C. § 17-101 et seq. (the "DLP Act"), the Delaware Revised Uniform Partnership Act, 6 Del. C. § 15-101 et seq. ("DRUPA"), and Uniform Commercial Code Revised Article 9 ("RA-9") as in effect in Delaware ("Delaware RA-9"). These changes take effect on August 1, 2005, except that the changes to Delaware RA-9 took effect when signed into law on June 28.

More...

On April 20, 2005, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Bankruptcy Reform Act"). While there has been much reporting on the effect of the Bankruptcy Reform Act on consumer bankruptcies, the Bankruptcy Reform Act will have a significant impact on business bankruptcy cases. Set forth below is a summary of the key provisions of the Bankruptcy Reform Act, paying particular attention to the business-related provisions. Most parts of the Bankruptcy Reform Act go into effect 180 days after the bill was signed (i.e., October 17, 2005), while some apply to all new cases. One provision also applies to pending cases. We have noted in the text below the significant provisions that take effect immediately; at the conclusion of this article, we provide the effective dates for the other key provisions.

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June 30, 2005

The Annual Meeting of the ABA will be held in Chicago, Illinois from August 5 – 9, 2005, and Commercial Financial Services has a lineup of programs and meetings that address a number of current topics. The Section of Business Law has a number of programs scheduled which are designed to explore the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. While the Act is, in the public’s mind, targeted to consumers and consumer bankruptcies, CFS will, along with Banking Law, Business Bankruptcy and UCC, jointly sponsor a
program which will address the Act's relevance to our practices. The program is titled “The Practical Impact of the Bankruptcy Reform Act of 2005 for Business, Financial and Transactional Lawyers” and will be moderated by Meredith Jackson of Irell & Manella LLP in Los Angeles. The program will be held on Sunday, August 7, 2005 at 2:30 p.m. in the Drake Hotel's Venetian Room.

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Committee on Uniform Commercial Code
Stephanie Heller

It was wonderful to see so many of you at the Spring Meeting in Nashville. Many of you went out of your way to say hello and to share your thoughts with me about the meeting and more generally about the UCC Committee. Thank you. Let me also take this opportunity to say a special thank you to those of you who helped organize our subcommittee, working group and task force meetings and our CLE programs and forums as well as to all of you who attended and participated in those meetings and programs. From all objective measures, they were a big success. Remember, if you are a member of the Business Law Section but were unable to attend the Spring Meeting you can obtain the materials for all of the UCC Committee programs as well as all of the other Spring Meeting programs free of charge at www.abanet.org/buslaw/library/spr05.shtml.

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Committee on Commercial Financial Services Subcommittee Reports

Subcommittee on Agricultural and Agri-Business Financing
Phillip L. Kunkel, Chair, T. Randall Wright, Vice-Chair

The Ag Finance Subcommittee will meet in conjunction with the American Agricultural Law Association as part of its annual symposium in Kansas City, Missouri, October 7 and 8. The subcommittee will sponsor two programs—First, a panel
program entitled "Check Kites, Ponzi Schemes and Other Forms of Off-Balance Sheet Financing," which will deal with livestock fraud schemes, looking especially at larger schemes that have been the subject of recent bankruptcy cases. Included in the panel will be the Honorable Jerry Ventrers, Bankruptcy Judge for the Western District of Missouri, who was the presiding judge in connection with a large cattle fraud case involving George Young and his companies. The second program is entitled "Current Developments in Anti-Corporate Farming Laws". It will focus on recent cases and statutory changes in laws that restrict ownership or operation of farming operations by corporate or other business entities. All subcommittee members are invited to attend. Registration can be completed on-line by going to http://www.aglaw-assn.org/.

Subcommittee on Aircraft Financing
James D. Tussing, Chair, Michael K. Vernier, Vice-Chair

The Aircraft Finance Subcommittee’s program in Chicago will begin on Friday, August 5 with a tour of United Airlines' computer operations control center and overnight aircraft maintenance facility. The tour bus will leave at 9:00 am from the Drake Hotel and return at 12:30 (times are subject to change). Subcommittee attendees and their guests are welcome. Space will be limited so please contact us for reservations. Our formal program will begin at 2:00 pm at the Drake Hotel with a presentation on Pension Issues in the Airline Industry by John Menke, Assistant Chief Counsel of the Pension Benefit Guaranty Corporation. Richard Seltzer, outside counsel to the Air Line Pilots Association, will speak on pilots and labor issues in airline restructurings. We will have an update on the United Airlines bankruptcy by Dean Gerber of Vedder Price Kaufman & Kammholz (United's air finance counsel), Douglas M. Walker, Senior Counsel at United Airlines and Marc Kieselstein of Kirkland & Ellis (United's bankruptcy counsel). Raymond Simon of White & Case will give us an update on new developments in Japanese Operating Leases.

The Subcommittee dinner will be Friday evening at Bistro Margo, 1437 North Wells Street. Wine and hors d’oeuvres will be offered at 8:00 pm with dinner to follow. Subcommittee attendees and guests are invited. Advance sign up is required. Please contact us for reservations.

Our presentations on Saturday, August 6, also at the Drake Hotel, will beginning at 9:00 am and end at 12:30. Michael K. Vernier of Standard & Poor's will discuss Recent Criteria Changes in Ratings of EETCs. The Role of German Landesbanks in Aircraft Financing will be presented by a panel that includes Helfried J. Schwarz of Milbank, Tweed, Hadley & McCloy LLP, Frankfurt, Germany, Herbert Thomas, HSH Nordbank AG, Kiel, Germany, and Frank Herick, Norddeutsche Landesbank Girozentrale, Hannover, Germany. Business Jet Financing will be discussed by Edward K. Gross of Ober, Kahler, Grimes & Shriver, Eileen Gleimer of Crowell & Moring and James H. Hancock of Seward & Kissel. An Update on the Cape Town Convention will be presented by Erin M. Van Laanen of MacAfee & Taft and F. Scott Wilson of Pratt & Whitney.

We hope you can join us in Chicago.

Subcommittee on Creditors’ Rights
Duane M. Geck, Chair, Carolyn P. Richter, Vice Chair

The Creditors’ Rights Subcommittee met jointly with the Bankruptcy Litigation Subcommittee at the ABA Spring Business Law Section in Nashville on March 31, 2005. Elizabeth Bohn, as the ABA Advisor to the NCCUSL Drafting Committee for Amendments to the Uniform Foreign Money Judgments Enforcement Act, reported on the amendments under consideration. Elizabeth also delivered an overview of the new Bankruptcy Reform Act which was on the verge of passing into law at the time of the meeting. To wrap up, Duane Geck reviewed the Pennsylvania Supreme Court’s decision entitled Pioneer Commercial Funding Corp. v. American Financial Mortgage Corp., and the subcommittee engaged in a discussion of its affect on the use of bailee letters in the mortgage warehouse lending industry.

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Subcommittee on Cross-Border Secured Transaction
James C. Chadwick, Chair, Joseph Turitz, Vice-Chair

At the Spring Meeting in Nashville, our Subcommittee jointly hosted a meeting with the UCC Subcommittee on International Commercial Law that was attended by approximately 50 lawyers from throughout the United States, Canada, the United Kingdom and Europe. The meeting focused on recent legislative and caselaw developments relating to cross-border secured transactions.

More...

Subcommittee on Intellectual Property Financing
Leianne Crittenden, Co-Chair, Thomas M. Ward, Co-Chair

We had a very interesting presentation in Nashville, covering the financing of portfolios of songs. After all, what would you expect in Nashville? Many thanks to John Murdock and John Rolfe of Boul, Cummings, Conners & Berry in Nashville for their presentation, and also to Karen Clark (Manager of the Nashville Music Private Banking Division at the SunTrust Bank Music Row Financial Center), who explained the lenders’ perspective. The valuation determination and the cash flows that secure the lending arrangement, presented by Charles Sussman of Gudvi, Sussman & Oppenheim, showed that this area is not for the faint of heart. We will have John Murdock and John Rolfe, as well as Mike Olsen (President and COO of Compendia Music, a thirty year industry veteran and attorney) back to speak in Chicago on more advanced topics concerning music financing, as well as the recent Grokster case, and look forward to seeing you there. Our IP Financing Subcommittee Meeting (Concertino Con Brio) is Sunday, August 7 from 1:00 to 2:30 pm.

Subcommittee on Loan Documentation
Marshall Grodner, Chair, Jeremy S. Friedberg, Vice Chair

Unfortunately (for me, but maybe not for the Subcommittee’s members), after the annual meeting in Chicago, my term as Chair of the Subcommittee will be over. The current Vice Chair, Jeremy Friedberg, will be taking over as Chair of the
Subcommittee. I hope our members will give Jeremy all of our support.

Over the last several years during my term as Chair, we have accomplished several goals. First, we have had programs at both the spring and annual meetings dealing with all of the standard provisions of a Credit Agreement. The Commercial Financial Services Committee is now considering forming a Task Force to make these programs into a Model Credit Agreement formbook.

More...

Subcommittee on Loan Workouts  
Caroline C. Galanty, Chair, Kimberly S. Winick

Loan Workout Subcommittee of the Commercial Financial Services Committee ("LWS") Examines Use of Advisors in Workout Context

How do you get your arms around all the relevant facts when your borrower is deteriorating? Who can you call? On March 31st at the Nashville Spring Meeting the LWS answered these questions in its program: "The Loan is not Performing... Now What? . . . Working with advisors to understand your options and set the most sensible course." This interactive program explored the roles and responsibilities of financial advisors, appraisers and consultants and discussed when it is appropriate - or critical - to use them. Panelists for the lively discussion included workout advisor Scott Davis, Managing Director, Mesirow Financial Consulting, Charlotte, NC; as well as lenders' counsel Elizabeth M. Bohn, partner, Jorden Burt LLP, Miami, and Kimberly S. Winick, Counsel, Mayer Brown Rowe & Mawe in Los Angeles. Caroline Galanty, Assistant General Counsel, Bank of America, N.A., (Los Angeles) and Subcommittee Chair, moderated.

Subcommittee on Real Estate Financing  
Neal Kling, Chair, Kathleen J. Hopkins, Vice Chair

The Real Estate Financing Subcommittee joined with the the Business Transactions Subcommittee of the Business Bankruptcy Committee to host a joint meeting at the Spring 2005 meeting in Nashville, Tennessee. This meeting was well attended and featured an outstanding program related to the enforceability of prepayment premiums in mortgage loan documents. John C. "Jack" Murray and Margery N. Reed, two nationally-recognized experts on the topic, led a spirited panel discussion. The discussion included issues related to prepayment premiums both "in-side" and "outside" the bankruptcy context, and issues related to yield maintenance provisions, "exit fee" provisions, and defeasance provisions. The analysis included both recent cases and sample loan document provisions. As a committee member, you can view the materials Jack provided at: www.abanet.org/buslaw/library/spr05.shtml

We look forward to our next meeting in Spring 2006.
We had another entertaining presentation in Nashville's joint meeting, concerning a variety of topics. The meeting began with a short update from Ed Smith of Bingham McCutchen LLP on the progress of the ABA Joint Task Force on Deposit Account Control Agreements (see Task Force report below). Next was a presentation of “Wheel of Misfortune,” with Martin Fingerhut of Blake Cassels & Graydon LLP, Meredith Jackson of Irell & Manella, LLP and Lynn Soukup of Alston & Bird LLP fielding the questions from Malcolm Lindquist of Lane Powell PC. The role of letter turner was ably conducted by Jim Prendergast of First American Corporation. Come to the meeting in Chicago to see another variety of unusual topics that could stymie commercial lawyers who do not accustomed to practicing in these areas: lending to the government, to a church, to racehorse owners and to Native American nations......The meeting will be held Sunday, August 7 from 9:00 to 10:30 in the Superior Room, West Mezzanine of the Drake Hotel. We hope to see you there!

Committee on Uniform Commercial Code Subcommittee Reports

Subcommittee on General Provisions and Relation to Other Laws

D. Benjamin Beard, Co-Chair; Gail Hillebrand, Co-Chair

Our subcommittee had a great turnout in Nashville. Our committee meeting followed the Check 21 Program and the panelists from that program joined our subcommittee for a great session of Q&A.

Our meeting in Chicago promises to be very timely and informative. Peter Langrock, Michael Ferry, and Carter Klein will be discussing the possibility of recovering attorneys’ fees in actions related to the UCC. Peter will speak to the general availability of attorneys’ fees in UCC related actions, Michael Ferry will address the possibility of recovering attorneys’ fees in consumer actions implicating the UCC, and Carter Klein will discuss section 5­111, one of the rare provisions in the UCC that actually allows for the recovery of attorneys fees. Please join us on Monday, August 8, 9:00 AM - 10:00 AM.

Subcommittee on Investment Securities

Penelope Christophorou, Chair; Meredith Jackson, Vice-Chair

The UCC Investment Securities Subcommittee will present the following presentation at the ABA Annual Meeting in Chicago on Saturday, August 6, 2005 from 1:00 to 2:00 PM.

- Securities Accounts and Deposit Accounts as Collateral: Twin Sons of Different Mothers
- The Recognized Market Exception in the Foreclosure of Securities: An Update

Lynn A. Soukup of Alston & Bird and Meredith S. Jackson of Irell & Manella will give a presentation which will analyze, compare and contrast the various UCC provisions relating to securities accounts and deposit accounts and a recent
unpublished decision concerning the recognized market exception in the foreclosure of securities.

Subcommittee on Letters of Credit
Carter H. Klein, Chair, George A. Hisert, Vice-Chair

The UCC Subcommittee on Letters of Credit will have the following agenda items for the Annual Meeting in Chicago:

1. Letter of Credit Developments — to be presented by Jim Barnes
2. Who's entitled to excess proceeds drawn on an LC when the beneficiary has been paid in full — the issuer or the applicant?
3. Enjoing a Letter of Credit Draw — U.S. Issuer, Off-Shore Venue and Foreign Insolvent Beneficiaries

Subcommittee on Litigation
Mary Binder, Co-Chair, Mark Wilson, Co-Chair

At the Annual Meeting in Chicago, the UCC Subcommittee on Litigation will present a draft of a verdict directory for review for the claims of "improper payment" under UCC 4-401(a) and "conversion" under 3-420, and for the claim of status as a "holder in due course" under 3-302(a).

The directories will integrate drafts of related instructions on questions of fact, such as "agreement," "authorized signature," "entrusted with responsibility," "ordinary care," "without notice," and "good faith."

Subcommittee on Payments
Stephen C. Velttri, Co-Chair, Paul S. Turner, Co-Chair, Marina Adams, Vice-Chair

Don't miss the UCC Subcommittee on Payments’ Chicago presentation of "Clash of the Titans: Competing Electronic Payment Products 5 Years After the Collapse of the Dot Com Bubble."

Our distinguished panel of academics and industry experts will review the extent to which the numerous emerging payment products have survived and how they have evolved. We will take a fresh look at the proliferation of new payment products and the challenges they pose to vendors of mature products and regulators. The panel will also review the impact on existing law of the use of new delivery mechanisms such as the Internet or wireless networks on traditional payment products including checking accounts, credit cards and debit cards and the emergence of new payment intermediaries and their status under existing law. Please join us for a thought-provoking discussion.

Subcommittee on Secured Transactions
Leianne S. Crittenden, Co-Chair UCC, Pauline Stevens, Vice Chair UCC, Malcolm C. Lindquist, Co-Chair CFS, Katherine S. Allen, Vice-Chair CFS
We had another entertaining presentation in Nashville’s joint meeting, concerning a variety of topics. The meeting began with a short update from Ed Smith of Bingham McCutchen LLP on the progress of the ABA Joint Task Force on Deposit Account Control Agreements. Next was a presentation of “Wheel of Misfortune,” with Martin Fingerhut of Blake Cassels & Graydon LLP, Meredith Jackson of Irell & Manella, LLP and Lynn Soukup of Alston & Bird LLP fielding the questions from Malcolm Lindquist of Lane Powell PC. The role of letter turner was ably conducted by Jim Prendergast of First American Title Corporation. Come to the meeting in Chicago to see another variety of unusual topics that could stymie commercial lawyers who do not accustomed to practicing in these areas: lending to the government, to a church, to racehorse owners and to Native American nations......The meeting will be held Sunday, August 7 from 9:00 to 10:30 in the Superior Room, West Mezzanine of the Drake Hotel. We hope to see you there!

Subcommittee on Sale of Goods
Keith A. Rowley, Co-Chair, Scott J. Burnham, Co-Chair

The UCC Subcommittee on the Sale of Goods will present "What Every Code Practitioner Should Know About the UNCISG." at the Annual Meeting in Chicago.

The presentation will compare and contrast key Article 2 and CISG provisions. The presenter is Charles Calleros, Professor at Arizona State University College of Law.

Joint Task Force/Working Group Reports

Joint Task Force on Deposit Account Control Agreements
Ed Smith, UCC Co-Chair, Roberta Torian, CFS Co-Chair, Marshall Grodner, CFS Co-Chair, Marvin Heilerson, Banking Law Vice-Chair, John Pickering, Banking Law Co-Chair

The Joint Task Force on Deposit Account Control Agreements is seeking to develop a form or forms of UCC Article 9 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 depository 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.

The Task Force has been meeting regularly since it was formed over a year ago. A working draft of a deposit account control agreement for a demand deposit account (without a lock box arrangement) has been developed by the Task Force as a result of discussions at a series of all-day meetings of the Task Force throughout the year. The draft will be further discussed at the Task Force meeting on July 11 in Los Angeles. After incorporating any modifications from that meeting, the draft should be available for discussion at the meeting of the Task Force in
Chicago at the Section 2005 Annual Meeting.

If the Task Force is successful in developing consensus on a form of deposit account control agreement for a demand deposit account (without lock box arrangements), it will turn its efforts to other forms of deposit account control agreements such as demand deposit accounts with lock box arrangements, blocked accounts, and deposit accounts where the cash is invested in money market instruments and which might be considered securities accounts.

If anyone is interested in joining the Task Force or obtaining a copy of the current working draft, please feel free to contact Ed Smith at Edwin.Smith@Bingham.com.

Joint Working Group on the Model Trading Partner Agreement
D. Benjamin Beard

The Joint Working Group will meet in Chicago to discuss the anticipated commentary to be prepared to accompany the nearly final terms of the Model Electronic Commerce Trading Partner Covenants, which can be accessed at http://lawplace.metadot.com/metadot/index.pl?id=2210.

Joint Working Group on Transferable Electronic Financial Assets
Linda J. Rusch, Co-Chair, Matais Hallendorff, Co-Chair

On Saturday, August 6, 2005 10:00 a.m. to 11 a.m., our working meeting will be on the Control of Electronic Chattel Paper. At the meeting we will continue our discussion of our ongoing collaborative project with The Open Group concerning implementation of the control requirement as it relates to electronic chattel paper. The project is focused on providing questions and answers regarding control for those who will need to prove control exists in order to establish first priority in electronic chattel paper under UCC Article 9.
In its legislative session ended June 30, 2005, the Delaware General Assembly enacted changes to the Delaware Limited Liability Company Act, 6 Del. C. § 18-101 et seq. (the "DLLC Act"), the Delaware Revised Uniform Limited Partnership Act, 6 Del. C. § 17-101 et seq. (the "DLP Act"), the Delaware Revised Uniform Partnership Act, 6 Del. C. § 15-101 et seq. ("DRUPA"), and Uniform Commercial Code Revised Article 9 ("RA-9") as in effect in Delaware ("Delaware RA-9"). These changes take effect on August 1, 2005, except that the changes to Delaware RA-9 took effect when signed into law on June 28.

The changes to the DLLC Act and the DLP Act are substantially similar. They include (i) confirmation that a member or manager (or an assignee of a limited liability company interest) or a partner (or an assignee of a limited partnership interest) is bound by the limited liability company agreement or partnership agreement, regardless of whether such person executes the agreement, (ii) expansion of permitted purposes (the business of banking remains prohibited), (iii) clarification that Delaware law does not require that a domesticating non-United States entity wind up its affairs or pay its liabilities and distribute its assets concurrent with domestication, (iv) clarification or confirmation of provisions relating to admission of members or partners in certain mergers, consolidations, domestications, and conversions, (v) clarification of circumstances in which members and managers, limited partners and general partners, and liquidating trustees may rely on entity records, (vi) clarification of charging orders, and that charging orders are the sole method by which a judgment creditor may satisfy a judgment from a member's limited liability company interest or a partner's partnership interest, (vii) provision for revocation of dissolution prior to the filing of a certificate of cancellation, and (viii) a listing of activities of a foreign limited liability company or foreign limited partnership that do not constitute doing business for purposes of the DLLC Act or the DLP Act requiring registration with the Delaware Secretary of State.

The changes to DRUPA are somewhat similar with respect to (i) the binding nature of partnership agreements, (ii) clarification of circumstances in which partners and liquidating trustees may rely on partnership records, (iii) clarification of charging
orders, and that charging orders are the sole method by which a judgment creditor may satisfy a judgment from a partner’s partnership interest, (iv) clarification that Delaware law does not require a converting entity to wind up its affairs or pay its liabilities and distribute its assets concurrent with conversion to a domestic partnership and admission of partners in connection with conversion, and (v) a listing of activities of a foreign limited liability partnership that do not constitute doing business for purposes of DRUPA requiring registration with the Delaware Secretary of State. Additional changes to DRUPA include (i) clarification of procedures for forming limited liability partnerships and causing existing partnerships to become limited liability partnerships, (ii) conforming the approval requirements for transfer of a domestic partnership to those applicable to conversion, (iii) clarification of provisions relating to annual reports, fees, and revocation of statements of qualification and foreign qualification, and (iv) clarification that cancellation and revival of statements of partnership existence cancel and revive statements of partnership existence, not the partnership itself.

Delaware RA-9 has been amended in several respects. A new Section 9-111 addresses certain choice of law issues. Delaware RA-9 Section 502 more clearly states that while a record of a mortgage may be effective as a financing statement, it is not a financing statement, and thus not subject to various rules requiring amendment of financing statements in certain circumstances. New provisions in Delaware RA-9 Section 9-516 provide guidance and/or safe harbors with respect to certain formatting and informational requirements for documents filed in Delaware’s real property records. Regarding the filing of an initial financing statement in lieu of a continuation statement, restated Section 707(c)(2) clarifies that identification of a centrally filed pre-effective-date financing statement is sufficient without need to identify any related local filing.

This article summarizes these amendments to the DLLC Act (Senate Bill No. 86, 75 Del Laws 51), the DLP Act (House Bill No. 151, 75 Del Laws 31), DRUPA (Senate Bill No. 85 as amended by Senate Amendment No. 1, 75 Del Laws 50), and Delaware RA-9 (House Bill No. 238, 75 Del Laws 66).

DLLC ACT AMENDMENTS.

The DLLC Act was amended by Senate Bill No. 86, 75 Del Laws 51, effective August 1, 2005.

Revisions to Section 18-101(7) confirm that a member or manager of a limited liability company or an assignee of a limited liability company interest is bound by the limited liability company agreement, regardless of whether such person executes the limited liability company agreement. Revisions to Section 18-106(a) expand the permitted purposes of a limited liability company to include granting policies of insurance or assuming insurance risks. The business of banking (as defined in Section 126 of Title 8) remains prohibited. Revisions to Sections 18-212(i) and 18-214(g) clarify that Delaware law does not require a domesticating non-United States entity to wind up its affairs or pay its liabilities and distribute its assets concurrent with becoming domesticated pursuant to Section 18-212. The provisions in Section 18-213(b) relating to transfer or continuance of domestic limited liability companies have been conformed to
the provisions applicable to conversion of domestic limited liability companies (see Section 18-216).

Section 18-301 has been amended in several respects to clarify or confirm admission of members in certain circumstances. Section 18-301(b)(3) has been restated to clarify that a person is admitted as a member of a limited liability company, pursuant to a merger or consolidation, (i) as provided in the surviving entity’s limited liability company agreement or, in the case of inconsistency, in the agreement of merger or consolidation, in the case of a person being admitted as a member of the surviving or resulting limited liability company, and (ii) as provided in the non-surviving or non-resulting entity’s limited liability company agreement, in the case of a person being admitted as a member of the non-surviving or non-resulting limited liability company. Section 18-301(c) confirms that in connection with certain domesticalations or conversions, a person is admitted as a member as provided in the limited liability company agreement.

Section 18-406 clarifies circumstances in which members, managers, and liquidating trustees may rely on the records of, or information relating to, the limited liability company.

Amendments to Section 18-703 clarify the nature of a charging order, and provide that a charging order is the sole method by which a judgment creditor may satisfy a judgment from and out of a member’s limited liability company interest. Notably, attachment, garnishment, foreclosure, and similar remedies are not available, and a judgment creditor does not have any right to become, or to exercise any rights or powers of, a member (other than to receive distributions to which the member would otherwise be entitled).

New Section 18-806 provides for revocation of dissolution in certain circumstances prior to the filing of a certificate of cancellation in the office of the Delaware Secretary of State. For example, all remaining members may revoke dissolution by affirmative vote or written consent.

Finally, new Section 18-912 lists certain activities of a foreign limited liability company in the State of Delaware that do not constitute doing business for purposes of Subchapter IX of the DLLC Act (and thus do not require registration with the Delaware Secretary of State pursuant to the DLLC Act). The list generally includes such activities as (i) maintaining, defending, or settling an action, (ii) holding meetings and otherwise conducting its internal affairs, (iii) maintaining bank accounts, (iv) maintaining offices or agencies for the transfer, exchange, or registration of its own securities, (v) selling through independent contractors, (vi) soliciting or obtaining orders which require acceptance outside the State of Delaware, (vii) selling, by contract consummated outside the State of Delaware but requiring delivery into the State of Delaware, machinery, plant, or equipment, (viii) creating or acquiring indebtedness (whether as lender or borrower), (ix) collecting debts or foreclosing mortgages or other security interests, (x) the conduct of an isolated transaction, (xi) doing business in interstate commerce, and (xii) doing business in the State of Delaware as an insurance company.
DLP ACT AMENDMENTS.

The DLP Act was amended by House Bill No. 151, 75 Del Laws 31, effective August 1, 2005. These changes are very similar to those discussed above with respect to the DLLC Act.

Revisions to Section 17-101(12) confirm that a partner or an assignee of a limited partnership interest is bound by the partnership agreement, regardless of whether such person executes the partnership agreement. Revisions to Section 17-106(a) expand the permitted purposes of a limited partnership to include granting policies of insurance or assuming insurance risks. The business of banking (as defined in Section 126 of Title 8) remains prohibited. Section 17-211(g) has been amended to provide increased flexibility (for limited partnerships formed on or after August 1, 2005) regarding amendments to partnership agreements and the adoption of new partnership agreements in connection with mergers and acquisitions. Revisions to Sections 17-215(i) and 17-217(g) clarify that Delaware law does not require a domesticating non-United States entity to wind up its affairs or pay its liabilities and distribute its assets concurrent with becoming domesticated pursuant to Section 17-215. The provisions in Section 17-216(b) relating to transfer or continuance of domestic limited partnerships have been conformed to the provisions applicable to conversion of domestic limited partnerships (see Section 17-219).

Section 17-301(b)(3) has been restated to clarify that a person is admitted as a partner of a limited partnership, pursuant to a merger or consolidation, (i) as provided in the surviving or resulting entity’s limited partnership agreement or, in the case of inconsistency, in the agreement of merger or consolidation, in the case of a person being admitted as a partner of the surviving or resulting limited partnership, and (ii) as provided in the non-surviving or non-resulting entity’s limited partnership agreement, in the case of a person being admitted as a partner of the non-surviving or non-resulting limited partnership. Section 17-301(c) confirms that in connection with certain domestications or conversions, a person is admitted as a partner as provided in the partnership agreement.

New Section 17-407 clarifies circumstances in which limited partners, general partners, and liquidating trustees may rely on the records of, or information relating to, the limited partnership.

Amendments to Section 17-703 clarify the nature of a charging order, and provide that a charging order is the sole method by which a judgment creditor may satisfy a judgment from and out of a partner’s partnership interest. Notably, attachment, garnishment, foreclosure, and similar remedies are not available, and a judgment creditor does not have any right to become, or to exercise any rights or powers of, a partner (other than to receive distributions to which the partner would otherwise be entitled).

New Section 17-806 provides for revocation of dissolution in certain circumstances prior to the filing of a certificate of cancellation in the office of the Delaware Secretary of State. For example, all remaining general partners and limited partners may revoke dissolution by affirmative vote or written consent.
Finally, new Section 17-912 lists certain activities of a foreign limited partnership in the State of Delaware that do not constitute doing business for purposes of Subchapter IX of the DLP Act (and thus do not require registration with the Delaware Secretary of State pursuant to the DLP Act). The list generally includes such activities as (i) maintaining, defending, or settling an action, (ii) holding meetings and otherwise conducting its internal affairs, (iii) maintaining bank accounts, (iv) maintaining offices or agencies for the transfer, exchange, or registration of its own securities, (v) selling through independent contractors, (vi) soliciting or obtaining orders which require acceptance outside the State of Delaware, (vii) selling, by contract consummated outside the State of Delaware but requiring delivery into the State of Delaware, machinery, plant, or equipment, (viii) creating or acquiring indebtedness (whether as lender or borrower), (ix) collecting debts or foreclosing mortgages or other security interests, (x) the conduct of an isolated transaction, (xi) doing business in interstate commerce, and (xii) doing business in the State of Delaware as an insurance company.

DRUPA AMENDMENTS.

DRUPA was amended by Senate Bill No. 85 as amended by Senate Amendment No. 1, 75 Del Laws 50, effective August 1, 2005. These changes include provisions similar to those discussed above with respect to the DLLC Act and the DLP Act.

Revisions to Section 15-101(8) clarify that the term “limited liability partnership” as used in DRUPA means a domestic (Delaware) limited liability partnership. Revisions to Section 15-101(12) confirm that a partner or transferee of an economic interest is bound by the partnership agreement, regardless of whether such person executes the partnership agreement. Revisions to Section 15-306(d) confirm that such Section applies only to the practice of law in Delaware. New Section 15-409 clarifies circumstances in which partners and liquidating trustees may rely on the records of, or information relating to, the partnership.

Amendments to Section 15-504 clarify the nature of a charging order, and provide that a charging order is the sole method by which a judgment creditor may satisfy a judgment from and out of a partner’s partnership interest. Notably, attachment, garnishment, foreclosure, and similar remedies are not available, and a judgment creditor does not have any right to become, or to exercise any rights or powers of, a partner (other than to receive distributions to which the partner would otherwise be entitled).

Sections 15-901 and 15-1001 have been amended to clarify procedures for forming a limited liability partnership, causing an existing partnership to become a limited liability partnership, and converting an entity to a domestic partnership or a limited liability partnership.

Revisions to Sections 15-901(g) and 15-904(i) confirm that Delaware law does not require a converting entity to wind up its affairs or pay its liabilities and distribute its assets concurrent with conversion to a domestic partnership pursuant to Section 15-901. Section 15-901(j) has been amended to confirm that a person admitted as a partner in connection with a conversion is so admitted as provided in the partnership agreement.
Similarly, Section 15-902(k) has been restated to clarify that the admission of a person as a partner (i) of a surviving or resulting domestic partnership pursuant to a merger or consolidation is governed by the partnership agreement of the surviving or resulting entity or, in the case of inconsistency, the agreement of merger or consolidation, and (ii) of the non-surviving or non-resulting domestic partnership is governed by the partnership agreement of the non-surviving or non-resulting entity. Section 15-904(k) confirms that in connection with certain domestications, a person is admitted as a partner as provided in the partnership agreement.

Section 15-905(b) conforms the approval requirements for the transfer of a domestic partnership to those applicable to conversion of a domestic partnership.

Section 15-1003(c) is amended to clarify provisions relating to notice of annual reports and applicable fees, and revocation of a statement of qualification or statement of foreign qualification and non-issuance of certificates of good standing if such reports and fees are not timely submitted. Section 15-1003(e) has been amended to delete the three-year limitation on reinstatement of statements of qualification and statements of foreign qualification.

Section 15-1104(a) has been amended to list additional activities of a foreign limited liability partnership in the State of Delaware that do not constitute doing business for purposes of DRUPA (and thus do not require registration with the Delaware Secretary of State pursuant to DRUPA). The list previously included such activities as (i) maintaining, defending, or settling an action, (ii) holding meetings and otherwise conducting its internal affairs, (iii) maintaining bank accounts, (iv) maintaining offices or agencies for the transfer, exchange, or registration of its own securities, (v) selling through independent contractors, (vi) soliciting or obtaining orders which require acceptance outside the State of Delaware, (vii) creating or acquiring indebtedness (whether as lender or borrower), (viii) collecting debts or foreclosing mortgages or other security interests, (ix) the conduct of an isolated transaction, and (x) doing business in interstate commerce. This amendment adds to that list selling, by contract consummated outside the State of Delaware but requiring delivery into the State of Delaware, machinery, plant, or equipment. In contrast to the DLLC Act’s and the DLP Act’s parallel provisions, DRUPA’s revised list of activities does not include doing business in the State of Delaware as an insurance company.

Finally, Sections 15-1209 and 15-1210 have been amended to confirm that the cancellation of a statement of partnership existence cancels the statement of partnership existence, not the partnership itself, and the revival of a statement of partnership existence revives the statement of partnership existence, not the partnership itself.

DELAWARE RA-9 AMENDMENTS.

Delaware RA-9 was amended by House Bill No. 238, 75 Del Laws 66, which became effective when signed into law on June 28.
Choice of Law Rules.

New Section 9-111 addresses certain choice of law issues. Subsection (a) provides that if a security agreement is governed by Delaware law, Delaware law governs classification of the collateral, as well as the creation, attachment, and enforcement of the security interest. Subsection (b) provides that if a security agreement is governed by Delaware law, Delaware law governs the characterization of the transaction subject to that agreement as, for example, a secured financing, sale, lease, bailment or consignment, or securitization.

Mortgages Effective as Financing Statements.

RA-9 Section 502(c) provides that a record of a mortgage is effective as a financing statement in certain circumstances (e.g., as a fixture filing and as regards as-extracted collateral or timber to be cut). However, some practitioners choose not to rely on this provision, instead filing real-property-related financing statements under RA-9 Section 502(b) in addition to mortgages filed in accordance with real estate law. Some are concerned that a record of a mortgage effective as a financing statement in accordance with RA-9 Section 502(c) might actually be a financing statement and thus subject to the various amendment requirements of RA-9. While it is clear that RA-9’s general five-year maximum life does not apply (see RA-9 Sections 515(a) and (g)), some find less certainty as regards RA-9 Section 507 (continued effectiveness with respect to collateral which is disposed of), or in the aftermath of information becoming seriously misleading. While the uniform text’s careful wording (is effective as, as contrasted with is) should allay these concerns, Delaware RA-9 now offers an explicit statement at the end of RA-9 Section 502(c), to wit: “A record of a mortgage is not a financing statement but is effective as a financing statement as provided in Section 9-502(c)” (emphasis added).

Real Estate Related Financing Statements – Compliance with Other Delaware Law.

Subsection (b) of RA-9 Section 516 provides an exclusive list of grounds on which a filing office may reject a record. Delaware law other than Delaware RA-9 imposes certain formatting and informational requirements for documents filed in real property records (see, e.g., 9 Del C. Ch. 96). Some practitioners are unaware of these provisions, or of their applicability to financing statements. Others, while aware, find reconciliation challenging and uncertain. New Sections 516(c)(3) through (6) of Delaware RA-9 provide guidance and/or safe harbors with respect to such reconciliation.

Initial Financing Statements In Lieu of Continuation Statement.

In some circumstances, RA-9 requires that a pre-effective-date financing statement be continued by the filing of an initial financing statement in lieu of a continuation statement in the jurisdiction and office prescribed by RA-9. The requirements for such initial financing statements are generally set forth in RA-9 Section 706(c). Some filers are uncertain, however, as to the application of RA-9 Section 706(c)(2) where the pre-effective-date financing statement, under applicable law, was
required to be filed in both a central office and a local filing office (recall the alternative subsections for former Article 9 Section 401). Delaware’s restated RA-9 Section 707(c)(2) clarifies that identification of the centrally filed pre-effective-date financing statement is sufficient without need to identify the related local filing.
On April 20, 2005, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Bankruptcy Reform Act"). While there has been much reporting on the effect of the Bankruptcy Reform Act on consumer bankruptcies, the Bankruptcy Reform Act will have a significant impact on business bankruptcy cases. Set forth below is a summary of the key provisions of the Bankruptcy Reform Act, paying particular attention to the business-related provisions. Most parts of the Bankruptcy Reform Act go into effect 180 days after the bill was signed (i.e., October 17, 2005), while some apply to all new cases. One provision also applies to pending cases. We have noted in the text below the significant provisions that take effect immediately; at the conclusion of this client advisory, we provide the effective dates for the other key provisions.

Provisions Affecting Business Bankruptcy Cases

Lease-Related Provisions

- **Deadline to Assume Commercial Realty Leases:** A debtor must assume or reject unexpired commercial realty leases within 120 days of a bankruptcy filing, or within 210 days of a bankruptcy filing, if the court permits that extension. The deadlines under the prior law were an initial 60 days with potentially unlimited extensions to move to assume or reject. No extension beyond 210 days is permitted, unless the lessor consents in writing. In addition, a debtor can no longer retain the ability to assume or reject a realty lease after a plan has been confirmed. Section 365(d)(4).

- **Change Concerning Cure of Nonmonetary Lease Defaults:** A debtor is not required to cure certain types of non-monetary defaults if cure is impossible retroactively, and thus, the cure may be prospective only. An example is a pre-petition violation of a "failure to operate" clause. Nonmonetary defaults that result in actual pecuniary losses to the landlord require the payment
of those losses. Penalties rates and other penalty provisions related to the nonmonetary default do not have to be paid or performed as part of the cure. Section 365(b).

- **Rejection of Assumed Leases**: If a debtor subsequently rejects an assumed real property lease, the landlord's administrative expense claim is limited to the monetary obligations that would have accrued over the two years following rejection; damages beyond the two year cap are entitled to unsecured claim status, capped by Section 502(b)(6). The landlord's administrative claim against the estate will be reduced if the landlord can recover from another source. Section 503(b)(7).

- **Personal Property Leases**: The automatic stay does not apply if a personal property lease is rejected or not timely assumed. Section 365(p).

**Plan Exclusivity**

- A debtor cannot obtain extensions of the period when it has the sole right to file a plan beyond 18 months after its bankruptcy filing, and a debtor cannot obtain the sole right to solicit acceptances of a plan beyond 20 months after bankruptcy filing. The rule is potentially not as restrictive in a “small business case” dealing with less than $2 million in debt. Section 1121(d) and (e).

**Special Administrative Expense Claim for Vendors and Reclamation**

- **New Administrative Expense Claim for Certain Suppliers**: All shipments of goods received by the debtor within 20 days before its bankruptcy filing are entitled to administrative expense priority for the value of the goods, if the sale was in the ordinary course of the debtor’s business. Section 503(b)(9).

- **Expanded Reclamation Period**: Suppliers can now seek to reclaim goods delivered to the debtor during the 45 days before the bankruptcy filing. Prior law only allowed reclamation of goods delivered during the 10 days before bankruptcy. In addition, suppliers now have a longer time period to make a reclamation claim—within 45 days of the debtor’s receipt of the goods, or within 20 days of the bankruptcy filing, if the 45 day period expires after the bankruptcy filing. Section 546(c).

**Limitations on Corporate Discharges**

- **Government Claims Relating to Fraud**: A corporate discharge does not extinguish debts owed to a governmental unit if those debts are based on certain fraudulent acts committed by the debtor. The language of this provision makes it unclear whether these nondischARGEABLE debts to governmental units must arise from the debtor’s own fraudulent dealings with the government, or if this extends to claims or fines the government could impose on account of the debtor’s defrauding of investors or creditors. Section 1141(d)(6).
Claims of Individuals Under the False Claims Act: If an individual holds a claim against a corporate debtor arising from the federal False Claims Act or similar state statute, such claim is not discharged. Section 1141(d)(6).

Voidable Transfer Provisions

Preferences - A More Lenient Ordinary Course of Business Defense: A voidable preference defendant now only needs to prove that a payment was made either in the ordinary course of business of the debtor and the transferee or made according to ordinary business terms. Prior law required a defendant to prove both to assert a successful ordinary course of business defense. Section 547(c)(2).

Extended Period to Perfect Security Interests: A security interest for an enabling loan perfected within 30 days of the receipt of the property by the debtor is not a preferential transfer. Prior law required perfection within 10 days to eliminate preference risk. This change does not alter state law limitations or priorities which may require perfection in a shorter time period. Section 547(c)(3).

Fraudulent Transfers - Longer Lookback Period: A trustee or debtor in possession may now seek to avoid fraudulent transfers that occurred during the two years before bankruptcy. Prior law allowed for a one year lookback period. Section 548(a)(1). Note: state laws on fraudulent transfer lookback periods are unchanged by the Bankruptcy Reform Act.

Avoidance of Insider Employment Contracts: The trustee or debtor in possession may also bring an action based on a transfer to insider employees under an employment contract if the transfer was not made in the ordinary course of business, without requiring the debtor to have been insolvent. Section 548(a)(1)(B)(iii)(IV). Reasonably equivalent value is still a defense.

Self Settled Trust – 10 Year Avoidance Period: The Trustee can bring an avoidance action against a debtor who transfers property to a trust of which the debtor is a beneficiary within ten years of the bankruptcy filing with the intent to hinder, delay, or defraud existing or prospective creditors. Section 548(e).

No More Small Preference Lawsuits: Transfers totaling less than $5,000 are not preferential. Section 547(c)(9).

Forum Selection: Preference actions to collect consumer debts of less than $15,000, or any other noninsider debt totaling less than $10,000, must be brought where the defendant resides. 28 U.S.C. § 1409(b).

Limits on Key Employee Retention Programs (KERPs) and Severance

More Stringent Requirements for KERPs: An employee may not receive a KERP payment unless he/she is essential to the survival of the business and he/she already has a bona fide job offer. Section 503(c)(1)(A), (B).
o **Limits on the Size of KERP Payments:** Even if the debtor is able to satisfy the standard for a KERP for a given employee, a KERP payment may not exceed 10 times the mean transfer to non-management employees during the calendar year preceding the KERP, or if there were no such transfers to non-management employees, the payment cannot be greater than 25% of what the employee could have received during the calendar year preceding the bankruptcy. Section 503(c)(1)(C).

o **Limits on Severance Payments:** A debtor cannot make a severance payment to an insider unless the payment is pursuant to a program generally applicable to all full-time employees and the amount is not greater than 10 times the mean severance payment made to non-management employees during that calendar year. Section 503(c)(2).

**Increased Utility Protections**

o **Utility Deposits Required:** A debtor can no longer provide a utility with “adequate assurance of payment” by simply granting the utility an administrative expense priority. Instead, a debtor must now provide a cash deposit, letter of credit, bond or the like for post-petition services. Section 366(c)(1).

o **Debtor’s Past History Not Relevant to Determining “Adequate Assurance of Payment”:** If a court must determine what constitutes adequate assurance of payment, it cannot consider the debtor’s prior timely payment history, the absence of a pre-petition security deposit or the availability of a post-petition administrative priority for utility services. Section 366(c)(3)(B).

**Plans and Payments in Single Asset Real Estate Cases**

o In order for the automatic stay to remain in place in a single asset real estate case, the debtor must, within 90 days of the bankruptcy filing, file a confirmable plan or commence making monthly payments to secured creditors (at the nondefault contract rate of interest) based on the value of the collateral. Section 362(d)(3). The payments can be from cash collateral/rents that secure the creditor's claim without court approval to use the cash collateral for this purpose.

o The “good faith” test is now a specific basis for stay relief with respect to real property. Stay relief will be granted if the court finds that the bankruptcy filing was part of a scheme to “delay, hinder and defraud” creditors that involved transfer of the collateral without the consent of the secured creditor or multiple bankruptcy filings. Section 362(d)(4). In such an instance, an order granting stay relief is effective in a subsequent case filed during the next two years unless the court finds changed circumstances or good cause.
**Creditors’ Committees and Equity Committees**

- **Increased Sharing of Information with Creditors:** Creditors’ committees are now required to provide access to information to creditors of the kind represented by the committee but who are not on the committee. In addition, creditors’ committees must solicit and receive comments from their creditor constituents, and the court may order additional reports or disclosures to the committee’s creditor constituents. Section 1102(b)(3).

- **Changes in Composition:** The court may now order the U.S. Trustee to change the membership of a creditors’ committee or an equity committee, if necessary to ensure adequate representation. Section 1102(a)(4).

- **Addition of Small Creditors to a Creditors’ Committee:** In addition to the general power of the court to adjust committee membership, the court may also require a creditors’ committee to include a “small business concern” that has a “large” claim as measured by that small business concern’s revenues. Section 1102(a)(4).

**Appointment of a Trustee; Conversion or Dismissal**

- The U.S. Trustee is now required to move for appointment of a trustee if there are reasonable grounds to suspect that the “current members of the governing body of the debtor, the debtor’s CEO or CFO, or those who selected the debtor’s CEO or CFO” participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor’s public financial reporting. Section 1104(e). This provision applies to all cases filed since enactment.

- The factors that constitute “cause” to convert a Chapter 11 case to Chapter 7, or to dismiss the case altogether, have been substantially expanded. In addition, the court is now required to convert or dismiss a case upon a showing of any of such factors, unless there are unusual circumstances showing the relief is not in the best interests of creditors and the estate and if a plan will soon be confirmed. However, if the debtor is facing a substantial or continuing loss or a diminution of the estate and there is no reasonable likelihood of rehabilitation, the court must dismiss or convert the case (or appoint a trustee or examiner, as discussed immediately below). Section 1112(b).

- In all circumstances, the court may appoint a trustee or examiner instead of converting or dismissing the case if this is in the best interests of creditors and the estate. Section 1104(a)(3).
**Improved Employee Wage Priorities**

- *Increased Wage Priorities and Lookback Period:* Employees are now entitled to priority claims for up to $10,000 for pre-petition wages, salaries, commissions, vacation, severance and the like earned during the 180 days before bankruptcy. Prior law had limited their priority claim to $4,925 and had limited the lookback period to 90 days. Section 507(a)(4). This provision applies to all cases filed since enactment.

**Retiree Benefits Modifications**

- If a debtor modified its retiree benefits while it was insolvent and within 180 days of its bankruptcy filing, the court must reinstate the old benefits unless the balance of the equities favor the modified benefits. Section 1114(l).

**Restrictions on Sales of Assets by Nonprofits**

- The debtor must now comply with applicable nonbankruptcy law when it uses, sells or leases property of a non-moneymed corporation or trust, i.e., a nonprofit entity. In other words, state law restrictions or limitations on sales of nonprofit assets, such as nonprofit hospitals, nonprofit educational facilities and the like, must now be respected in bankruptcy. Section 363(d)(1). Note: this provision applies to pending cases. In addition, transfers made under a plan by a non-moneymed corporation or trust must comply with applicable nonbankruptcy law. Section 1129(a)(16).

**Restrictions on Sales of Private Data**

- The debtor may not sell or lease personal data unless (i) the sale or lease is consistent with the debtor’s policy on the privacy of such data as of the commencement of the case, or (ii) a consumer privacy ombudsmen is appointed (see below, under “New Professionals”) and the court approves the sale or lease after giving due consideration to the facts and circumstances and finding that the sale does not violate applicable nonbankruptcy law. Section 363(b)(1).

**Restrictions on Sales Free and Clear of Claims**

- Purchases of interests in consumer transactions or consumer contracts will not be free and clear of claims or defenses (such as those arising under the Truth in Lending Act) relating to that transaction or contract. Section 363(o).

**Special Treatment if the Government is Involved**

- Wages and benefits awarded in a proceeding of the National Labor Relations Board attributable to any post-petition period are entitled to administrative expense treatment. Section 503(b)(1)(A)(ii).

- The Bankruptcy Reform Act includes an express exception from the automatic stay for a securities self-regulatory organization to enforce its regulatory power (except for imposing monetary sanctions), conduct investigations, delist a company’s securities, or refuse to permit the quotation of any stock. Section 362(b)(25).
Suspension from the Medicare Program is not enjoined by the automatic stay. Section 362(b)(28).

Tax-Related Contents of Disclosure Statements

For a disclosure statement to contain "adequate information," it now must also include a discussion of the potential material federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case. Section 1125(a)(1).

Treatment of Tax Claims Under a Plan

Payments Must Take Place Over a Shorter Period: Payments on account of secured and priority tax claims under a plan cannot take place over a period longer than five years after the commencement of the case. Prior law permitted payments over time for six years after the plan was confirmed. Section 1129(a)(9)(c)(ii).

Unsecured Creditors Cannot Receive Better Treatment than Tax Claimants: Payment on account of secured and priority tax claims must be made in a manner at least as favorable as payments to the most favored nonpriority, unsecured creditor class. Section 1129(a)(9)(c)(iii).

Interest Rate Determined by Nonbankruptcy Law: Applicable nonbankruptcy law will determine the appropriate rate of interest for tax claims paid over time. To the extent such claims are paid under a confirmed plan, the interest rate shall be determined as of the calendar month the plan is confirmed. Section 511.

Failure of File Tax Returns

The court may dismiss the case if the debtor fails to pay post-petition taxes or to file a tax return or obtain an extension for a tax return that is due postpetition. Section 1112(b)(4)(I).

Administrative Priority for Claims Arising from Closure of Health Care Business

If a debtor or a governmental agency incurs costs or expenses to transfer patients from closed facilities or to dispose of patient records in accordance with new Bankruptcy Code Section 351, such costs and expenses are entitled to administrative priority. Section 503(b)(8).

International Bankruptcy Matters

Section 304 of the Bankruptcy Code, relating to ancillary proceedings, was repealed, and a new Chapter 15 relating to cross-border bankruptcy cases will now control.

Derivative/Commodity Contracts

Various sections of the Bankruptcy Code are modified to allow termination or netting of various financial contracts upon a bankruptcy filing. See, e.g., Sections 101(38)(A) and (B), 362(b)(27), 546(j), 561, and 562.
**Status Conferences are Required**
- Upon the court’s own motion or the request of a party in interest, the court is now required to hold status conferences to further the expeditious and economical resolution of the case. 
  Section 105(d)(1). Under the former statute, the court could exercise discretion over whether to set such a conference.

**Section 341 Meetings in Prepackaged Cases**
- If the debtor files a prepackaged plan of reorganization and has solicited votes pre-petition, the court may dispense with a meeting of creditors. Section 341(e).

**Increased Notice Requirements**
- Section 342 of the Bankruptcy Code is substantially modified to require a debtor to serve notices to each creditor at the address specified by the creditor in two communications sent within 90 days of the bankruptcy filing and such notice shall include the debtor's account number if supplied by the creditor. Notices of a change in the debtor’s schedules shall include the debtor’s taxpayer I.D. Number (the last four digits). Section 342(c)(2). Notices that are not sent to the address and with the account number specified by a creditor in accordance with Section 342 will not be effective, and a creditor will not be liable for monetary damages for a stay violation if it has not been served at the address it specifies under Section 342. Section 342(g).

**Disclosure of Affiliate Interests**
- The Bankruptcy Reform Act proposes (but does not require) that the Bankruptcy Rules require debtors to disclose the “value, operations, and profitability” of entities in which the debtor holds a controlling or substantial interest.

**Further Information Required with the Schedules, 341 Meeting and Final Reports**
- The debtor’s schedules and statements must now also include a statement of the debtor’s monthly net income, itemized to show how that amount is calculated, as well as a statement disclosing any reasonably anticipated increases in income or expenses during the 12 months after the bankruptcy filing. Section 521(a)(1)(B).
- At least seven days before the Section 341 meeting of creditors, the debtor must supply its most recent tax return to the trustee and to any creditors that requests it. If the debtor fails to do so, the court must dismiss the case unless the debtor can show its failure was due to circumstances beyond its control. Section 521(e)(2).
- The data requirements of interim reports have been expanded somewhat from current practice to include number of full-time employees, information about the debtor’s industry classification, and with respect to any plan filed or confirmed, data regarding the recovery by each class of creditors, both in absolute terms and as a percentage of total allowed claims in the class. 28 U.S.C. § 589b(e).
Final reports must contain data regarding the receipts and disbursements of the estate, claims asserted against the estate, claims allowed, and distributions to creditors. 28 U.S.C. § 589b(d).

New Professionals
- **Health Care Ombudsman**: The court must appoint an ombudsman to monitor the level of patient care and represent the interests of patients unless the court finds that the appointment is not necessary. Section 333.
- **Consumer Privacy Ombudsman**: If the debtor seeks to sell personally identifiable information, covered by a privacy policy, the court must order the appointment of a consumer privacy ombudsman to assist the court in considering the sale. Sections 332 and 363(b)(1).

Compensating Professionals
- In awarding compensation, the court shall take into account whether a professional is board certified or has otherwise demonstrated skill and experience in the bankruptcy field. Section 330(a)(3)(E).

Revised Disinterestedness Standard Arising from Securities Sales
- Parties are no longer prevented *per se* from being “disinterested” due to their serving as investment banker for an outstanding security of a debtor or as attorney for an investment banker in connection with the offer, sale or issuance of a security of a debtor. Section 101(14).

Exclusive Jurisdiction Over Claims Relating to Section 327
- The District Court now has exclusive jurisdiction over claims or causes of action that involve construction of Section 327 of the Bankruptcy Code (relating to retention of professionals) or the disclosure requirements under Section 327. 11 U.S.C. § 1334(c)(2).

Provisions Limited to “Small Business” Bankruptcies

**Initial Financial Reporting and Periodic Reports**
- **Expanded Initial Financial Reporting**: Small business debtors must, within 7 days of their bankruptcy filing, file their most recent balance sheets, statement of operations, cash-flow statement, and federal income tax return, or certify they have not prepared these financial records. Section 1116(1).
- **Expanded Periodic Reports**: Small business debtors must file periodic reports containing profitability information, projections of receipts and disbursements, comparisons of projections to actual results, and setting forth whether the debtor is in compliance with the requirements of the Bankruptcy Code and Bankruptcy Rules. Section 308.

**Increased Role of the U.S. Trustee**

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1 A small business bankruptcy case is one in which total debt for the debtor and affiliate debtors is less than $2 million exclusive of insider debt, and no creditors’ committee is appointed or is determined to be inactive.
o The Bankruptcy Reform Act adds a new 28 U.S.C. § 586(a)(7) requiring the U.S. Trustee to investigate a small business' viability, inquire about its business plan, attempt to develop an agreed scheduling order, visit the debtor’s business premises if appropriate and advisable, and review and monitor diligently the debtor’s activities, in order to determine as promptly as possible if the debtor will be unable to confirm a plan.

**Disclosure Statement and Plan Efficiencies**

o Small business debtors have 180 days of exclusivity, and must file a plan within 300 days of the commencement of the case, unless those periods are extended by the court upon a showing that it is more likely than not that the court will confirm a plan within a reasonable period of time. Section 1121(e).

o In a small business case, no disclosure statement is required if the court determines that the plan provides adequate information to creditors. The court may also conditionally approve a disclosure statement subject to final approval later, presumably at the confirmation hearing. Section 1125(f).

o The court is required to confirm the plan within 45 days after it is filed, unless that period is extended, once again upon a showing that it is more likely than not that the court will confirm a plan within a reasonable period of time. Sections 1129(e); 1121(e)(3).

**Provisions Affecting Consumer Cases**

**The Means Test**

o If an individual’s income for the 6 months preceding his bankruptcy filing exceeds the median income of his state, he will be forced to file a Chapter 13 case if the debtor can “afford” (see below) to repay his creditors $10,000 over 5 years. If debtor can only “afford” to repay between $6,000 and $10,000 over 5 years, conversion is required only if his repayment would represent more than 25% of the nonpriority unsecured claims. Section 707(b)(2).

o To determine whether a debtor can “afford” a Chapter 13 plan, the trustee will compare the debtor’s actual income against an IRS based budget of what the consumer should be spending. If there is extra income, the trustee will apply the Means Test. Section 707(b)(2)(A)(ii).

**Credit Counseling**

o An individual must receive credit counseling during the 180 days preceding the bankruptcy unless the individual can establish that there are exigent circumstances that prevented him from obtaining the required credit counseling. 11 U.S.C. § 109(h).

**Limited Effect of the Automatic Stay for Repeat Filers**

o The automatic stay will terminate after 30 days if an individual re-files within one year of his prior bankruptcy unless the court extends the stay. Section 362(c)(3).
The automatic stay does not apply if an individual has filed two or more cases within the prior year unless the court orders otherwise. Section 362(c)(4).

**Exemptions**

- A debtor must live within a state for 730 days to claim that state’s exemptions. Section 522(b)(3).

- Homestead Exemption: A debtor may not exempt an interest acquired within 1215 days of the bankruptcy filing that exceeds the aggregate amount of $125,000 in real or personal property that the debtor uses as a residence. Section 522(q). Note: this and other provisions limiting the homestead exemption apply to all cases filed on or after April 20, 2005.

**Pension Liabilities**

- Debts owed to a pension, profit-sharing, stock bonus, or other plan are not dischargeable. Section 523(a)(18).

**Valuation of Personal Property**

- The value of personal property securing an allowed claim shall be determined based on the replacement value as of the bankruptcy filing. Section 506(a)(2).

**Retirement Funds**

- Retirement funds that are exempt from taxation under section 401, 403, 408, 408A, 414, or 501(a) of the Internal Revenue Code are exempt assets to the extent their value does not exceed $1 million. Section 522(n).

**Nondischargeable Debts**

- Consumer debts owed to a single creditor aggregating more than $500 for luxury goods/services purchased within 90 days of the bankruptcy filing are presumptively non-dischargeable. Section 523(a)(2)(c).

- Cash advances to consumers under an open end credit plan (such as credit cards) aggregating more than $750 within 70 days of the bankruptcy filing are presumptively non-dischargeable. Id.

**Residential Leases**

- If a landlord has a judgment of possession against a debtor involving residential property, the automatic stay does not prevent the commencement or the continuation of an eviction or ejection proceeding. Section 362(b)(22). However, if nonbankruptcy law would permit the tenant to cure the default, the debtor may stop the landlord’s eviction/ejection proceeding by curing the default within 30 days of the bankruptcy filing. Section 362(l).

**Reaffirmation Agreements**
If the debtor does not file and perform a reaffirmation agreement with regards to personal property within 30 days after the meeting of creditors (or such later time as the court permits), the automatic stay is lifted. Section 362(h); Section 521(a)(2)(B).

Effective Dates of the Bankruptcy Reform Act

Generally, the provisions of the Bankruptcy Reform Act take effect 180 days from the date of enactment, i.e., October 17, 2005, and the provisions to not apply to pending cases. With respect to the provisions discussed in this client advisory, there are several exceptions to effective date, as set forth below.

Provisions that Apply to Cases That Are Now Pending

- The requirement that a debtor must comply with applicable nonbankruptcy law when it uses, sells, or leases property of a non-moneyed corporation or trust, i.e., a nonprofit entity.

Provisions that Apply to All Cases Filed After April 20, 2005

- The new fraudulent transfer provisions relating to payments to insiders outside the ordinary course of business.

- The provision mandating that the U.S. Trustee seek appointment of a trustee in certain management fraud cases.

- The provision relating to potential reinstatement of pre-petition retiree benefits modifications.

- The increased priority wage claims for employees, and the lengthened lookback period for such wages.

- The limitations on the use of the homestead exemption for recently-acquired realty.

Other Unique Effective Dates

- The increased small business reporting requirements go into effect 60 days after the rules are prescribed.

- The two year lookback period for fraudulent transfers does not go into effect for a year.
MESSAGE FROM THE CHAIR:

COMMERCIAL FINANCIAL SERVICES COMMITTEE

By:
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June 30, 2005

The Annual Meeting of the ABA will be held in Chicago, Illinois from August 5 – 9, 2005, and Commercial Financial Services has a lineup of programs and meetings that address a number of current topics. The Section of Business Law has a number of programs scheduled which are designed to explore the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. While the Act is, in the public’s mind, targeted to consumers and consumer bankruptcies, CFS will, along with Banking Law, Business Bankruptcy and UCC, jointly sponsor a program which will address the Act’s relevance to our practices. The program is titled “The Practical Impact of the Bankruptcy Reform Act of 2005 for Business, Financial and Transactional Lawyers” and will be moderated by Meredith Jackson of Irell & Manella LLP in Los Angeles. The program will be held on Sunday, August 7, 2005 at 2:30 p.m. in the Venetian Room.

We will also be presenting a Committee Forum titled “Second Lien Financing: Negotiating the “Silent Second” on Saturday, August 6, 2005 at 2:30 in the Georgian Room. This forum will be chaired by Tony Callobre of Sheppard Mullin in Los Angeles and will cover issues and strategies which are common in the second lien world.

Our programs and committee meetings at the Annual Meeting are typically concentrated on Saturday and Sunday. This year we have a number of substantive subcommittee meetings scheduled, and those meetings, together with our programs which provide continuing legal education credit, provide a fantastic opportunity for you to experience updates and education on cutting edge legal issues faced by lawyers with a commercial finance practice – and you can do it over a weekend in Chicago!

As an added benefit this year, we will have an “entertainment” component to the joint dinner with the UCC Committee. It might not qualify for CLE, but it will be a lot of fun and it will showcase the vocal and creative talents of a number of our committee members. You won’t want to miss the dinner which will be held at Mike Ditka’s Restaurant at 100 E. Chestnut Street beginning at 7:30 pm. If you do not yet have a ticket, you should be able to purchase one at the meeting.

The Spring Meeting in Nashville was a great success. Commercial Financial services sponsored a number of programs and forums, including Jerry Blanchard’s program entitled “Zone of Insolvency: Lender Liability in the New Millennium”. Lynn Soukup moderated a very interesting and practical panel discussion titled “When Godzilla Meets Bambi: Securities Law Issues for Finance Lawyers”. Steve Weise, Teresa Harmon and Nashville’s own John Murdock presented “Commercial Law Developments – 2004”. If you were unable to attend the Spring Meeting, or if you were there but can’t lay your hands on the materials, go to http://www.abanet.org/buslaw/library/spr05.shtml The ABA has the materials for these programs and for other CLE programs presented in Nashville.

Looking forward, the Committee has begun planning for our fall meeting. Every year Commercial Financial Services meets in conjunction with the Annual Convention of the Commercial Finance Association. This year we will meet at the San Diego Marriott on Wednesday, November 9, 2005 from 11:00 am to 4:00 pm. Following our traditional format, we are planning three programs, including a program on blanket liens and “out of the ordinary” collateral, a program which addresses the non-uniformity in filing systems and the requirements in jurisdictions with non-uniform requirements, and a program which is tentatively titled “The Devil is in the Details (Think While You Draft)” which will
address errors in documents and transactions and recent cases highlighting some of those errors. It promises to be a great meeting.

As a part of the CFA Annual Convention, our Committee has the privilege of presenting a program on a legal issue to the CFA. This year, Stuart Ames of Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A. in Miami will chair a program title *“The Tipping Point: Shifts in Negotiating Leverage Created by the Bankruptcy Reform Act”*. Stu’s program will address the practical impact of the Act, including the impact on negotiating strategies when structuring a transaction.

If you are interested in becoming active in Committee work or presenting a topic, or if you would like to see a specific topic addressed, please give me a call. I look forward to seeing you in Chicago in August.
MESSAGE FROM THE CHAIR:

UNIFORM COMMERCIAL CODE COMMITTEE

By:
Stephanie Heller
Federal Reserve Bank of New York
New York, NY
stephanie.heller@ny.frb.org

June 30, 2005

It was wonderful to see so many of you at the Spring Meeting in Nashville. Many of you went out of your way to say hello and to share your thoughts with me about the meeting and more generally about the UCC Committee. Thank you. Let me also take this opportunity to say a special thank you to those of you who helped organize our subcommittee, working group and task force meetings and our CLE programs and forums as well as to all of you who attended and participated in those meetings and programs. From all objective measures, they were a big success. Remember, if you are a member of the Business Law Section but were unable to attend the Spring Meeting you can obtain the materials for all of the UCC Committee programs as well as all of the other Spring Meeting programs free of charge at http://www.abanet.org/buslaw/library/spr04.shtml.

What you will not see if you go to the website, however, is any evidence of what was by far for me the highlight of Spring Meeting 2005 – the “Stump the Chumps” panel. As you know, instead of holding our traditional full UCC Committee meeting at the Spring Meeting, Bill Henning, Linda Rusch, Ed Smith, Steve Weise, and Stephen Sepinuck graciously agreed to allow about 50 of us to spend an hour trying to stump them with arcane UCC questions. After the ground rules were set (chocolate kisses whenever I felt the urge and The Portable UCC for the two audience members who posed the toughest questions – something about craw fish and Kmart I recall), the fun began! Actually it seems that the fun began in the hallways well before the event as various members of the committee plotted to devise the most intricate questions imaginable. Stephen and I had so much fun that we are thinking of making this an annual event at the Spring Meeting with of course a whole new set of chumps. So send in your suggestions for next year’s panel!

I am also pleased to report that our effort to reach out to new members at our UCC/CFS dinner was warmly received. For the first time we reserved a few tables for new committee members and first time Spring Meeting attendees who wanted to have dinner with Committee leadership and learn more about the work of the Committees and the ins and outs of the Spring Meeting. We plan to do this again in Chicago at the UCC/CFS dinner which will be held on Saturday evening, August 6th at Mike Ditka’s Restaurant (100 E. Chestnut Street) immediately following the Section Welcome Reception at the Drake Hotel. If you have not already signed-up for the dinner and plan on attending the Annual Meeting please think about joining us for what will definitely be a fun evening.

Let me end this column with a preview of the programs that the UCC Committee will present at the Annual Meeting in Chicago this August. On Saturday, August 6th we will present a Committee Forum entitled “Cross Border Within Your Own State—Secured Transactions in Indian Country”. This will be a discussion of the UCC, primarily article 9, adapted for enhancement by Indian tribes to facilitate economic development and credit extensions in Indian Country, and the accompanying implementation guide.

The UCC Committee is also sponsoring two CLE programs on the Bankruptcy Reform Act of 2005 that highlight the impact that this significant legislation will have on UCC and secured
transaction legal practices. The first program will be presented on Sunday August 7th and is entitled “It’s Your Chance to be Special: Secured (and Other Interested) Parties to Financial Contracts Under the Bankruptcy”. The program will focus on protected financial contracts and the extent to which the Bankruptcy Reform Act has strengthened the rights of counterparties under these contracts in insolvency situations, with a particular focus on collateral and credit enhancement rights.

The second CLE program will be presented on Monday August 8th jointly by the UCC Committee and the Committees on Banking Law, Business Bankruptcy, Commercial Financial Services and is entitled “The Practical Impact of the Bankruptcy Reform Act for Business, Financial and Transactional Lawyers”. The Bankruptcy Reform Act of 2005 contains many provisions that limit the rights of debtors, but what issues and concerns does it raise for lenders? The panel will consider the practical impact of this new legislation from the varying perspectives of different stakeholders in the finance community.

The UCC Committee will also be co-sponsoring several CLE programs including a program on Saturday August 6th that will cover the nuts and bolts of the Bankruptcy Reform Act of 2005 and a program on Monday August 8th entitled “The Wonderful – and No Longer Exotic – World of Electronic Payment Obligations” which will look at electronic chattel paper, promissory notes and other payment intangibles. You should be receiving an electronic mailing of the UCC Committees full meeting agenda shortly.

As I have said many times before, I am very proud to be associated with such an incredible group of people and excited about the work that our subcommittees, working groups and task forces are doing.

[Signature]
The Creditors’ Rights Subcommittee met jointly with the Bankruptcy Litigation Subcommittee at the ABA Spring Business Law Section in Nashville on March 31, 2005. Elizabeth Bohn, as the ABA Advisor to the NCCUSL Drafting Committee for Amendments to the Uniform Foreign Money Judgments Enforcement Act, reported on the amendments under consideration. Elizabeth also delivered an overview of the new Bankruptcy Reform Act which was on the verge of passing into law at the time of the meeting. To wrap up, Duane Geck reviewed the Pennsylvania Supreme Court’s decision entitled Pioneer Commercial Funding Corp. v. American Financial Mortgage Corp., and the subcommittee engaged in a discussion of its affect on the use of bailee letters in the mortgage warehouse lending industry.

The Subcommittee will be meeting jointly with the Bankruptcy Litigation Subcommittee at the ABA Annual Meeting in Chicago on Saturday, August 6, 2005. The meeting is a ticketed lunch event at 12:30 p.m. and the featured speaker is Chief Bankruptcy Judge Eugene Wedoff from the Northern District of Illinois who will be commenting on “What every business lawyer needs to know about the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.” This will be a timely and instructive presentation from a very distinguished Bankruptcy Judge and we look forward to seeing you in Chicago.

The Subcommittee puts on three programs a year, with the final meeting for the year to be at the National Conference of Bankruptcy Judges in San Antonio from November 2-5, 2005. The Business Law Section and NCBJ meetings provide hundreds of pages of materials on a CD-ROM. These materials, including those from our meetings, are available on the ABA website for Business Section members to access at http://www.abanet.org/buslaw/library/spr04.shtml.

If you would like to join our subcommittee or participate by presenting materials, simply email the Chair, Duane Geck, or the Vice Chair, Carolyn Richter, at the email addresses noted above.
Cross-Border Secured Transaction Subcommittee of Commercial Financial Services Committee:

James C. Chadwick, Chair  
Patton Boggs LLP  
Dallas, Texas  
jchadwick@pattonboggs.com

Joseph Turitz, Vice-Chair  
General Counsel - Corporate Finance Group  
CapitalSource Finance LLC  
Chevy Chase, Maryland  
jturitz@capitalsource.com

At the Spring Meeting in Nashville, our Subcommittee jointly hosted a meeting with the UCC Subcommittee on International Commercial Law that was attended by approximately 50 lawyers from throughout the United States, Canada, the United Kingdom and Europe. The meeting focused on recent legislative and caselaw developments relating to cross-border secured transactions.

Martin Fingerhut of Blake, Cassels & Graydon LLP provided an update on cross-border securitizations, particularly (i) the securitization of Canadian accounts receivable in the United States, (ii) the resolution of the Avianca bankruptcy litigation, which involved a challenge to the "true sale" nature of an airline ticket receivables securitization, and the lessons learned from the experience, and (iii) the effect of SEC and United States financial accounting standards on securitization standards in foreign countries. Steven O. Weise of Heller, Ehrman, White & McAuliffe provided an update on the UNCITRAL Report of Working Group VI (Security Interests) concerning the work of its seventh session (New York, January 24-28, 2005). Edwin E. Smith of Bingham McCutchen LLP provided an update on the U.N. Convention on the Assignment of Receivables in International Trade.


Members of the Commercial Financial Services and UCC Committees who have an interest in cross-border secured transactions and related areas are invited to join the Subcommittee by emailing the Chair at jchadwick@pattonboggs.com. We look forward to seeing you in Chicago.
Loan Documentation Subcommittee of the Commercial Financial Services

Marshall Grodner, Chair
McGlinchey Stafford
Baton Rouge, LA
mgrodner@mcglinchey.com

Jeremy S. Friedberg, Vice Chair
Leitess, Leitess & Friedberg, P.C.
Baltimore, MD
jsf@ll-f.com

Unfortunately (for me, but maybe not for the Subcommittee’s members), after the annual meeting in Chicago, my term as Chair of the Subcommittee will be over. The current Vice Chair, Jeremy Friedberg, will be taking over as Chair of the Subcommittee. I hope our members will give Jeremy all of our support.

Over the last several years during my term as Chair, we have accomplished several goals. First, we have had programs at both the spring and annual meetings dealing with all of the standard provisions of a Credit Agreement. The Commercial Financial Services Committee is now considering forming a Task Force to make these programs into a Model Credit Agreement formbook.

Second, we have set up a listserv and have started to post program materials on our Subcommittee’s website. You can access our website by going the Commercial Financial Services Committee’s website http://www.buslaw.org/cgi-bin/controlpanel.cgi?committee=CL190000 and scrolling down to our Subcommittee. Right now, only the materials from the spring meeting are posted, but hopefully by the annual meeting in Chicago, all of the past materials on Credit Agreements will be posted. Also, if you would like to e-mail the other members of the Subcommittee with any issues or interesting forms, please feel free to do so by e-mailing the following address: BL-LOANDOCUMENTATION@MAIL.ABANET.ORG.

Since we have gone over the standard provisions of the Credit Agreement, Jeremy and I thought we may start doing programs on standard ancillary documents to a Credit Agreement, such as commitment letters, security agreements, control agreements, promissory notes, lien waivers, legal opinions, etc. We will begin with a program at the annual meeting in Chicago on inter-creditor and subordination agreements. We will deal with issues regarding provisions between an account/inventory lender and a fixed asset (equipment and real estate lender), between a senior lender and the new style second lien lender, and between a senior lender and the old style debt/equity mezzanine lender.

I have really enjoyed my term as Chair of the Subcommittee, and wish Jeremy the best of luck as the incoming Chair. I also want to thank all the Subcommittee members for all your support.

I hope to see y’all in Chicago.
# UNIFORM STATE LAWS SCORECARD

Survey of Adoptions of Revised Official Text of the UCC

As of June 1, 2005

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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 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 June 1, 2005.

1. In addition to enactments noted below, all states and the District of Columbia have adopted (i) the 1995 Official Text of Article 5 of the UCC, other than Wisconsin, (ii) the 1994 Official Text of Article 8 of the UCC and (iii) 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 and 4.
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<td>Saturday, August 6, 2004</td>
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<td>10:00 a.m. to 11:30 a.m.</td>
<td>Loan Documentation</td>
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<td></td>
<td>12:30 p.m. to 2:00 p.m.</td>
<td>Lunch Meeting; advanced ticket purchase required</td>
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<td></td>
<td>2:30 p.m. to 4:30 p.m.</td>
<td>CFS Committee Forum: “Second Lien Financing: Negotiating the ‘Silent’ Second”</td>
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<tr>
<td></td>
<td>4:30 p.m. to 5:30 p.m.</td>
<td>CFS Committee Chairs and Vice Chairs Meeting</td>
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<td></td>
<td>7:30 p.m. to 8:00 p.m.</td>
<td>Joint Dinner – UCC and Commercial Financial Services Committees</td>
</tr>
<tr>
<td>Sunday, August 7, 2004</td>
<td>9:00 a.m. to 10:30 a.m.</td>
<td>Joint Meeting UCC Subcommittee – Secured Transactions and CFS Subcommittee – Secured Lending</td>
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<tr>
<td></td>
<td>1:00 p.m. to 2:30 p.m</td>
<td>Intellectual Property</td>
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<td></td>
<td>2:30 p.m. to 4:30 p.m.</td>
<td>PROGRAM: Co-sponsors: CFS, UCC, Banking Law and Business Bankruptcy “The Practical Impact of the Bankruptcy Reform Act of 2005 for Business, Financial and Transactional Lawyers”</td>
</tr>
<tr>
<td>Monday, August 8, 2004</td>
<td>9:00 a.m. to 10:30 a.m.</td>
<td>Joint Meeting UCC Subcommittee-International Commercial law and CFS Subcommittee-Cross Border Secured Transactions</td>
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<tr>
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<td>11:30 a.m. to 12:30 p.m.</td>
<td>Securitization and Derivatives</td>
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<tr>
<td>Time and Date</td>
<td>Event Description</td>
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<tr>
<td>Saturday, August 6, 2005</td>
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<tr>
<td>8:00 a.m. to 9:00 a.m.</td>
<td>Task Force – State Certificate of Title Laws Working Group on Simplification</td>
<td></td>
</tr>
<tr>
<td>Drake Hotel Tudor Room</td>
<td>Alvin C. Harrell, Chair</td>
<td></td>
</tr>
<tr>
<td>East Mezzanine</td>
<td>LeAnne Leathers, Vice Chair</td>
<td></td>
</tr>
<tr>
<td>8:30 a.m. to 10:00 a.m.</td>
<td>Joint Task Force -- Deposit Account Control Agreements</td>
<td></td>
</tr>
<tr>
<td>Westin Hotel Governor’s Suite</td>
<td>Ed Smith, Co-chair</td>
<td></td>
</tr>
<tr>
<td>3rd Floor</td>
<td>Roberta Torian, Co-chair</td>
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<td></td>
<td>Marshall Grodner, Co-chair</td>
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<tr>
<td></td>
<td>Marvin Heileson, Co-chair</td>
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<tr>
<td></td>
<td>John Pickering, Vice Chair</td>
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<tr>
<td>10:00 a.m. to 11:00 a.m.</td>
<td>Joint Working Group – Transferability of Electronic Financial Assets (Joint Working Group with Cyberspace Law Committee)</td>
<td></td>
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<tr>
<td>Westin Hotel Windsor Room</td>
<td>Mattias Hallendorff, Co-Chair</td>
<td></td>
</tr>
<tr>
<td>2nd Floor</td>
<td>Linda Rusch, Co-Chair</td>
<td></td>
</tr>
<tr>
<td>10:00 a.m. to 11:00 a.m.</td>
<td>Task Force -- Consumer Involvement</td>
<td></td>
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<tr>
<td>Drake Hotel Astor Room</td>
<td>Mike Ferry, Co-Chair</td>
<td></td>
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<tr>
<td>East Mezzanine</td>
<td>William J. Woodward, Jr., Co-Chair</td>
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<tr>
<td>11:00 a.m. to 12:30 p.m.</td>
<td>Subcommittee -- UCC Litigation</td>
<td></td>
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<tr>
<td>Drake Hotel Tudor Room</td>
<td>Mark Wilson, Co-Chair</td>
<td></td>
</tr>
<tr>
<td>East Mezzanine</td>
<td>Mary Binder, Co-Chair</td>
<td></td>
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<tr>
<td>1:00 p.m. to 2:00 p.m.</td>
<td>Subcommittee – Investment Securities</td>
<td></td>
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<tr>
<td>Drake Hotel Astor Room</td>
<td>Penelope Christophorou, Chair</td>
<td></td>
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<tr>
<td>East Mezzanine</td>
<td>Merredith Jackson, Vice Chair</td>
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<tr>
<td>2:00 p.m. to 2:30 p.m.</td>
<td>UCC Committee (award presentation)</td>
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<tr>
<td>Drake Hotel Gold Coast Ballroom</td>
<td>Stephanie Heller, Chair</td>
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<tr>
<td>Upper Level</td>
<td>Stephen Sepinuck, Vice Chair</td>
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<tr>
<td>2:30 p.m. to 4:00 p.m.</td>
<td>Committee Forum: Cross Border within your own State -- Commercial Law in Indian Country</td>
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<tr>
<td>Drake Hotel Gold Coast Ballroom</td>
<td>Stephanie Heller, Chair</td>
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<tr>
<td>Upper Level</td>
<td>Stephen Sepinuck, Vice Chair</td>
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<tr>
<td>4:00 p.m. to 5:00 p.m.</td>
<td>UCC Committee Chairs and Vice Chairs</td>
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<tr>
<td>Drake Hotel Astor Room</td>
<td>Stephanie Heller, Chair</td>
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<tr>
<td>East Mezzanine</td>
<td>Stephen Sepinuck, Vice Chair</td>
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<tr>
<td>7:30 p.m. Cocktails (cash bar)</td>
<td>Joint Dinner – UCC and Commercial Financial Services Committees</td>
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<tr>
<td>8:00 p.m. Dinner (with wine service)</td>
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<td>Program to follow</td>
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<td>advanced ticket purchase required</td>
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<td>Time</td>
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<td>Event Description</td>
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<tr>
<td>8:00 a.m. to 9:00 a.m.</td>
<td>Drake Hotel Superior Room West Mezzanine</td>
<td>Subcommittee – Sale of Goods</td>
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<tr>
<td></td>
<td></td>
<td>Scott J. Burnham – Co-chair</td>
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<td>Keith Rowley – Co-chair</td>
</tr>
<tr>
<td>9:00 a.m. to 10:30 a.m.</td>
<td>Drake Hotel Superior Room West Mezzanine</td>
<td>Joint Meeting</td>
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<tr>
<td></td>
<td></td>
<td>UCC Subcommittee – Secured Transactions</td>
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<tr>
<td></td>
<td></td>
<td>Leianne S. Crittenden, Chair</td>
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<td></td>
<td>Pauline Stevens, Vice Chair</td>
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<td>And</td>
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<td></td>
<td>CFS Subcommittee – Secured Lending</td>
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<td></td>
<td></td>
<td>Malcom C. Lindquist, Chair</td>
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<tr>
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<td>Katherine Simpson Allen, Vice Chair</td>
</tr>
<tr>
<td>10:30 a.m. to 12:30 p.m.</td>
<td>Drake Hotel Venetian Room East Mezzanine</td>
<td>PROGRAM: It’s Your Chance to be Special: Secured (and Other Interested) Parties to Financial Contracts Under the Bankruptcy Reform Act</td>
</tr>
<tr>
<td>1:30 p.m. to 2:30 p.m.</td>
<td>Drake Hotel Parkside Room West Mezzanine</td>
<td>Subcommittee – Letters of Credit</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Carter Klein, Chair</td>
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<td>George Hisert, Vice Chair</td>
</tr>
<tr>
<td>2:30 p.m. to 4:30 p.m.</td>
<td>Drake Hotel Venetian Room East Mezzanine</td>
<td>JOINT PROGRAM: The Practical Impact of the Bankruptcy Reform Act for Business, Financial and Transactional Lawyers</td>
</tr>
<tr>
<td>4:30 p.m. to 5:30 p.m.</td>
<td>Drake Hotel Astor Room East Mezzanine</td>
<td>Task Force – Forms Under Revised UCC Article 9</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Jonathan C. Lipson, Co-chair</td>
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<td>Katherine Simpson Allen, Co-chair</td>
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<tr>
<td>4:30 p.m. to 5:30 p.m.</td>
<td>Westin Hotel Windsor Room 2nd Floor</td>
<td>Joint Working Group on Electronic Contracting Practices (Joint Working Group with Cyberspace Law Committee)</td>
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<td></td>
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<td>Kathleen Porter, Co-chair</td>
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<td>Christina Kunz, Co-chair</td>
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<tr>
<td>Time</td>
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<tr>
<td>8:00 a.m. to 9:00 a.m.</td>
<td>Westin Hotel, 2nd Floor</td>
<td>Working Group on the Model Trading Partner Agreement (with Cyberspace)</td>
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<tr>
<td></td>
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<td>Ben Beard, Co-chair</td>
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<td>Jamie Clark, Co-chair</td>
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<tr>
<td>9:00 a.m. to 10:00 a.m.</td>
<td>Westin Hotel, 2nd Floor</td>
<td>Subcommittee – General Provisions and Relations to Other Laws</td>
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<td></td>
<td></td>
<td>Ben Beard, Co-chair</td>
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<td>Gail Hillebrand, Co-chair</td>
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<tr>
<td>10:00 a.m. to 11:30 p.m.</td>
<td>Drake Hotel, Grand Ballroom</td>
<td>Joint Meeting</td>
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<td>Lower Level</td>
<td>UCC Subcommittee – Payments</td>
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<tr>
<td></td>
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<td>Paul S. Turner, Vice Chair</td>
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<td>Steve Veltri, Co-chair</td>
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<td>Marina Adams, Vice Chair</td>
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<td>And</td>
<td>Banking Law Subcommittee – Payments and Electronic Banking</td>
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<td>Joseph R. Alexander, Chair</td>
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<td></td>
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<td>Karen Nash-Goetz, Vice Chair</td>
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<tr>
<td>11:30 p.m. to 12:30 p.m.</td>
<td>Drake Hotel, Grand Ballroom</td>
<td>Joint Meeting</td>
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<td>Lower Level</td>
<td>UCC Subcommittee -- International Commercial Law</td>
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<td></td>
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<td>Larry Safran, Chair</td>
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<td></td>
<td>AND</td>
<td>CFS Subcommittee – Cross Border</td>
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<td>Jim Chadwick, Chair</td>
</tr>
<tr>
<td>11:30 p.m. to 12:30 p.m.</td>
<td>Drake Hotel, Parkside Room</td>
<td>Subcommittee – Leasing</td>
</tr>
<tr>
<td></td>
<td>West Mezzanine</td>
<td>Barry Graynor, Chair</td>
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<td></td>
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<td>Teresa D. Davidson, Vice Chair</td>
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</table>