Joint Newsletter of the ABA Section of Business Law
Committees on Commercial Financial Services and Uniform Commercial Code

Commercial Law Newsletter

Messages from the Chairs

Committee on Commercial Financial Services
Christopher J. Rockers, Chair, Husch & Eppenberger, LLC

Since our last newsletter the Committee on Commercial Financial Services met at the Annual Meeting in Honolulu and we held our stand-alone fall meeting on October 25, 2006 in Washington, D.C. in conjunction with the Annual Convention of the Commercial Finance Association. Consistent with historic format, we met the day before the convention from 11:00am to 4:00pm. We presented three programs. Ed Smith, Marshall Grodner and Cris Kako presented a reprise and update on the Report of the Joint Task Force on Deposit Account Control Agreements. Bobbi Accord chaired a program on Multiple Party Financing Transactions. Joining her as panelists were the Hon. Thomas L. Ambro, United States Court of Appeals, Third Circuit, Wilmington, DE, and Alan S. Dubin, Arent Fox, Washington, D.C. Our third panel was titled “Hedge Funds: As Lenders, As Borrowers, and As Collateral,” and was presented by James Robertson and Mark R. Karsons of Sidley Austin, LLP. Ed Smith, Marshall Grodner, and Cris Kako also presented the Report of the Joint Task Force on Deposit Account Control Agreements to the Commercial Finance Association in a presentation to the entire convention on October 27, 2006.

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Committee on Uniform Commercial Code
Stephen L. Sepinuck, Chair, Gonzaga University School of Law

The commercial world continues to buzz with UCC-related activity, producing a lot of interesting and potentially important developments since the last edition of this newsletter.

Commercial Paper. There have been a few interesting payments cases this year. Probably the one garnering the most attention is a decision authored by Judge Posner in Wachovia Bank v. Foster Bancshares, Inc., 457 F.3d 619 (7th Cir. 2006). Under Article 4 the drawee bank takes the risk that a check is forged, and thus not authorized by the drawer. In contrast, the depositary bank takes the risk that the check was altered. In this case, a check was deposited at Foster Bank drawn on Wachovia Bank. The check was either a copy of an original check (that is a forged check with a forged drawer’s signature) or an altered check (with the name of the payee on the original check changed). Pursuant to Wachovia’s usual procedures, it destroyed the check after paying it and retained only an imaged copy. The imaged copy made it impossible to determine whether the check was forged or altered. Wachovia commenced a declaratory judgment seeking a determination that the check was altered, and thus Foster Bank was liable to Wachovia Bank. The lower court held for Wachovia Bank. The Seventh Circuit affirmed, concluding that the depositary bank should have the burden to demonstrate that the check was forged instead of altered because making a copy of the check is a more novel method of bank fraud. In ruling, the court noted that a different result – requiring the drawee to retain the paper check to enforce the presentment warranty – would impose the enormous costs associated with retaining mounds of paper.
Spotlight

Spotlight
Stephen L. Sepinuck, UCC Committee Chair

Barring adverse reaction, this column will be a new, regular feature in the Newsletter. Its purpose is to identify some of the most flawed judicial decisions interpreting the Uniform Commercial Code to be published after the previous edition of the Newsletter. The purpose of the column is not to be mean. It is not to get judges recalled, law clerks fired, or litigators disciplined for incompetence. Instead, it is shine a spotlight on major errors of analysis, and thereby provide practitioners and judges with reason to disregard the opinion as precedent.

To merit attention in this column, a decision must not merely err on a matter of law. The error must be patent and fundamental to the analysis. One the other hand, the decision need not reach the wrong result. In fact, a good candidate may contain multiple errors that cancel each other out, so that in the end the right result is reached, albeit for wrong reasons. The two decisions discussed below are among the most misguided UCC opinions of the year. You be the judge: which is worse?

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Real Estate Finance Subcommittee
Neal Kling, Chair, Kathleen Hopkins, Vice Chair

Our Subcommittee will have an interesting program at the Spring Meeting on letters of credit. This program is an absolute MUST for lawyers advising landlords, tenants, borrowers and lenders need to understand the intersection of LC and bankruptcy law, however, and the impact of recent case law on how documents should be drafted and claims asserted. Please join distinguished bankruptcy attorney Christopher Combest of Quarles & Brady, as he guides us through this complex subject.

Agricultural and Agri-Business Finance Subcommittee Report
T. Randall Wright, Chair, Robert Lawrence Harris, Vice Chair

Demand for ethanol and related bio-fuels has resulted in the creation, in the last several years, of dozens of ethanol companies, many of which have built or are in the process of building new ethanol plants in the farm belt. In turn, demand for corn and water in those states has increased dramatically. At the Spring meeting in Washington, the Agricultural and Agri-Business Finance Subcommittee will present: "Wall Street Meets the Corn Belt–Debt and Equity Financing in the Ethanol Industry." An experienced panel will discuss debt and equity financing of ethanol plants, their impact on demand for corn and water, and the future of the industry. The panel will include Bruce Rastetter, CEO of Hawkeye Renewables, an Iowa bio fuel company; Kevin Stroup, a lawyer who has significant experience both on the legal and business side of the industry; and Joshua Nelson, a principal at one of the nation's leading private equity firms, Thomas H. Lee Partners. This is an important topic for anyone with an interest in agriculture and agricultural finance.

Committee on Uniform Commercial Code: Subcommittee Reports
Subcommittee on Investment Securities
Penelope Christophorou, Chair, Meredith Jackson, Vice-Chair

The Investment Securities Subcommittee has a full agenda for the ABA Section of Business Law Spring Meeting in Washington, DC. On March 15, 2006 from 10:00 AM to 11:00 AM, we will be presenting "Under What Circumstances Will a Note Be Deemed to Be A Security for Purposes of Article 8?" The recent and ongoing case of Highland Capital Management LP v. Schneider in New York will be discussed. Please join us for the presentation and the lively discussion that will undoubtedly ensue.

On March 16, 2006 from 3:00 PM to 4:30 PM the UCC Committee and the Business Bankruptcy Committee will co-sponsor a forum entitled "What Happens When the Broker is Broke: Article 8 and the Bankruptcy of the Securities Intermediary". The panel will consist of Michael Krimminger of Federal Deposit Insurance Corporation (FDIC), Josephine Wang of Securities Investor Protection Corporation (SIPC), Thomas J. Moloney of Cleary Gottlieb Steen & Hamilton LLP and Charles W. Mooney of The University of Pennsylvania Law School. The forum will draw on
the experiences of customers in the recent Refco Capital Markets insolvency.

Please join us at the ABA Section of Business Law Spring Meeting in Washington, DC for these events.

Subcommittee on Leasing
Barry A. Graynor, Chair, Teresa Davidson, Vice-Chair

The Subcommittee on Equipment Leasing will be hosting the following program at the ABA Section of Business Law Spring Meeting in 2007:

Vince Borst, of Askounis & Borst, P.C., will address Recent Developments in Lease Collection and Enforcement Issues. The session will be interactive and will cover bankruptcy and state decisions affecting a lessor's rights after default. Topics from bankruptcy include preference and adversary litigation; use of cash collateral; and reclassification of leases to loans. Topics on enforcement will range from recovery and disposal of equipment to deficiency collection issues.

Subcommittee on Letter of Credit
George Hisert, Chair

The Letter of Credit Subcommittee did not meet at the Annual Meeting in Hawaii. At the ABA Section of Business Law Spring Meeting in Washington, D.C., the Committee will be presenting a seminar entitled "The New UCP 600: Everything You Were Too Afraid To Know But Need To Ask About" on Friday, March 16 from 12:30 p.m. to 2:00 p.m. New UCP 600 goes into effect July 1, 2007. This is a topic which anyone who deals with letters of credit will need to have a basic understanding of.

The Subcommittee continues its project preparing a model supersedeas letter of credit. The latest version of the model form is being circulated to members of the Subcommittee.

Subcommittee on Payments
Stephen C. Veltri, Chair, Greg Cavanagh, Vice-Chair

We will meet on Friday, March 16, 2006, from 9:00 to 11:00 a.m. during the annual meeting of the Business Section in Washington, D.C. The Subcommittee will host two speakers who will address an issue of great importance to developing nations. While Article 4A and other legal regimes governing international funds transfers were necessarily drafted with large remittances in mind, small remittances are often critically important to developing economies. Dilip Ratha, an economist with the World Bank, will discuss the importance of small, international remittances to economic development as well as innovative and efficient means of making those payments. Richard Fraher, of the Federal Reserve Bank of Atlanta, will describe the FedACH International service, with a particular focus on the Fed's new Directo a Mexico program. The program should be interesting and informative on a topic of central importance to the global economy.
Everyone associated with the Uniform Commercial Code Committee was saddened to learn of the passing of Paul S. Turner on October 7, 2006. Paul had been serving as co-chair of the Payments Subcommittee. He was a regular contributor to the annual survey of developments in commercial law, was a principal draftsman of the Model Positive Pay Services Agreement and Commentary, and otherwise gave his time and talent to many other projects of the Subcommittee. Paul worked tirelessly on many law reform efforts, such as Article 4A, and was the author of such fine works as *The Law of Payment Systems and Electronic Funds Transfers and Managing the Risks of Payment Systems*, with Diane Wunnicke. He was a good friend to us all and will be sorely missed. Paul's family has asked that those wishing to remember him consider a contribution to Tower Cancer Research, 9090 Wilshire Boulevard, Beverly Hills, CA 90211.

**Subcommittee on Sales**
*Scott Burnham, Co-Chair, Keith Rowley, Co-Chair*

The Sales Subcommittee will present “Have Parties Stopped Fighting the Battle of the Forms?” at the upcoming Business Law Section Spring Meeting in Washington, DC. Professor Jay Mootz (Penn State-Dickinson), co-author of *Commercial Contracting*, will make a brief presentation on finding the terms of the contract in an era of electronic contracting, particularly with respect to consumer transactions, and then lead a roundtable discussion of issues raised by the presentation. Elsewhere, subcommittee chair Keith Rowley keeps his fingers on the pulse of state legislative response to UCC Revised Article 1 and the 2003 amendments to UCC Articles 2 and 2A, while he and other subcommittee members prepare to undertake the 2006 Article 2 annual survey.

**Joint Subcommittee Reports**

**Secured Lending (CFS) and Secured Transactions Subcommittees (UCC)**
*Katherine Simpson Allen, Chair, Wansun Song, Vice Chair (CFS); Leianne S. Crittenden, Chair, Pauline M. Stevens, Vice Chair (UCC)*

Our two subcommittees with a joint meeting in Washington D.C. addressing the following topics:

**Chattel Paper—Plain & Fancy**

*Chattel Paper, Payment Intangibles and the PEB.* Steve Weise (Heller Ehrman LLP) and Ed Smith (Bingham McCutchen LLP) will discuss the possible responses of the UCC Permanent Editorial Board (PEB) to the 9th Circuit BAP's controversial decision in the NetBank/Commercial Money Center case, holding that the payment rights evidenced by chattel paper can be assigned separately from the underlying chattel paper. They will also explain how, when and why the PEB might decide to take positions on issues like this in general.

*International Chattel Paper & Receivables.* Steve and Ed will also discuss the United Nations Convention on the Assignment of Receivables in International Trade, recently signed by the United States and on its way to ratification. The Convention covers the
assignment (as security or outright) of contractual rights to payment in commercial and loan transactions where either the assignment or the underlying receivable is deemed to be "international" in nature. The Convention establishes rules for the law governing perfection and priority and also deals with substantive matters, such as bulk assignments, assignments of future receivables, anti-assignment clauses, and the rights of the obligors.

*Electronic Chattel Paper.* Richard Newman (Mayer, Brown, Rowe & Maw LLP) and Mattias Hallendorff (Dorsey & Whitney LLP) will discuss the successful development of the necessary technology systems and a usable legal framework for determining, and rendering opinions on, perfection of security interests in electronic chattel paper by control, as reflected in recent securitization transactions and the "white paper" issued by the ABA Joint Working Group on Transferability of Electronic Financial Assets (co-chaired by Mr. Hallendorff and Mr. Newman).

### Joint Task Force/Working Group Reports

#### Task Force on Consumer Involvement

*Michael Ferry, Co-Chair; William Woodward, Jr., Co-Chair*

Don Clifford and Bill Woodward are putting together a program for the Spring meeting, currently titled "Consumers and Technology in the Next Decade--What to Expect." We hope to have a presence from the FTC and State Attorney Generals at the program. We also continue to work on ways to involve the Consumer Fellows in the work of the UCC Committee. Lastly, we will also be welcoming our newest Consumer Fellow, Alan White of Community Legal Services in Philadelphia, to his first Committee meeting.

#### Joint Task Force on Deposit Account Control Agreements

*Edwin S. Smith, UCC Chair, John Pickering, Vice-Chair, Marshall Grodner, CFS Chair*

At the urging of a number of practitioners and inside counsel of depositary banks, the American Bar Association’s Business Law created a special task force in 2004 to draft a form of UCC Article 9 deposit account control agreement that was fair to all parties, represented market practice, could be widely accepted by market players and could be concluded with no or minimal negotiation. The task force is jointly sponsored by the Commercial Financial Services Committee, the Uniform Commercial Code Committee, the Banking Law Committee and the Consumer Financial Services Committee. Marshall Grodner is the Co-chair from the Commercial Financial Services Committee, and Ed Smith is the Co-chair from the Uniform Commercial Code Committee.


### Note from the Co-Editor

*Maria Ann Milano, UCC Editor*
As many of you know, the Commercial Money Center case created a bit of a stir in our community. On November 5, 2006, the UCC Committee of the California State Bar's Business Law Section sent a letter to the Permanent Editorial Board (PEB) regarding it. For those of you who may have missed it on the UCC Listserve, a copy of the letter is linked here.

More...

UCC Scorecard

UNIFORM STATE LAWS SCORECARD
Survey of Adoptions of Revised Official Text of the UCC
As of October 2, 2006

Committee Leadership Rosters

- **Committee on Commercial Financial Services**
  (as of 09/2006)

- **Committee on Uniform Commercial Code**
  (as of 10/2006)
MESSAGE FROM THE CHAIR:
COMMERCIAL FINANCIAL SERVICES COMMITTEE
By:
Christopher J. Rockers
Husch & Eppenberger, LLC
Kansas City, Missouri
christopher.rockers@husch.com

December 28, 2006

Since our last newsletter the Committee on Commercial Financial Services met at the Annual Meeting in Honolulu and we held our stand-alone fall meeting on October 25, 2006 in Washington, D.C. in conjunction with the Annual Convention of the Commercial Finance Association. Consistent with historic format, we met the day before the convention from 11:00am to 4:00pm. We presented three programs. Ed Smith, Marshall Grodner and Cris Kako presented a reprise and update on the Report of the Joint Task Force on Deposit Account Control Agreements. Bobbi Accord chaired a program on Multiple Party Financing Transactions. Joining her as panelists were the Hon. Thomas L. Ambro, United States Court of Appeals, Third Circuit, Wilmington, DE, and Alan S. Dubin, Arent Fox, Washington, D.C. Our third panel was titled “Hedge Funds: As Lenders, As Borrowers, and As Collateral,” and was presented by James Robertson and Mark R. Karsons of Sidley Austin, LLP. Ed Smith, Marshall Grodner, and Cris Kako also presented the Report of the Joint Task Force on Deposit Account Control Agreements to the Commercial Finance Association in a presentation to the entire convention on October 27, 2006.

We have scheduled a full slate of subcommittee meetings and programs for the 32nd Annual Spring Meeting in Washington, D.C. Our meeting will be held at Renaissance Hotel at 999 Ninth Street NW in Washington from March 15 through 18, 2006. The meeting is two weeks early this year so plan accordingly. In addition to subcommittee meetings of the majority of our subcommittees, we are scheduling a Committee Forum which will focus on ethics issues for business lawyers. The forum will be titled “Do the Right Think, Inside and Out: Ethics for Transactional Attorneys,” and will be moderated by Corie Pauling, Senior Counsel at TIAA. She will be joined by Thomas B. Mason, Zuckerman Spaeder LLP, Washington D.C., and by Raymond L. Sweigart, Pillsbury, Winthrop Shaw Pittman LLP, McLean, VA. The forum will focus on ethics for transactional lawyers, whether in-house or outside and will deal with conflicts, engagement letters, and communications with non-clients and more that is relevant to each of our practices. The panel will include the perspective of an in-house ethics counsel, bar ethics committee member and firm professional responsibility committee member. The forum will provide ethics credit for those attendees who are required to obtain ethics hours.

We have also scheduled a program which will be chaired by Jim Chadwick on lending to borrowers in regulated industries, and we will present our ever popular Commercial Law Developments to be presented by Steve Weise and Teresa Harmon. We will co-sponsor several other CLE programs.

Commercial Financial Services has just been appointed a lawyer though the Business Law Ambassadors Program. Ross Romero will be with us in the Ambassadors program for the 2006-
2008 term and we look forward to Ross’s involvement in the substantive work of our Committee and working with him. Welcome Ross.

Commercial Financial Services has continued efforts to attract and build our membership. Over the past year, committee membership has increased by more than 5% and we are actively striving to provide current cutting edge products to our membership as well as provide fundamental programming to younger lawyers or lawyers whose practices are trending toward commercial finance law. The Committee meets 3 times a year and if you are interested in presenting at a meeting, or if you have identified a specific practice area that fits our mission statement, or if you would like to become active or more active in our committee work, please let me know. There are many opportunities for lawyers who practice in our area and we are continuing to look for lawyers to fill needs as they arise. The ABA and our Committee is deeply committed to diversity of all types.

I look forward to seeing you at the Spring Meeting in Washington. Have a happy and safe New Year.
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Another interesting case is *Zengan, Inc. v. Comerica Bank*, 40 Cal. Rptr. 3d 666 (Cal. Ct. App.), review granted, 140 P.3d 656 (Cal. 2006). In that case, the chief financial officer of Zengan embezzled $4.6 million by forging the CEO’s authorization on four wire transfer payment orders. Zengan sued the successor in interest to the originating bank for breach of contract, negligence, and several other common-law claims, as well as under § 4A-204. The trial court dismissed all of the common-law claims as preempted by the UCC. It dismissed the Article 4A claim for refund for lack of timely notification under § 4A-505. The court of appeals agreed with the preemption argument because such claims would alter the complex loss allocation scheme established by the Code. As to notification of the unauthorized transfer, the parties agreed that Zengan had timely informed the Bank that the payment was unauthorized and fraudulent. However, the court concluded that this was not sufficient. The court noted that liability for an unauthorized payment order can lie with either the customer or with the bank, depending upon the security procedures, if any, in effect. Specifically, in the absence of an agreed, commercially reasonable security procedure, the bank is liable for the loss. Likewise, if the bank fails to comply with the agreed security procedure, the bank is liable for the loss. If, however, the bank complies with the agreed security procedure, then the customer bears the loss, notwithstanding that the payment order was unauthorized. *See* § 4A-202. Because of this, the court concluded that Zengan was required to “communicate to the Bank that the Bank was liable for the fraudulent transfer” not merely that the transfers were unauthorized. One judge dissented on the § 4A-505 issue and the case is now being reviewed by the state supreme court.

The most recent payments case of note is *United States v. Payment Processing Center, LLC.*, 2006 WL 3251382 (E.D. Pa. 2006), which pitted Amy Boss against Barkley Clark in a bout of dueling expert witnesses. The case concerned when provisional credits to a telemarketing
processor’s deposit account become finally paid. The court ruled that even though the deposit agreement gave the depositary institution additional time to charge back the deposit account for dishonored drafts, this did not alter the time of final payment. It then held that “[a] period of more than 10 days is a sufficient lapse of time to establish the drafts were returned . . . outside the normal computerized processing system, i.e., beyond the ‘midnight deadline.’” As a result, the bulk of the provisional credits were final. Because of that, the deposits were property of the telemarketer and the federal government could restrain their use.

**Letters of Credit.** On October 25, the ICC Commission on Banking Technique and Practice approved the 2007 Revision of the Uniform Customs and Practice for Documentary Credits (UCP600). The vote was 91–0. UCP600 will come into effect on July 1, 2007. The UCC Committee’s Subcommittee on Letters of Credit will be sponsoring a 90-minute non-CLE program on UCP600 on Friday March 16, 2007, during the Business Law Section’s Spring meeting in Washington, D.C.

**Investment Securities.** The United States Court of Appeal for the Second Circuit has certified to the New York Court of Appeals the issue of whether large, subordinated promissory notes issued by a publicly traded corporation to identified payees in connection with the acquisition of a business are “securities” within the meaning of § 8-102, and therefore exempt from the general statute of frauds in pre-revision § 1-206. *See Highland Capital Management LP v. Schneider, 460 F.3d 308* (2d Cir. 2006). *See also Highland Capital Management LP v. Schneider, 2006 WL 2669339* (N.Y. 2006) (accepting certification). The District Court for the Southern District of New York had concluded that the notes were not securities, and thus the alleged oral agreement of the payees to sell them was not enforceable. *2005 WL 1765711* (S.D.N.Y. 2005), *aff’d in part and vacated in part, 2006 WL 2382917* (2d Cir. 2006).

The U.S. House of Representatives voted unanimously on November 15th to pass H.R. 5585, the Financial Netting Improvements Act of 2006, in the form previously passed by the Senate. The Act will become effective if President Bush signs it, which is expected. This legislation will amend the Bankruptcy Code and various other federal laws to clarify the rights that a party to certain financial contracts may exercise upon the insolvency of a counter-party. In particular, the Act would clarify which rights may be exercised free from the automatic stay. It would also amend section 546 of the Bankruptcy Code to expand the protection from preference and fraudulent transfer avoidance beyond margin and settlement payments to all transfers to or for the benefit of protected counterparties in connection with a prepetition securities contract, commodity contract, forward contract, or repurchase agreement.

**Secured Transactions.** Shortly before the ABA Annual meeting in Honolulu, Standard & Poors (“S&P”) rated the first securitization involving electronic chattel paper. The deal involved $1.078 billion in securities backed by auto loans. Approximately 14% of the auto loans were documented in electronic form. In connection with the transaction, S&P received what is apparently the first legal opinion on perfection by control of a security interest in electronic chattel paper. According to Richard Newman, one of the authors of the perfection opinion, the transaction was possible because the e-paper being securitized was created and maintained through the use of a third-party custodian whose technology provided a system through which control could be obtained.
in accordance with § 9-105. For further information about this transaction, contact Mr. Newman at Mayer Brown Rowe & Maw LLP, rnewman@mayerbrownrowe.com

Postings on the UCC listserv jumped markedly shortly after the Ninth Circuit Bankruptcy Appellate Panel issued its decision in In re Commercial Money Center, 350 B.R. 465 (9th Cir. BAP 2006). The court ruled, among other things, that payment streams stripped from chattel paper are properly classified as payment intangibles, not as chattel paper. Thus, a sale of such payment streams would be automatically perfected under § 9-309(3). Opinions differ widely as to whether the court interpreted the Code correctly; indeed the two reporters for revised Article 9 – Professors Steven Harris and Charles Mooney – apparently disagree, having submitted affidavits on different sides. Although the decision seems consistent with some of the language in § 9-102 comment 5d, the Permanent Editorial Board decided on November 11th to consider adding a comment to the Code expressing disagreement with the court’s analysis. Any such comment, if drafted and proposed, will likely be submitted for public comment.

On a somewhat related point, the PEB also discussed various proposals to deal with a perceived “glitch” in § 9-318. The scenario of concern involves a debtor who first sells chattel paper to a buyer who perfects by filing but who then grants a security interest (via sale or collateralized borrowing) to a secured party who takes possession. The drafters intended second secured party – the one with possession – to have priority under § 9-330(b). That result is put into question, however, by the language of § 9-318(a), which suggests that the debtor retains no rights to the chattel paper after the first sale, and thus no subsequent grant of a security interest in the chattel paper could attach. The PEB decided to consider dealing with this issue by comment. Such a comment is likely to indicate that even if a debtor retains no rights in an account, chattel paper, or payment intangible, a debtor may have the power to convey rights sufficient for a subsequent security interest to attach under § 9-203(b)(2), and that such a later security interest could even have priority under § 9-330.

For those following the cases on the debtor’s name, two recent decisions are worthy of note. In In re Borden, 2006 WL 3095640 (Bankr. D. Neb. 2006), the court deemed a filing against “Michael R. Borden” that identified him as “Mike Borden” to be seriously misleading because the filing apparently was not disclosed in a search using the longer first name. The court characterized the longer name as the debtor’s “legal name” and, therefore, his “correct name” under § 9-506(c). Across the state’s northern border, another court ruled similarly in In re Berry, 2006 WL 2795507 (Bankr. D. Neb. 2006) (a financing statement listing the debtor=s first name as “Mike,” instead of “Michael,” will be inadequate if the filing is not uncovered in a search using the full name). The court added that its contrary analysis a few years earlier in In re Erwin, 2003 WL 21513158 (Bankr. D. Neb. 2003), “should be accorded the proverbial ‘decent burial.’ ”

There are also non-legal matters to report on. First, allow me to introduce the new members of the Committee’s leadership.

Penelope Christophorou. Penny will serve as one of two Vice-chairs of the Committee, while continuing in her previous role as Chair of the Subcommittee on Investment Securities. As many of you already know, Penny is counsel at Cleary Gottlieb Steen & Hamilton LLP in New York and in expert on all things related to Article 8. Her practice focuses on commercial financing and
she represents many investment banking institutions, broker-dealers, banks, clearing organizations, and corporate borrowers.

Mario J. Ippolito. Mario will join Penny as Vice-chair of the Committee. He is a partner in the New York office of Paul, Hastings, Janofsky & Walker LLP and a fellow of The American College of Commercial Finance Lawyers. His practice focuses on lending and corporate finance transactions, equipment leasing, workouts, bankruptcies and reorganizations, and portfolio acquisitions.

Kristen Adams. Kristen will join Gail Hillebrand as Co-chair of the Subcommittee on General Provisions and Relations to Other Law. Kristen is an Associate Professor and holds the LeRoy Highbaugh Sr. Chair at Stetson College of Law in St. Petersburg, Florida. She teaches Contracts, Payment Systems, and Commercial Transactions, and is currently completing a casebook on Commercial Transactions to be published by the Thompson/West Group.

George Hisert. George is moving up from Vice-Chair to Chair of the Subcommittee of Letters of Credit, succeeding Carter Klein. George is a partner in the San Francisco office of Bingham McCutchen. He works in the firm’s Financial Institutions Area and co-chairs its Bank, Commercial and Structured Finance practice group. He has more than 34 years experience representing major banking and financial institutions in commercial loan and credit transactions, letters of credit, and regulatory matters.

Second, many thanks are due to those who have served the Committee for the last several years. Carter Klein and Ben Beard in particular deserve much appreciation for their hard work in chairing, respectively, the subcommittees on letters of credit and general provisions. Of course, special thanks are due to Stephanie Heller for her three years of excellent leadership, inexhaustible energy, and endless patience as Committee Chair. I am sure the whole Committee joins me in applauding your service and wishing you the best in your ascension to the Council. Rest assured, though, that Stephanie will not leave us behind completely. She has graciously – if not enthusiastically – agreed to serve as one of the chumps for Stump the Chumps III at the Spring Meeting in DC. She’ll be joined on the panel by Chuck Mooney, Meredith Jackson, and Bob Zadek. So, send in those questions (to me) or come prepared to ask them in person.

Finally, it is impossible to end this column without commenting on the passing of Paul Turner in October. As many of you know, Paul co-chaired the Subcommittee on Payments, co-authored the Annual Survey of Commercial Law published in The Business Lawyer, and was active in a variety of law reform activities. He was the consummate gentleman, liked and respected by all who came to know him. Please keep his family in your thoughts and prayers.

Best wishes to all and see you in D.C. in March.

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

Barring adverse reaction, this column will be a new, regular feature in the Newsletter. Its purpose is to identify some of the most flawed judicial decisions interpreting the Uniform Commercial Code to be published after the previous edition of the Newsletter. The purpose of the column is not to be mean. It is not to get judges recalled, law clerks fired, or litigators disciplined for incompetence. Instead, it is shine a spotlight on major errors of analysis, and thereby provide practitioners and judges with reason to disregard the opinion as precedent.

To merit attention in this column, a decision must not merely err on a matter of law. The error must be patent and fundamental to the analysis. One the other hand, the decision need not reach the wrong result. In fact, a good candidate may contain multiple errors that cancel each other out, so that in the end the right result is reached, albeit for wrong reasons. The two decisions discussed below are among the most misguided UCC opinions of the year. You be the judge: which is worse?


This case concerned whether a secured party violated the debtor’s rights while enforcing a security interest. In 1987, the debtor borrowed $250,000 from the secured party and in return gave the secured party an option, upon default, to buy the debtor’s interest in a redemption agreement for $350,000 minus the amount of the debt then outstanding. In 1998, after a series of defaults, the secured party notified the debtor that it was exercising its option to purchase debtor’s redemption rights and that this satisfied the debtor’s secured obligation. Four years later, the debtor sued claiming this violated his rights under Part 6 of Article 9.

The court committed the first of its numerous errors by ruling that former Article 9 applied to the dispute because the transaction and the default both took place prior to the effective date of revised Article 9. In fact, revised Article 9 applies as long as the litigation was commenced after the July 1, 2001 effective date, which it did. See § 9-701(a), (c). Indeed, both parties thought revised Article 9 controlled, but the court ruled otherwise without even citing to the transition rules. 718 N.W.2d at 831-32.

The court’s next error was more substantial. Although both parties regarded the debtor’s rights under the redemption agreement as the relevant collateral, the court instead treated the secured party’s option to purchase those rights as the collateral. Indeed, the court was quite specific on this point, italicizing its disagreement with the parties’ position and then reiterating twice more that the option, not the redemption rights, were the pertinent collateral. Id. at 832-33. This is just plainly wrong. The option may well have been a security device – a point alluded to by the court – but it was not the collateral. Collateral is, after all, property in which the debtor has an interest. See § 9-102(a)(28) (defining “debtor”). The debtor had no rights in the option; the debtor issued the option.

From here, the court went on to discuss whether the option structure constituted an impermissible pre-default waiver of the debtor’s right to: (i) notification of a disposition, (ii) a commercially reasonable disposition; (iii) redeem the collateral prior to the disposition; and (iv) payment of a surplus. See § 9-602. The court concluded that the secured party’s exercise of
the option could indeed be a disposition of the collateral (a conclusion arguably inconsistent with its treatment of the option as the pertinent collateral), and thus violate the duties to give reasonable advance notification of the disposition, to permit redemption prior to disposition, and to conduct a commercially reasonable sale. However, it concluded that the debtor was not entitled to any surplus. This conclusion was not explained. Instead, the court supported it merely by quoting former § 9-504(2), which provided that the debtor is not entitled to a surplus if the underlying transaction is a sale of accounts or chattel paper. Yet the underlying transaction was a $¼ million loan, not a sale of accounts or chattel paper, so this portion of the court’s analysis was again wrong.

Despite all this, the court concluded that the secured party did not in fact dispose of the collateral, but instead had conducted a strict foreclosure by exercising the purchase option. 718 N.W.2d at 839-40. Because the debtor did not object within 21 days, the strict foreclosure was effective. Given that the secured party’s notification that it was exercising the option was phrased not as a proposal to which the debtor could object, but as a fait accompli, this conclusion is questionable. Still, no express wording is required for a proposed strict foreclosure and there is no specific requirement that the proposal inform the debtor of the right to object. Thus, the court may have reached the correct result, at least if it had applied revised Article 9. However, former Article 9 – which the court had erroneously concluded was the applicable law – limited strict foreclosure to collateral in possession of the secured party, see former § 9-505(2). Here, both the option and the redemption rights to which it related were intangible, and thus incapable of possession. Thus, strict foreclosure was – at least arguably – not available at all.


This case pitted a putative secured party against a transferee of fund from the debtor’s deposit account. Madisonville State Bank ("MSB") had a security interest in the debtor’s accounts, inventory, chattel paper, documents, and equipment. Sometime later, the debtor paid approximately $59,400 to its law firm for services rendered. The payment was made from a deposit account at First State Bank. MSB sued the law firm for conversion and, not surprisingly, the law firm moved for summary judgment on the basis of § 9-332(b). The trial court granted the motion and MSB appealed.

MSB argued that § 9-332 did not apply because MSB did not have a security interest in the deposit account, instead it had a security interest in certain proceeds, which were deposited into the deposit account. Although the decision of the court of appeals is a bit unclear, the court apparently accepted this argument and reversed the lower court. In other words, it seems to have concluded that § 9-332 applies only if the security interest in the deposit account is claimed as original collateral. This is, of course, nonsense. Article 9 expressly treats proceeds as collateral. See § 9-102(a)(12)(A) & comment 3(a). Indeed, the vernacular of Article 9 throughout clearly treats a security interest in proceeds as a security interest in whatever those proceeds happen to be. Indeed, it does this in particular with respect to deposit accounts, thus unambiguously indicating that a security interest in a deposit account can arise if proceeds of other collateral are deposited into a deposit account. See, e.g., § 9-312(b).

The court then compounded this error by apparently also concluding that § 9-332(b) could not protect the law firm because it protects a transferee from a perfected security interest in a deposit account, and MSB had no control agreement with First State Bank, and thus was unperfected. If this
is really what the court ruled, then the court erred in two ways. First, and less important, MSB may well have had a perfected interest in the deposit account. The court never bothered to mention whether MSB was perfected in the original collateral by filing, but if MSB was, then it was perfected in the identifiable proceeds deposited into the deposit account under § 9-315(d)(2). Second, and more important, § 9-332(b) makes no reference to perfection. Perfection is mentioned in the examples to comment 2, but merely as an illustration, not as a requirement for the provision to be applicable). The provision itself, though, allows a transferee to take free whether the security interest is perfected or unperfected.

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UCC Joint Task Force on Deposit Account Control Agreements

Edwin S. Smith, UCC Chair, John Pickering, Vice-Chair, Marshall Grodner, CFS Chair

At the urging of a number of practitioners and inside counsel of depositary banks, the American Bar Association’s Business Law created a special task force in 2004 to draft a form of UCC Article 9 deposit account control agreement that was fair to all parties, represented market practice, could be widely accepted by market players and could be concluded with no or minimal negotiation. The task force is jointly sponsored by the Commercial Financial Services Committee, the Uniform Commercial Code Committee, the Banking Law Committee and the Consumer Financial Services Committee. Marshall Grodner is the Co-chair from the Commercial Financial Services Committee, and Ed Smith is the Co-chair from the Uniform Commercial Code Committee.

The form of deposit account control agreement developed by the task force was released at the American Bar Association’s 2006 Spring Meeting in Orlando, Florida, and was published in 61 The Business Lawyer 745 (February 2006) together with an initial report of the task force. The form addresses the common situation in which a secured party seeks to enter into a control agreement with its debtor and the debtor’s depositary bank relating to a transactional deposit account to which the debtor initially has access.

The form is divided into two documents: a set of general terms (the “General Terms”) and a very short deposit account control agreement (the “DACA”). Parties may complete the provisions in the DACA setting forth the deposit account number and the resolution of other discrete issues to be negotiated while the form at the same time incorporates by reference the General Terms. The General Terms provide the core agreement by which the depositary bank agrees to follow instructions from the secured party as to the disposition of the funds in the deposit account without the further consent of the debtor (see UCC section 9-104(c)(2)) as well as provisions resolving such often hotly negotiated topics as by when the depositary bank must react to such instructions, to what exculpation and indemnification the depositary bank is entitled, to what extent the depositary bank subordinates any security interest or right of setoff which the depositary bank might have in the deposit account, and under what circumstances the DACA may be terminated or assigned.

The task force is now developing inserts to the DACA. One insert, that has been finalized by the task force, addresses the typical transaction in which the debtor does not have access to the deposit account and the funds in the deposit account are regularly transferred to the secured party. Other inserts “under construction” deal with lock box arrangements, blocked savings accounts, first and second lien arrangements, and sweeps to overnight investment accounts. In addition, a DACA is being developed for securitization transactions jointly with the Commercial Financial Services Committee’s Subcommittee on Securitizations.
The task force meets at the Spring and Annual Meetings of the Section and also at day-long sessions three or four times during the year, typically in New York City. Many task force members participate at the day-long sessions in person or by telephone conference. The email list serve for the task force is quite active. Anyone interested in joining the task force should contact Marshall Grodner at mgrodner@mcginchey.com or Ed Smith at edwin.smith@bingham.com.

To obtain a copy of the task force’s initial report, the DACA, the General Terms and the completed and draft inserts, it is only necessary to surf the task force’s web site at http://www.abanet.org/dch/committee.cfm?com=CL710060.
November 5, 2006

BY EMAIL TRANSMISSION

Permanent Editorial Board for the
Uniform Commercial Code
c/o The American Law Institute
4025 Chestnut Street
Philadelphia, Pennsylvania 19104

Re: In re Commercial Money Center, Inc.

Ladies and Gentlemen:

We are writing to you on behalf of the Uniform Commercial Code Committee of the Business Law Section of the State Bar of California (the “UCC Committee”) to address certain specific concerns of the UCC Committee with respect to the decision In re Commercial Money Center, Inc.1 (the “Case”). Considerable discussion has been generated over the Case, including on the Washburn University School of Law “UCCLaw-L -- UCC Law Discussion List” (the “UCC ListServ”).2 The UCC Committee wishes to supplement this discussion and, hopefully in the process, address some of the points raised in the UCC ListServ discussions. Please note that in this letter we have only included a basic summary of the issues and holdings in the Case, as we assume most are generally familiar with the Case.3

1. Summary of Issues and Holdings in the Case

A. Issue: Are the payment streams under the equipment leases “chattel paper” within the meaning of Section 9-102(a)(11) or “payment intangibles” within the meaning of Section 9-102(a)(61)?

Holding: The payment streams are payment intangibles.4

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1 In re: Commercial Money Center, Inc., U.S. Bankruptcy Appellate Panel of the 9th Circuit, BAP No. SC-05-1238-MoTB; Bk. No. 02-09721-H7; Adv. No. 03-90331.
2 See: http://lists.washlaw.edu/mailman/listinfo/ucclaw-l/.
3 A further discussion on the background of securitizations, the commercial reasons for “stripping” and a schematic diagram of the Case and other securitization structures can be found in the Appendices to this letter.
4 Although the court evidently believed that this legal conclusion is one of the holdings in the Case, some have argued that this legal conclusion amounts to “obiter dictum.” For purposes of this letter, we will treat this legal conclusion as a holding (without attempting to resolve that debate).
B. **Issue:** Were the transactions concerned sales of the payment streams or loans secured by the payment streams?\(^5\)

**Holding:** The transactions were loans, not sales.

C. **Issue:** Was NetBank’s security interest in the payment streams perfected by possession of the related equipment leases?

**Holding:** The Case was remanded for a factual determination as to whether NetBank, through an agent, had possession of the equipment leases.

2. **Loan vs. Sale**

Of the holdings in the Case, the finding that the underlying transaction was a loan, and not a sale, appears to be uncontroversial. The transaction between the assignor (Commercial Money Center) and the assignee (NetBank) involving a pool of sub-prime equipment leases was found to be a loan and not a sale. The court reached this conclusion because the assignee had none of the potential benefits or risks associated with ownership of the lease chattel paper and equipment. In making this determination, the court rightfully looked to the substance of the allocation of risks in the transaction, and not the form or purported characterization of the transaction by the parties. Based on the court’s conclusion, the assignee’s security interest could be perfected either by filing a financing statement or by taking possession of the equipment leases. No financing statement was ever filed. However, because there was a dispute about whether the assignee had taken possession of the leases through an agent, the court remanded the Case for a determination of that factual issue.

3. **“Stripping” and the Creation of Payment Intangibles**

The court found that Commercial Money Center created payment intangibles by separately assigning its interest in the payment streams under certain equipment leases and its interest in the leases themselves, which, in the court’s view, effectively “carved out” or “stripped” the payment streams from the underlying chattel paper (even though the separate assignments were made in the very same agreement).\(^6\) This holding is controversial due to the possibility that a security interest in chattel paper which is

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\(^5\) If the transactions were sales, NetBank’s interest in the payment streams would be automatically perfected upon attachment under Section 9-309(3); however, if the transactions were loans, NetBank’s interest in the payment streams could be perfected only by filing under Section 9-310(a) or (according to the court after discussing a 1991 bankruptcy case) by taking possession of the related leases.

\(^6\) We note that most loans secured by equipment leases (i.e., lease receivable discounting agreements) use granting language that includes both (1) an assignment of the lease payments and (2) a grant of a security interest in the underlying lease chattel paper and the leased equipment. Under the analysis in the Case, these transactions create payment intangibles by the mere use of words that “strip” the lease payments from the underlying leases. Although we are not aware of any lenders attempting to rely on automatic perfection under Section 9-309 in what are clearly loan transactions, we believe that most lenders and lessors would be surprised to learn that they are creating payment intangibles when they use the typical granting language of a loan against a lessor’s lease receivables.
perfected by filing or by possession may, as to the related payment rights, be subordinate
to the interest of a prior buyer of the payment rights, even if there is no actual,
constructive or record notice of that interest. This holding is also problematic because it
opens the door to “shifting” collateral from one type to another merely by using some
words rather than others in an agreement, which creates various priority issues and results
in other uncertainties under the UCC. These two issues -- the possible first priority of an
unknown prior interest in the payment rights under equipment leases and other chattel
paper and the potential problems created by “shifting” collateral types -- are discussed in
sections 4 and 5 of this letter. Possible resolutions to the problems raised by these issues
are discussed in section 6 of this letter.

4. The Relative Priority of Payment Intangible Buyers vis à vis Chattel Paper
Purchasers

The primary problem raised by the Case but left unaddressed is the relative
priority between a buyer of payment intangibles that were created (i.e., stripped) from
chattel paper and a subsequent “purchaser” of the chattel paper (including a buyer of the
chattel paper and a lender taking an interest in the chattel paper to secure a loan).
Assuming the applicability of the court’s holding that payment rights stripped from the
underlying chattel paper from which they arise constitute payment intangibles, the key
question seems to be whether the “super-priority” rules of Section 9-330(b) and (c) allow
a subsequent purchaser of chattel paper to obtain priority in the proceeds of such chattel
paper (i.e., the payments received under the chattel paper) -- the same payments
presumably embodied in the previously sold payment intangibles. The resolution of this
question primarily requires an examination of the interplay among Sections 9-318,
9-322(c) and 9-330(b) and (c), which interplay the court expressly did not undertake to
examine in the Case.7

There seems to be a great deal of support from scholars and practitioners who
have reacted to the Case for the position that a subsequent perfected purchaser of chattel
paper meeting the requirements of Section 9-330(b) (e.g., new value, possession or
control, good faith, ordinary course of business and no knowledge of violation) should
have priority with respect to the payments arising under such chattel paper vis-à-vis a
prior purchaser of payment intangibles stripped from such chattel paper. However, there
is certainly some difference of opinion as to whether Article 9 clearly produces this
result.

With respect to the hypothetical question posed above, there seem to be two main
issues raised by Article 9 and the Official Comments thereto. First, an ambiguity seems
to arise from a plain reading of Section 9-318(a), which provides that a “debtor that has
sold . . . a payment intangible . . . does not retain a legal or equitable interest in the

7 The court did discuss Section 9-330(b), but stated that “[w]e explicitly decline to resolve the ambiguity in
Revised UCC Section 9-330(b) . . . .” We assume for purposes of this discussion that the sale of the
payment intangibles stripped from the chattel paper was indeed a true sale so that the buyer receives the
benefit of automatic perfection under Section 9-309 and that the subsequent purchaser of the chattel paper
complied with the requirements of Section 9-330(b) to obtain “super-priority” over other perfected security
interests in the chattel paper.
collateral sold.” As others have noted, this could mean that once a seller sold stripped payment intangibles from chattel paper, the seller would retain no more interest in such payment intangibles to sell to anyone else (i.e., the subsequent purchaser of the chattel paper from such a seller would be buying chattel paper devoid of any rights to payments). Section 9-318(b) does not change this result inasmuch as it affects solely buyers of accounts and chattel paper who have not perfected their interests in such receivables and does not apply to buyers of payment intangibles or promissory notes. Moreover, Official Comment 4 to Section 9-318 can be read to underscore this point with respect to sales of payment intangibles, which are automatically perfected under Section 9-309.8

The second issue centers around whether the super-priority rules of Section 9-330 (including as they relate to priority over proceeds of such chattel paper) apply to the hypothetical facts at issue here since Section 9-330 could be read to apply only to disputes among creditors with interests in chattel paper as original collateral. In the question at hand, since the interest of the first buyer, at least as determined by the court in the Case, is in payment intangibles and not chattel paper, it could be argued that the rules of Section 9-330 do not apply to determine the priorities as between these two parties.9 It should certainly be noted that several commentators disagree with this interpretation. For example, Steven Weise has made the point that Sections 9-330(b) and (c) and 9-322(c) can (and should) be read to govern the kind of dispute at issue in the hypothetical question generated by the Case -- where one of the two parties is claiming an interest in the “stripped” payment intangibles only. That argument is predicated on a not unreasonable reading of Section 9-322 (reinforced by Official Comment 8 thereto) that if the chattel paper purchaser’s security interest “qualifies for priority over a conflicting security interest under . . . Section 9-330,” the chattel paper purchaser’s security interest “also has priority over a conflicting security interest in . . . the proceeds of the collateral.” The word “qualifies” means that there does not have to exist an actual conflicting security interest in the chattel paper. However, others have expressed concern that Sections 9-330 and 9-322 are ambiguous enough on this point that a court could conclude otherwise.10

5. Problems Created by “Shifting” Collateral Types under the UCC

The court’s most controversial holding in the Case is premised on the notion that, for purposes of classifying the types of collateral involved in the financing transactions between Commercial Money Center and NetBank, once the payment streams have been “stripped” from the underlying equipment leases (which, as noted above, is accomplished merely by separately assigning, even in the same agreement, the payment streams and the underlying leases), the payment streams under the equipment leases are analytically

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8 Official Comment 4 to Section 9-318 provides as follows: “If the security interest of a buyer of accounts or chattel paper is perfected, the usual result would take effect: transferees from and creditors of the seller could not acquire an interest in the sold accounts or chattel paper. The same result would occur if payment intangibles or promissory notes were sold, inasmuch as the buyer’s security interest is automatically perfected under Section 9-309.”

9 As the court noted, “this special priority rule only applies by its terms to an interest ‘in the chattel paper.’ We have just held that the payment streams stripped from the leases are not chattel paper, so arguably this special priority rule is inapplicable.” Case at 23.

10 The summary of the issues in the paragraph were largely culled from a posting on the UCC ListServ by Robert Ihne.
severable from the equipment leases themselves. In the court’s view, the leases constitute chattel paper because they are “records that ‘evidence’ a monetary obligation,” but the payment streams do not constitute chattel paper because they “are not ‘records’ that ‘evidence’ monetary obligations, they are the monetary obligations.” Having determined that the payment streams are a type of collateral distinct from chattel paper, the court ultimately determined the payment streams to be payment intangibles.

The problem with the analytical framework used by the court in the Case is that it moves Revised Article 9 somewhat off center. Now, instead of a unified set of perfection and priority rules that are well-designed and produce consistent results, we potentially have a system that creates different outcomes for essentially identical transactions, alters priority rules in unintended ways, introduces transactional risks that are not well-understood and creates uncertainty where formerly there was high degree of certainty.

Here is a sample of some of the difficult questions raised or unexpected results produced by the collateral classification holding and related analysis in the Case:

A. S sells all of S’s rights in certain equipment leases to B, who neither files nor takes possession. B runs that risk that S can grant to a subsequent purchaser that files or takes possession a senior interest in the very same leases. However, if S “separately” (merely by using words of separate assignment, even if they appear in the same agreement) sells to B all of S’s rights in the payments under the leases and all of S’s other rights in the leases and if B neither files nor takes possession, then arguably under the holding of the Case, B has acquired a perfected security interest in the payment rights and an unperfected security interest in the other rights. Although B remains at risk with respect to the non-payment rights, B’s interest in the payment rights (although not the subject of any filing) will trump the interest of a subsequent purchaser that acquires a security interest and perfects by filing and, because the payment rights are distinct from the leases themselves and (if separately assigned) do not constitute chattel paper, may even trump the interest of a subsequent purchaser that acquires a security interest and perfects by possession and otherwise meets the requirements for priority in chattel paper set forth in Section 9-330(b).

B. On Day 1, A sells all of its payment rights under certain equipment leases to B, who neither files nor takes possession. On Day 2, to secure an obligation, A grants a security interest in all of its rights under the leases to C, who immediately perfects by filing. The security agreement between A and C contains a negative pledge, which is set forth in all caps in C’s filing. On Day 3, to secure an obligation, A grants a security interest in all of its rights under the leases to D, who takes possession. D meets all the requirements for priority under Section 9-330(b) with one exception: prior to entering into the transaction with A, D reviewed C’s filing. Subsequently, A becomes insolvent and there is a priority contest among B, C and D. Assume for the moment that the court hearing the matter interprets Section 9-330(b) as implicitly granting A the power to transfer rights in the leases (including all payment and other rights thereunder) to a secured party. Assume further that the court agrees with the holding in the Case regarding the classification of collateral: if “stripped” (i.e., separately assigned), the payment rights under the leases constitute payment intangibles. In the priority contest
between B and C as to the payment rights under the leases, B wins under the first to file or perfect rule contained in Section 9-322(a)(1). In the priority contest between C and D as to the leases, D cannot rely on Section 9-330(b) to achieve priority over C (D was aware of the negative pledge), with the result that C wins under Section 9-322(a)(1). And in the priority contest between B and D as to the payment rights, it appears (as Steven Weise has argued) that D does have a security interest that qualifies for priority over a conflicting security interest under Section 9-330 and, therefore, D wins under Section 9-322(c)(2). In short, B trumps C, who trumps D, who trumps B. In light of this circular priority, how does the court rule?

C. S sells to B all of S’s rights in certain promissory notes in a “servicing retained” transaction. Each of the notes is secured, pursuant to a related security agreement, by an interest in certain specified equipment. In one case, S absolutely assigns to B all of S’s rights in a note and the related security agreement. In another case, S absolutely assigns to B, in separate clauses in the same agreement, all of S’s rights in the payments due under a note as well as all of S’s other rights in the note and the related security agreement. In each case, B neither files nor takes possession of the note or the related security agreement. Like the equipment leases in paragraph A above, each note, together with the related security agreement, constitutes tangible chattel paper. In the first case, B runs the risk of having its interest in the note and the related security agreement primed by a subsequent purchaser that meets the requirements of Section 9-330(b). In the second case, however, because the payment rights under the note are “stripped” (i.e., separately assigned), the payment rights could, under the holding of the Case, be classified as payment intangibles. In that event, it appears that a subsequent purchaser who takes possession of the note and the related security agreement and otherwise meets the requirements of Section 9-330(b) would not be able to prime B’s prior interest in the payment rights.

D. D sells to SP1 all of D’s rights in the principal and interest payments and other fees, costs and charges (including any prepayment premium) under an unsecured non-negotiable promissory note and grants to SP1 a security interest in all of D’s other rights in the note. SP1 neither files nor takes possession of the note. Later, D grants to SP2, as security for a loan, a security interest in all of D’s rights in the note. As part of the loan transaction, SP2 takes possession of the note. Assume that SP2 otherwise meets the requirements for priority in instruments set forth in Section 9-330(d). Assume further that D becomes insolvent and there is a priority contest between SP1 and SP2 with respect to the payments under the note. SP2 argues that its interest in the note qualifies for priority under Section 9-330(d), that the payments under the note constitute proceeds of the note and that, as a result, SP2’s interest in the payments primes SP1’s interest in the payments. SP1 argues that the payment rights in the note are distinct from the note itself, the former being payment intangibles and the latter being an instrument (i.e., a writing that evidences a right to the payment of a monetary obligation as opposed to the right to the payment of the monetary obligation itself). SP1 further argues that, having been “stripped,” the payment rights in the note are not proceeds of the note (the note being merely the writing evidencing the payment rights as opposed to the payment rights themselves). If SP1’s analysis is correct, Sections 9-330(d) and 9-322(c)(2) will not protect SP2. According to SP1, under Section 9-330(d) SP2 may be a qualified purchaser.
of the writing that evidences the payment rights, but SP2 is not a qualified purchaser of the payment rights evidenced by the writing. And even if SP2 is deemed to be a qualified purchaser of the note and all related rights (including payment rights) under Section 9-330(d), because D did not have rights or the power to transfer rights in the payment rights at the time of the loan transaction, SP2 does not have a security interest in the payment rights under the note (either as original collateral or as proceeds) and thereby fails to meet the stated requirements for priority set forth in Section 9-322(c)(2). Is it clear that SP1 is wrong? If requested, would a law firm that is experienced in UCC matters give an opinion to the effect that SP2’s interest has priority over SP1’s interest with respect to the payment rights?

E. S is the owner of a promissory note that is secured by an interest in certain specific goods. The security interest in the goods is created by a security agreement that is separate from the note. Pursuant to a written purchase and sale agreement, S absolutely assigns an undivided 10% interest in all of its rights in the note to B. In the purchase and sale agreement, S specifically reserves for itself the benefit of all security interests created by, and all enforcement and other rights arising under, the security agreement. Assume that B neither files nor takes possession of the note. By separately assigning an undivided 10% interest in the note without the benefit of any security, has S “stripped” a portion of the note from the chattel paper (the note and the security agreement taken together)? If so, is B’s undivided 10% interest in the note automatically perfected under Section 9-309(4)?

We expect that there are other difficult questions raised or unexpected results produced by the collateral classification holding and related analysis in the Case.

6. Suggested Resolutions

Here are two (but by no means the only) possible resolutions that have been proposed by the UCC Committee to address the priority and other issues created by the holdings in the Case:

A. To avoid “shifting collateral” problems, amend the UCC to provide explicitly that chattel paper and instruments include the related payment rights and make certain related changes.

(1) Amend Section 9-102(a)(11) to provide that “chattel paper” includes the monetary obligations evidenced by the related record or records.

(2) Amend Section 9-102(a)(47) to provide that an “instrument” includes the right to the payment of a monetary obligation evidenced by the related negotiable instrument or other writing.

(3) Add a new provision stating that a separate assignment of the payment rights or other rights arising under chattel paper or an instrument (whether in the same security agreement and otherwise and however phrased) does not create a general intangible or other type of collateral but instead
constitutes an assignment of the chattel paper or instrument (as applicable). This provision might be added as a new subsection to Section 9-203.

(4) Make technical amendments either to Section 9-318(b) or to Section 9-322(c) so that it is clear that the interest of a subsequent purchaser of chattel paper or an instrument who takes possession and otherwise meets the requirements for priority set forth in Section 9-330(b) or (d) will also have priority in any payments arising under the chattel paper or instrument.

B. Amend the UCC to provide that perfection in payment intangibles derived from chattel paper is not automatic and must be achieved by possession of the chattel paper or by filing.

As the main concern with the holding in the Commercial Money Center case is the desire to protect a subsequent chattel paper purchaser against a “secret” prior true sale of the payment stream, proposal B is a simple one:

(1) Amend Section 9-309(3) to expressly exclude payment intangibles derived from (i.e., stripped from) chattel paper.

This amendment would directly address the priority problem raised by the court’s holding due to automatic perfection in a sold payment intangible derived from chattel paper. This amendment would also not hinder in any substantial way the stripping of payment streams from chattel paper because the buyer of the payment streams would be able to protect its interests by filing or taking possession of the chattel paper to perfect. The later purchaser of the chattel paper would be placed on notice by the filing or possession by the earlier buyer of the chattel paper.

(2) Amend Section 9-318(b) to add the following sentence: “For purposes of determining the rights of creditors of, and purchasers for value of chattel paper from, a debtor that has sold a payment intangible derived from such chattel paper, while the buyer’s security interest is unperfected or perfected by filing, the debtor is deemed to have rights and title to the payment intangible identical to those the debtor sold.”

This amendment would address the concerns raised by commentators that the later purchaser of the chattel paper -- even one that took possession -- would end up with an “empty shell” because the payment stream had been stripped out. A later purchaser of the chattel paper who takes possession should prevail not only against a prior buyer who is unperfected but also against a prior buyer who perfects by filing.

(3) Amend Section 9-330(b) by inserting “or in any payment intangible derived from the chattel paper” immediately after the second reference to “chattel paper” in that section.
This amendment (when coupled with the other two amendments) would clear up any ambiguity in Sections 9-330(b) and (c) and 9-322(c) that a subsequent purchaser of chattel paper who takes possession and otherwise meets the various conditions of Section 9-330(b) would have priority over the earlier buyer of the payment stream.

Should either proposal be adopted, we offer to recommend corresponding changes to the Official Comments that would need to be made.

* * *

In closing, we are submitting this letter in the interest of contributing to the lively discussion and debate regarding the ramifications of the Case. We have offered two proposals to resolve the real and significant impact that the Case will have on secured transactions. By limiting our proposed resolutions to the two set forth in this letter, we do not mean to imply that our resolutions are either exhaustive or complete. We may have other possible resolutions to propose at a future date, or, alternatively, we may opt to develop further those already proposed. In all cases, however, we wish to assist the PEB in its consideration of the Case and its resolution and wish to remain engaged in this process to the extent that the PEB deems helpful. To that end, if any portion of this letter seems unclear and requires further explanation, we will be happy to provide the same upon request.

Sincerely yours,

/s/ James S. Cochran

James S. Cochran
Co-Chair
Overview of Securitization, True Sale, and Payment Stripping

This Appendix 1 attempts to address the question of whether there is a business need or reason to “strip” and sell a payment and therefore create, or to recharacterize the lease receivable payments as, a sold “payment intangible” which is afforded automatic perfection under Section 9-309(3) when sold.¹

1. Securitization

The court in the Case states that “[w]e are told that the multi-billion dollar securitization industry depends on being able to fractionalize financial assets, and specifically on stripping payment streams from underlying transactions such as the equipment leases in this case.” (Case at 2.) This statement is an acknowledgement of the relative obscurity surrounding the securitization industry and process. The goal of securitization is, however, in its essence, relatively straightforward: it is the creation of publicly or privately offered (and traded) securities, typically in the form of commercial paper, notes or certificates, backed by the securitized receivables pool. As discussed below, whether a securitization is structured as loan or sale of a lease portfolio to a bankruptcy-remote “special purpose entity” (“SPE”) or to a lender’s commercial paper conduit, securitization is both relatively common and vital to the leasing industry, as the securitization industry provides a source of relatively low-cost liquidity to a lessor’s portfolio of lease assets, with the ability to raise additional investment capital from its lease portfolio and to redeploy that capital in new higher-yielding transactions, increasing the lessor’s profit potential.

A. Special Purpose Entity

A securitization is essentially a two-step process. The issuance of the securities backed by the receivables is the second step. The first step of the process, in a “classic” lease pool securitization, is for a leasing company to “package” and transfer a portfolio of its lease transactions via a “true sale” of the receivables, the underlying leases and the leased equipment (collectively described as the “lease pool”) to an SPE formed

¹ This question was raised by Donald J. Rapson on the UCC ListServ in his September 1, 2006 posting: “what exactly are the purported benefits of stripping the payment stream from the underlying chattel paper or promissory note?”

² Although the interest or certificate rate of the securities backed by the securitized lease pool is usually significantly lower than the lessor’s borrowing rate, largely due to risk diversification and credit support, the lessor’s true cost of the securitized sale or borrowing must include the significant transactional costs of the attorneys, accountants, and other professional or financial advisors engaged by the transaction parties as well as the costs of the surety bond and portfolio credit rating. These costs are typically borne by the lessor, and therefore, the “all-in” cost to the lessor is considerably higher than the interest or certificate rate of the asset-backed securities. Nonetheless, in many instances the all-in cost to the lessor is still less than the lessor’s own borrowing rate, or lease portfolio sale value, without the securitization. Even if the all-in cost of the securitization is relatively high, the lessor may nevertheless be forced to securitize in order to raise additional investment capital due to a limited borrowing capacity arising from pre-existing high leverage ratios on its balance sheet.
specifically to take title to the lease pool, which SPE then issues securities backed by the lease pool.

B. **Sale vs. Loan Securitization Structures**

The possibility has been raised on the UCC ListServ that the Commercial Money Center transactions were not “true securitizations” as there was no SPE in the structure.\(^3\) We believe the lack of an SPE is not relevant to the analysis. A securitization can be accomplished within a number of different structures. The complexities of the securitization process arise from the nuances of the transaction, which attempt to address legal, accounting, and credit issues. Securitization structures range from relatively complex “classic securitizations” (i.e., “true sales” to an SPE formed to achieve bankruptcy remoteness) to rather straightforward loans made by a lender and secured by a prior perfected security interest in the borrower’s lease portfolio, which loans are then transferred by the lender to its affiliated “commercial paper conduit” (i.e., the lender’s own SPE). In an alternative structure to a “true sale,” the lessor/packager assigns the lease payments and grants a security interest in the remainder of the lease pool (i.e., the other rights under the leases and the residual rights in the equipment) to a lender’s captive commercial paper conduit, which commercial paper conduit acts to consolidate similar lease pools packaged and transferred from other leasing companies, with the goal of achieving economies of scale and risk reduction via portfolio diversification and ultimately issuing commercial paper backed by the lease receivables.\(^4\)

C. **Surety**

In either the “true sale” or “loan” securitization scenario, depending on the credit quality of the portfolio, there may be a requirement or necessity for surety bonding to support the credit quality of the portfolio. As such, securitization structures typically provide for some form of surety, recourse, indemnity or other credit support to bolster the credit profile of the securitized pool and thus enhance the rating given by the rating agency (such as Moody’s, S&P or Fitch) to the securities backed by the pool.\(^5\) The goal of the “sponsor parties” (e.g., the lessor or the lender) desire to achieve a sufficiently-enhanced credit rating on the portfolio to assure that the asset-backed securities to be issued by the SPE or commercial paper conduit are marketable.\(^6\)

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\(^3\) See Donald J. Rapson’s posting on the UCC ListServ of October 12, 2006: “it has now been determined that this case did not involve a securitization. There was no Special Purpose Vehicle (SPV) in the structure of the transaction. Consequently, characterizations of this case as a ‘classic securitization’ are incorrect.” This posting was responded to later the same day on the UCC ListServ by Tom McCurnin, who identified himself as one of the attorneys who worked on the Case and who indicated that, in approximately 25% of Commercial Money Center’s lease pools, an SPE was used to securitize the pools.

\(^4\) A further discussion of the reasons for utilizing the sale over the loan structure is provided below in this Appendix 1.

\(^5\) Please see diagrams of the Commercial Money Center structure as well as of a “classic” securitization and alternative structures in Appendices 2 through 5 to this letter.

\(^6\) Thus, for many pools of lease assets (particularly pools that are of “sub-prime” credit quality, as in the Case), a surety is essential to the issuance of securities backed by the pools as the surety assures, to the satisfaction of the rating agencies rating the transaction and for the benefit of the future holders of the
2. **True Sale**

The first-step of the securitization mentioned above, the packaging and transfer of the lease portfolio to the SPE or commercial paper conduit, typically requires some closer analysis as the securitization structure can exist anywhere in a continuum that runs from transactions that are clearly structured and intended as debt to transactions that are clearly structured and intended as sales.

As for Commercial Money Center’s securitization structure, it appears from the facts provided in this case that the debtor/seller of the lease portfolio, Commercial Money Center, and the secured party/purchaser, NetBank, desired to achieve a “true sale” securitization structure. Notwithstanding the parties’ stated intentions, it also evident from the economic substance of the transaction (e.g., the reversionary interest of Commercial Money Center in the payment stream, the guaranteed minimum payments, the indemnity contract and the substantial continuing servicing obligations) -- and, as noted in section 2 of the letter, the court held -- that the transaction had more of the risk allocation and economic substance of a loan than of a sale.

In answer to a question posed on the UCC ListServ, there is a credible *business* explanation as to why Commercial Money Center might have desired to “strip the payment stream from the leases.” A “true sale” of the lease portfolio would have allowed Commercial Money Center to accomplish two business goals which could not be achieved via a “loan” securitization structure. Those two goals, which are briefly discussed below, are (i) off-balance sheet “sale” treatment and (ii) immediate recognition of income.

**Off-Balance Sheet “Sale” Treatment:** The seller receives off-balance sheet treatment, meaning that the leases and the related equipment are no longer assets on the lessor/seller’s balance sheet and that the corresponding “securitized loan” (which has been re-characterized as a sale) is no longer a liability on its balance sheet. This considerably “cleans-up” the balance sheet of the lessor/seller and can be a significant benefit, particularly for a smaller leasing company with limited equity capital resources, and which must turn to debt capital to acquire its lease portfolios. A lessor/seller with a very high debt-to-equity ratio has fewer financing options because lenders are increasingly reluctant to lend to such a lessor. In that case, the sale of the lease assets increases the equity capital and net worth of the lessor, making the lessor’s balance sheet view more attractive to lenders.

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7 See Donald J. Rapson’s September 29, 2006 posting on the UCC ListServ and footnote 1 above in this Appendix 1.
Immediate Recognition of Income: The seller achieves immediate “gain on sale” income recognition of the securitized portfolio payment stream sale proceeds, in contrast to a loan where the principal amount of the loan would be retained as a liability on the lessor’s balance sheet, and the income (the difference between the principal and interest payments and the rental income) would be amortized over the life of the loan. Without “true sale” treatment, the borrower would have to recognize the income from the transfer of the portfolio to the lender over the life of the portfolio, which might range from 24 to 36 months for a high-tech lease portfolio, from 48 to 60 months for most generalized equipment, and from 72 months to 84 months (or higher) for longer-life lease assets.

3. Payment Stripping

Less common, but still within the scope of securitization structures in the leasing world (and as attempted by Commercial Money Center), is for a lessor to structure a sale transaction in which only the lease payments, and not the underlying leases or equipment, are sold (i.e., a “stripping”). A true sale of a payment stream only, if properly structured, would allow the seller to accomplish two important business goals in addition to immediate income recognition and off-balance sheet financing: (i) retention of residual value interest in the underlying leases and equipment; and (ii) the ability to depreciate the leased equipment for tax purposes (i.e., to utilize the depreciation deductions and other capital allowance benefits under the Internal Revenue Code).

Retention of Residual Value Interest: “Stripping” the lease payments allows the lessor to obtain the benefits noted above under sale treatment, yet retain ownership of the leases and the underlying equipment, an important profit component for the lessor. In true “fair market value” leases, the value of this residual interest could be considerable and could represent substantially all, if not all, of the profit in the transaction for the seller. In a “lease intended as security,” the residual interest retention would not represent as much of a profit potential, but it could still be significant, even with 10% “puts” or bargain purchase options (as appears from the UCC ListServ was the structure of the Commercial Money Center lease pools).

Ability to Retain Tax and Accounting Benefits: The retention by a lessor of the ability to depreciate the equipment for tax purposes is of considerable value to a true “fair market value” lessor (a lessor under a lease with a “fair market value” purchase option, which would likely entitle the lessor to claim tax benefits under the Internal Revenue Code). As the Commercial Money Center leases appear to have been disguised financings with 10% purchase options, Commercial Money Center would not likely have been able to take the tax benefits available to owners of capital equipment. However, the

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8 It is noted that the retention of the residual value in the equipment is one of the more favorable aspects to the lessor of the “loan” (as opposed to the “true sale”) securitization structure. In a “loan” structure, the rights to the equipment remain with the lessor (albeit subject to the lender’s security interest). By contrast, in a “true sale” structure the lessor relinquishes its interest in the equipment – unless, of course, the lessor structures the transaction as a sale of the “stripped” portfolio lease payments only, in which case the lessor will retain its ownership interest in the equipment and the associated tax and accounting benefits.

11 See Thomas McCurnin’s posting of October 18, 2006.
ability to take tax allowances or credits, such as under the Modified Accelerated Capital Recovery System, or investment tax credits, and any other available capital equipment investment tax benefits, would be a clear benefit to other leasing companies, particularly where profits margins are thin. An additional benefit to a lessor/seller who retains legal title to the underlying leased equipment assets is to allow the lessor/seller to depreciate the equipment for book purposes. This benefits the lessor’s balance sheet by allowing the lessor to continue to reflect an asset (the equipment’s residual value) on the lessor’s balance sheet, strengthening the balance sheet and making (among other benefits) lenders more likely to extend credit to the lessor.

Consequently, the four goals described above in parts 2 and 3 of this Appendix 1 (i.e., off-balance sheet treatment, immediate recognition of income, retention of residual value interest, and the ability to receive certain tax and accounting benefits) are achievable simultaneously only by structuring a transaction as a “true sale” of the payment stream alone (i.e., by “stripping”) without a corresponding sale of the underlying chattel paper or leased equipment. It bears repeating, however, that the

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12 In the Case, the court’s legal conclusion that payment intangibles had been created rested on its factual finding that the lease payments had been “stripped” from the leases themselves. According to the court, pursuant to each Sale and Servicing Agreement between Commercial Money Center and NetBank (“SSA”), Commercial Money Center assigned “its contractual rights to future lease payments” and “its rights under the surety bonds” to NetBank. (Case at 2-3.) In addition, “as security for NetBank’s receipt of the lease payments and any surety bond payments, [Commercial Money Center] granted NetBank a security interest in the underlying leases and other property.” (Case at 3.) In other words, stated the court, Commercial Money Center “assigned NetBank both an interest in the payment streams and an interest in the underlying leases, but it separated the two interests.” (Case at 3.) From the simple fact of “separation” (accomplished merely by the particular wording used in the SSA), the court went on to conclude that the lease payments were neither chattel paper nor accounts and, for that reason, necessarily fell “within the payment intangible subset of the catch-all definition of general intangibles.” (Case at 15-16.) Although the court acknowledged that a payment intangible is, as defined under Section 9-102, a general intangible under which the account debtor’s principal obligation is a monetary obligation, the court did not undertake any analysis whatsoever of the lessee’s obligations under the leases (whether under the payment provisions of the leases or otherwise). (See Case at 16.) If the court had done so, the court might have concluded that the lessees had numerous material obligations under the leases in addition to the payment obligations and that these additional obligations could not be separated from the payment obligations or treated as secondary obligations in comparison to the payment obligations by the mere use of some words rather than others in the SSA. For example, the leases that were the subject of the Case were likely “triple-net, hell-or-high-water” leases (i.e., “finance leases” under Article 2A) under which the lessor contractually delegated to the lessee essentially all of the risks, obligations and responsibilities which typically reside with an owner of equipment. These risks, obligations and responsibilities, which derive from the equipment or from its possession and use, include, among others, those related to (1) loss and liability, (2) maintenance, performance and condition, and (3) fees, charges, taxes and assessments. In short, the court might have concluded that, despite the attempted “separation” of the payment rights from the other rights under the leases, the lessees’ obligations to make payments under the leases were inescapably and unavoidably intermingled with the lessees’ other material obligations under the leases, which would make it impossible to isolate the lessees’ payment obligations from their other obligations and then characterize the payment obligations as the “principal” obligation in a set of obligations that, merely as a result of the words used in the SSA, was designed to exclude all non-payment obligations (Case at 3 and 4). If the court had engaged in a fuller analysis such as that described above in this footnote, it is very possible that the court would have avoided the simple (and, some would argue, simplistic) legal conclusion that the mere use of particular granting words in the SSA were sufficient to transmute the payment rights under the lease chattel paper into payment intangibles as defined in Section 9-102.
“stripping” of payments is not necessary to achieve the goal of securitization, which is simply the ability to “securitize” the portfolio assets in order to achieve liquidity at a lower borrowing rate.

In conclusion, although there is a “business need” to sell stripped lease payments in order to obtain favorable accounting and tax treatment, and retain profit potential, there is no need to treat these various structures differently from the sale of, or a loan secured by, the underlying chattel paper under Article 9. The filing of a UCC-1 financing statement, or possession of the chattel paper, is, in our experience, an almost universal practice in these transactions, and we believe that the securitization industry would not be greatly inconvenienced by making this a requirement for perfection in “stripped payment” securitization transactions, as suggested in the body of this letter. In fact, the securitization industry would likely be greatly relieved by the certainty of a required UCC-1 financing statement filing, or possession of the underlying collateral, to assure perfection and relative priority in stripped payments and other interests transferred under chattel paper.
**Issue #1:** Is the payment stream chattel paper (section 9102 (a) (11)) or a general intangible (section 9102 (a) (42) and (61))

**Held:** general intangible, namely a payment intangible

**Issue #2:** Is the assignment a sale or a security interest? If a sale (and a payment intangible), then the transaction is automatically perfected (section 9309 (3)); if a security interest, need to file or possess (there was no filing)

**Held:** a security interest

**Issue #3:** Did Debtor retain possession leases? If so, the security interest is unperfected and falls to the strong-arm challenge of the bankruptcy trustee

**Held:** Remand for factual determination
LEASE SECURITIZATION FINANCING

Lease Company

Proceeds (95) (Minus Expenses) Plus Stock

Lease Receivables Inc.

Proceeds (95) Plus Subordinated Transferor Interest (5+10)

Equipment (10) and Leases (100) (Sale)

Equipment and Leases (Transfer)

Trustee

Trustee Fee

Reserve Fund

Purchase Price (95)

Investors

Interest Rate Exchange Agreement

Guaranteed Rate Provider

Letter of Credit

Servicing Fee

TRADITIONAL SECURED FINANCING

Lease Company

Loan Proceeds

SPV

Trust

Pledge of Equipment and Leases

Banks / Investors
ISOLATE ASSETS

Lease Company

Proceeds

Equipment and Leases (Sale)

SPV

Proceeds

Equipment and Leases (Pledge)

Investors

- True Sale
- Nonconsolidation
- Bankruptcy Remote
# UNIFORM STATE LAWS SCORECARD

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

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

Our thanks to the National Conference of Commissioners on Uniform State Laws ("NCCUSL") for their help in compiling the information above. These revisions are based on information provided by NCCUSL available as of October 2, 2006.

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, (ii) the 1994 Official Text of Article 8 of the UCC and (iii) the 1998 Official Text of Article 9 of the UCC.

2. All states have adopted the 1990 version of Article 2A with the exception of Louisiana and South Dakota. Louisiana has not enacted Article 2A and South Dakota still has the 1987 version of Article 2A. A 2003 version of Article 2A has been introduced in Kansas and Oklahoma, but has not yet been enacted in any state.

3. New York and South Carolina are the only states that still have the 1951 version of Articles 3 and 4.
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<tr>
<th>Name</th>
<th>Firm</th>
<th>Address</th>
<th>Contact Information</th>
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<tbody>
<tr>
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---

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Term expires:  Indefinite
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<td>Thomas M. Ward</td>
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<tr>
<td>University of Maine School of Law</td>
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<td>246 Deering Avenue</td>
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<tr>
<td>Portland, ME  04102</td>
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<tr>
<td>Tel:  207.780.4355</td>
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<td>Fax:  207.780.4239</td>
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<tr>
<td>Caroline C. Galanty</td>
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<td>Bank of America, N.A.</td>
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<tr>
<td>333 South Hope Street, 24th Floor</td>
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<tr>
<td>Los Angeles, CA  90071</td>
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<td>Fax:  213.621.8757</td>
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<td>Email: <a href="mailto:caroline.x.galanty@bankofamerica.com">caroline.x.galanty@bankofamerica.com</a></td>
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# Uniform Commercial Code Committee
## October 2006

<table>
<thead>
<tr>
<th>Group</th>
<th>Chair(s)</th>
<th>Vice Chair(s)</th>
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<td>Committee</td>
<td>Stephen L. Sepinuck</td>
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<td>Mario J. Ippolito</td>
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<td>Kristen Adams</td>
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<td>International Commercial Law</td>
<td>Larry I. Safran</td>
<td>Kate Sawyer</td>
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<td>Penelope Christophorou</td>
<td>Meredith S. Jackson</td>
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<td>Teresa Davidson</td>
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<td>Stephen C. Veltri</td>
<td>Greg Cavanagh</td>
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<td>Sale of Goods</td>
<td>Scott Burnham</td>
<td>Keith A. Rowley</td>
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<td>Pauline Stevens</td>
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<td>Article 7</td>
<td>William H. Towle</td>
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<td>Commercial Law Newsletter</td>
<td>Maria Milano</td>
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<td>Terri A. Motosue</td>
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<td>Mary Binder</td>
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<td>Michael Ferry</td>
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<td>William Woodward, Jr.</td>
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<td>Deposit Account Control Agr.</td>
<td>Edwin E. Smith (UCC)</td>
<td>John D. Pickering</td>
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<td>Article 9 Forms</td>
<td>Katherine Simpson Allen</td>
<td></td>
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<td>State Certificate of Title Laws</td>
<td>Alvin C. Harrell</td>
<td>Lee Anne Leathers-Lutz</td>
</tr>
</tbody>
</table>
| Working Groups               | Electronic Contracting Issues | Kathleen M. Porter  
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|                             | Simplification               | Louis Del Duca  
|                             |                             | Paul Shupack |
|                             | Transferability of Elec. Assets | Richard M. Newman  
|                             |                             | (UCC) |
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|                             | Committee on Institutes & Seminars | James J. Murphy |
|                             | Consumer Law Fellows         | David McMahon  
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|                             |                             | Alan White |