Committee on Commercial Finance
Lynn Soukup, Chair, Pillsbury Winthrop Shaw Pittman LLP

Let me begin my first letter as chair of the Commercial Finance Committee by thanking the current and past leadership of the Committee for their many contributions. In particular thanks to Chris Rockers, our immediate past chair, for his leadership of the Committee and his leadership of a new taskforce working to enhance the Section’s offerings for commercial and corporate lawyers. I’d also like to recognize Don Rapson, one of the first members of the ComFin Committee and an outstanding commercial lawyer and educator. A remembrance of Don prepared by fellow members of the ComFin and UCC Committees reflects how much Don and his contributions will be missed.

During and since the 2007 Annual Meeting in August, the ComFin Committee has had a full schedule of programs and projects. I’d like to highlight our current projects and encourage you to participate in them.

More...

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

Although there are no longer any drafting committees working on revisions to the Uniform Commercial Code, the UCC Committee remains active in a variety of ways. In addition to planning CLE programming for the Spring Meeting of the Business Law Section, Committee members are involved in a variety of activities designed to provide timely and useful information to the practicing bar and ensure that commercial transactions can proceed smoothly. What follows is a brief description of some of the most recently inaugurated projects. This description also serves as a call for assistance; anyone interested in becoming involved should contact the person identified.

More...

Donald Rapson Remembrance

On Saturday, October 6, 2007, Donald J. Rapson, one of the initial members of the Commercial Financial Services Committee, died. Assisting in the formation of the Commercial Finance Committee is but one of Don’s many, many contributions to our profession and to the law. Don was a successful lawyer in private practice, the Senior Vice President and Assistant General Counsel of The CIT Group for fifteen years and an adjunct professor of law at Columbia University and NYU.

More...
Mark Your Calendar!

- **December 15, 2007** – ADR in Commercial Finance Colloquium is seeking abstracts of proposed papers for publication and presentation at the Business Law and Dispute Resolution Sections by December 15. Details on the information to be submitted and plans for presentations and publications are available at [http://www.abanet.org/dch/comadd.cfm?com=CL190000 &pg=2](http://www.abanet.org/dch/comadd.cfm?com=CL190000 &pg=2)

- **April 10 - 12, 2008, Dallas, TX** – The Business Law Section Spring Meeting will feature CLE programs on ADR in commercial finance transactions, cross-border lending, syndicated loans, alternative energy finance and the ever popular annual review of commercial law developments, as well as a full schedule of subcommittee and taskforce meetings.

Committee on Uniform Commercial Code: Spotlight

**Stephen L. Sepinuck, UCC Committee Chair**

**Kristen Adams, Chair, Subcommittee on General Provisions & Relations to Other Law**

The purpose of this column is to identify some of the most disconcerting 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 to shine a spotlight on analytical errors, and thereby provide practitioners and judges with reason to disregard the opinion.

*In re Rowe,*

369 B.R. 73 (D. Mass. 2007)

This case involves a very restrictive application of U.C.C. § 9-203(b)'s requirement of an authenticated security agreement. It is reminiscent of the well known, but widely disfavored, holding in American Card Co. v. H.M.H. Co., 196 A.2d 150 (R.I. 1963).

More...

Featured Articles

**Borrower and Guarantor Defenses - The Blue Hills Case**

David R. Kuney, Sidley Austin, LLP

The *Blue Hills* decision covered a broad array of borrower/guarantor defenses to loan and guaranty enforcement. Not only did the court reject many of them, but it showed a willingness to permit acceleration without notice, and to use violations of the separateness covenants as a basis to support the acceleration. Equally important, the court found the guarantors liable for the full amount of the loan, not just for damages "caused" by the breach of the covenant. *Blue Hills* may be the first in many cases in which borrowers seek to defeat loan covenants by arguing "bad faith" and defects in the notice and cure. Because Blue Hills requires a borrower to comply strictly with the terms of the mortgage, it represents an important case for the lending community.

More...
Ethics: Conflicts of Interests for Transactional Attorneys  
Thomas B. Mason, Zuckerman Spaeder LLP

As an attorney who advises law firms and lawyers on ethics, I frequently hear complaints from transactional lawyers that the ethics rules appear to have been written by litigators and are ill-suited to the realities of transactional practice. For many, the ethics rules concerning conflicts of interest seem particularly geared towards litigation. But with some basic background and a few practice tips, transactional attorneys can avoid the pitfalls of the conflicts rules.

More...

Delaware Update - 2007 Legislation Amending Certain Alternative Entity Laws and Articles 8 & 9 of Delaware’s UCC  
Norman M. Powell, Young Conaway Stargatt & Taylor, LLP

In its legislative session ended June 30, 2007, the Delaware General Assembly enacted amendments to the Delaware Limited Liability Company Act, 6 Del. C. § 18-101 et seq. (the "DLLC Act"), the Delaware Revised Uniform Limited Partnership Act, 6 Del. C. § 17-101 et seq. (the "DLP Act"), and Articles 8 and 9 of the Uniform Commercial Code as in effect in the State of Delaware, 6 Del. C. § 1-101 et seq. (respectively, "Delaware Article 8" and "Delaware Article 9"). The amendments to the DLLC Act and the DLP Act took effect on August 1, 2007; the amendments to Delaware Article 8 and Delaware Article 9 took effect upon enactment into law on July 5, 2007.

More...

Committee on Commercial Finance: Subcommittee, Task Force and Liaison Reports

Subcommittee on Agricultural and Agri-Business Financing  
T. Randall Wright, Chair; R. Lawrence Harris, Vice-Chair

The growing wine industry and the legal and regulatory issues that confront it was the topic when the Agricultural and Agri-Business Financing Subcommittee met in October in conjunction with the American Agricultural Law Association in San Diego, CA. Jay M. Behmke, a partner at the Carle, Mackie, Power & Ross law firm, and Lindsay Wurlitzer, Senior Vice President of American AgCredit, were the featured speakers. Their presentations included the historical growth and projected future growth of the industry, issues in wine labeling, and state-law constraints relating to distribution of wine products.

The next meeting of the subcommittee is in Dallas, at the Spring section meeting. The topics for that meeting will be announced later, but ideas from ABA members are always welcome.

Subcommittee on Creditors’ Rights  
Carolyn P. Richter, Chair; Shannon Lowry Nagle, Vice-Chair

We hope you can join us in Dallas for the next ABA Spring Meeting (April 10-12). Our topic will most likely focus on issues faced by hedge funds and private equity firms lending to new and distressed credits, and will look at regulatory, tax, contractual,
market changes and other considerations.

Our last spring meeting topic was "Hedge Funds in Chapter 11 Cases", which was presented by a panel lead by the new Vice-Chair of our Committee, Shannon Lowry Nagle. Shannon is a partner in the New York office of O'Melveny and Myers and specializes in financial restructuring and bankruptcy.

We also met at the National Conference of Bankruptcy Judges in November, where we discussed claims trading in bankruptcy, including issues negotiated between a buyer and a seller, and the new Enron decision in which the appellate court did not allow equitable subordination of a lender's claim to extend to third parties who bought the lender's claims. Shannon also lead that discussion, which was followed by an update from Tampa, Florida bankruptcy lawyer, Bill Zewadski, on how debtors residing in Florida can utilize the Florida homestead exemption, which is unlimited in amount, following the Bankruptcy Reform Act's amendments to Section 522(b)(3) of the Bankruptcy Code (which impact the amount a debtor can claim as a homestead exemption).

**Subcommittee on Cross-Border and Trade Financing**

*Daryl Clark, Chair*

As the newly appointed chair of this Subcommittee, it is my pleasure to take this opportunity to advise of the Subcommittee’s Mission Statement. It is: "The mission of the Cross-Border and Trade Financing Subcommittee is to have a forum for the promotion of understanding existing legislation, legislative developments and legal practices regarding secured and unsecured lending and trade finance in relevant foreign jurisdictions and to facilitate an awareness among counsel on how such laws and legal practises impact the participation of domestic lenders in such jurisdictions."

As you may know, the Cross-Border and Trade Financing Subcommittee is a sister subcommittee to the UCC International Commercial Law Subcommittee and it will be the approach taken by this Subcommittee that where possible and appropriate our meetings will be "joint efforts" with the UCC International Commercial Law Subcommittee.

At the upcoming Spring meeting, there will be a CLE program on UNCITRAL and other international projects in the commercial law and insolvency area. The Cross Border and Trade Financing Subcommittee will be a co-sponsor of this CLE program along with the Business Bankruptcy Committee and the UCC International Commercial Law Subcommittee.

The Subcommittee is also looking at the possibility of having a meeting in Europe during the late Spring which, if scheduled, will take place in lieu of the Spring meeting in Dallas in April 2008. If this scheduling change occurs, the appropriate communication will be made to all members of the Subcommittee well in advance of the new scheduled meeting date.

For the Spring meeting in Dallas, the CLE program co-sponsored by this Subcommittee is scheduled for Friday, April 11, 2008 from 8:00 a.m. to 10:00 a.m. A thirty minute meeting of the Subcommittee will follow immediately after the CLE program.

**Subcommittee on Intellectual Property Financing**

*Matthew W. Kavanaugh, Chair, John E. Murdock III, Vice-Chair*
At the Annual Meeting in San Francisco, the Intellectual Property Subcommittee hosted a presentation by three speakers - James Gatto, a partner at Pillsbury Winthrop, Shaw Pittman; Sean Kane, a partner at Drakeford & Kane LLC; and Don McGowan, in-house counsel at Microsoft in charge of Games Studio division. James and Sean discussed legal issues relating to Second Life and other virtual worlds. Don discussed the development and financing of computer games. Links to the materials from the program are available at the Subcommittee's ABA webpage.

The Subcommittee plans to hold a meeting at the ABA Business Law Section Spring Meeting in Dallas and requests that suggested topics for that meeting, as well as any other items of interest or proposed projects relating to IP financing, be sent to the Chair, Matt Kavanaugh, at mkavanaugh@buchalter.com and to the Vice-Chair, John Murdock, at jmurdock@boultcummings.com.

Subcommittee on Lender Liability
Jeffrey W. Kelley, Chair, Mathew S. Rotenberg, Vice-Chair

The Lender Liability Subcommittee is in the process of planning a program for the Spring Meeting on recent cases involving claims against lenders. Additional details on the program will be available in the next issue. If you are aware of recent cases or would like to participate in the program, please contact us. We hope to see you at the Spring Meeting.

Subcommittee on Loan Documentation
Jeremy S. Friedberg, Chair, Bobbi Acord and Scott Lessne, Vice-Chairs

"'Applicable Other Law' -- ERISA, Sarbanes-Oxley and the Patriot Act in Loan Documentation" was our topic when the Loan Documentation Subcommittee met in August at the ABA Annual Meeting. Jeremy Friedberg was joined by expert panelists Kurt Lawson and David Mittleman to explore the impact of "other" laws (ERISA, Sarbanes-Oxley and the Patriot Act) on commercial loan documentation and the basic issues about which loan documentation counsel needs to be aware.

Bobbi Acord, Parker, Hudson, Rainer & Dobbs LLP, and Scott Lessne, CapitalSource Finance LLC, are the new co-vice chairs of the Loan Documentation Subcommittee. Please welcome them at our next meeting in Dallas, Spring 2008. The topics for that meeting will be announced soon; please submit any ideas for programs you would like to see.

Subcommittee on Loan Workouts
Steven B. Soll, Chair, Cathy L. Reece, Vice-Chair

The Loan Workout Subcommittee has new and energetic leadership. Steven B. Soll, a Member at the Firm of Otterbourg, Steindler, Houston & Rosen, P.C. and Cathy L. Reece, a Member at the Firm of Fennemore Craig, P.C. have been appointed Chair and Vice-Chair of the Subcommittee. Steve, Cathy and John R. Clemency, a Partner at Greenberg Traurig, LLC presented a panel at the Fall Commercial Finance Meeting in Phoenix entitled: On the Downturn: Trends and Issues in Loan-to-Own, Workouts and Foreclosures on Equity Interests. Each panelist prepared written material and a PowerPoint presentation on their respective topic. If you would like to obtain a copy of the written materials or PowerPoint presentation, please contact Steve Soll. The Subcommittee intends to present a panel presentation at our April, 2008 subcommittee meeting in Dallas. As we prepare for this
meeting, we welcome suggestions for program topics, as well as volunteers for the panel.

**Subcommittee on Real Estate Financing**  
*Kathleen Hopkins, Chair; Ed Lester, Vice-Chair*

The Real Estate Financing Subcommittee started this year with a bang, making a presentation at the fall Commercial Finance meeting entitled "Avoiding Jail, Disbarment and Other Bad Consequences: What You Need to Know About Real Estate Collateral." Although having dirt lawyers at the CFA seems a bit out of the ordinary, since many financings include some aspect of real estate, we really did fit in quite well. Our subcommittee vice-chair Ed Lester moderated a distinguished panel including Ray Carpenter from Holland & Knight (a state and federal tax law guru), John Hoag from Stewart Title (an undisputed genius on title insurance), Kevin Napper from Carlton Fields (a truly wise man on issues of white collar criminal law) and Norm Powell from Young Conaway Stargatt & Taylor (frequent newsletter contributor and all-knowing on matters of unauthorized practice of law and ethics violations). Our only regret was that the short time allocated to the program was insufficient to do the topic justice. Accordingly, we plan to invite back our panel members to our April, 2008 subcommittee meeting in Dallas, to continue and expand on this critical topic. Hope you can join us!

**Subcommittee on Securitization and Derivatives**  
*Teresa Wilton Harmon, Chair; Anthony R.G. Nolan, Vice-Chair*

Subcommittee on Securitization and Derivatives Teresa Wilton Harmon, Chair, Anthony R.G. Nolan, Vice-Chair  
The Securitization and Derivatives Subcommittee met at the ABA Annual Meeting in San Francisco. The Subcommittee discussed a broad range of topics, including developments in the subprime mortgage market, the status of indenture trustee and servicer reporting under Reg AB, developments in Canadian securitization, and newly updated rating agency derivatives criteria. Eric Marcus of Kaye Scholer continues his work on revising the ABA's Deposit Account Control Agreement to fit securitization transactions. Many thanks to Eric and his working group.

We look forward to meeting again in 2008 and are particularly excited that the 2008 Annual Meeting will be in New York City. Please forward topic or speaker suggestions to subcommittee cochairs Teresa Harmon (tharmon@sidley.com) or Anthony Nolan (anthony.nolan@klgates.com). The subcommittee is also looking for volunteers to help plan future events, work on the subcommittee website and assume future leadership roles. Please be sure to let us know if you are interested in becoming more involved.

The following recent cases may be of interest to securitization practitioners:

**Financial Insurers:**  
*Fin. Sec. Assurances Inc. v. Stephens, Inc.*, 2007 Lexis App. 22214 (11th Cir. 2007). The Eleventh Circuit recently concluded that FSA, as financial insurer of municipal bonds, could not bring 10b-5 securities claims against the underwriters on the bonds. FSA made four arguments in favor of its standing to bring 10b-5 claims, each of which was rejected by the court.

**Bankruptcy Remote SPVs:**  
Bankr. LEXIS 2424 (Bkrtcy. N.D. Ill. 2007), the Bankruptcy Court in two separate decisions upheld the separateness of a financing SPE from its parent. The separateness was challenged under an Illinois alter ego theory, not on substantive consolidation grounds. The Court also rejected the argument that course of performance had amended the loan contract so that the parent of the financing sub had legally become the borrower.

In re Ark-La-Tex Timber Co., 482 F.3d 319 (5th Cir. 2007). A recent decision of the United States Court of Appeals for the Fifth Circuit also refused to collapse entities on alter ego grounds and stated that a non-debtor could not be substantively consolidated with a debtor.

Subcommittee on Syndications and Lender Relations
Anthony R. Callobre, Chair, Gary D. Chamblee and Michelle White Suárez, Vice-Chairs

The Syndications and Lender Relations Subcommittee of the Commercial Finance Committee held a joint meeting with the Syndicated Bank Financing Subcommittee of the Developments in Business Financing Committee on Monday, August 13, 2007 in connection with the ABA annual meeting in San Francisco. The meeting featured some terrific speakers! Bridgett Marsh (Associate General Counsel of the LSTA and new vice-chair of the Syndicated Bank Financing Subcommittee) led a very robust discussion of the current distressed state of the syndications market. Rick Brown of Kennedy Covington and Christian Brose of Helms Mullis (each a Vice-Chair of the Model Intercreditor Agreement Task Force for Second Lien Financings) led a panel discussion involving the current state of the second-lien financing market, including a report on current trends in intercreditor arrangements between first-lien and second-lien creditors and a status report on the work of the Model Intercreditor Agreement Task Force. The Syndications and Lender Relations Subcommittee of the Commercial Finance Committee and the Syndicated Bank Financing Subcommittee of the Developments in Business Financing Committee once again will meet jointly at the ABA Spring Meeting in Dallas to present a CLE panel presentation on the current state of the syndicated loan market. The panel will be moderated by Eliot Ganz of the LSTA and will feature other leading syndications industry legal representatives.

Liaison to Business Law Today
Kathleen Hopkins, Editor-in-Chief

We need your tales of WEIRD COLLATERAL. Next summer, the Section's magazine, Business Law Today, is planning on producing a mini-theme issue called Weird Collateral. We are seeking articles from UCC and ComFin committee members on unusual collateral and how it gets secured, foreclosed, etc. (and problems with same, like champerty). If you handle unusual collateral (slot machines? live animals? i.p.? perishables? lawsuits? body parts? fishing quota rights? etc...) we would like to hear from you. Please contact me at khopkins@rp-lawgroup.com if you are interested in writing on this issue (or any other issue which you think would interest our section members). To make it into the Weird Collateral issue we need your drafts by end of February. Author guidelines can be found on-line at: http://www.abanet.org/buslaw/blt/guidelines.html

Model Intercreditor Agreement Task Force
Gary D. Chamblee, Chair, Alyson Allen, Christian Brose, Richard K. Brown, Robert L. Cunningham, Jr., and Jane Summers, Vice-Chairs
The Model Intercreditor Agreement Task Force met on November 8th in Scottsdale, Arizona for an all day working session to discuss and revise the Model Intercreditor Agreement. The meeting was held at Buchalter Nemer’s offices courtesy of Matt Kavanaugh in conjunction with the joint meeting of the ABA Commercial Finance Committee and the annual Commercial Finance Association meeting. The agenda included a discussion of "market" provisions in intercreditor agreements with the goal of identifying provisions in the draft model agreement that can be considered "market" in a constantly changing financial environment and provisions where no market standard has yet developed. That discussion was led by Rick Brown of the Kennedy Covington law firm. Alyson Allen of Ropes & Gray led a discussion of the bankruptcy provisions in the draft agreement and of the broader impact of the bankruptcy laws on the enforceability of other provisions in the draft agreement. Bob Cunningham of the Gibson, Dunn law firm led a discussion on balancing the interests of first and second lien lenders.

New members are welcome. In particular, the Task Force would like to encourage in-house counsel at financial institutions to join the Task Force. We want to be sure that a broad perspective on first and second lien issues is reflected in the work of the Task Force. The Task Force website can be accessed at http://www.abanet.org/dch/committee.cfm?com=CL190029.

Committee on Uniform Commercial Code: Subcommittee and Task Force Reports

Subcommittee on Equipment Leasing
Barry Graynor, and Teresa Davidson, Co-Chairs

(1) At the annual ABA meeting on August 13, 2007 G. Anthony Lopez, Senior Managing Director, FTI Consulting, Inc., gave a presentation on the Principles of Lease Accounting: US GAAP and International Financial Reporting Standards (IFRS). His talk provided an historical perspective on lease accounting, illustrated the basic lease accounting (risks and rewards) model, and described recent SEC, IFRS, and FASB leasing and related initiatives. Mr. Lopez can be reached at tony.lopez@fticonsulting.com.

(2) The subcommittee continues to monitor the proposed Article 2/Article 2A amendments. Earlier this year, the Texas legislature considered introducing revised Articles 2 and 2A (2003). Several industry groups objected to the proposed language and the revisions were not introduced. A similar effort was made in Oklahoma during 2007 and may be proposed again in 2008. In New Mexico a bill was introduced that would have amended Article 2A significantly, by subjecting commercial leases to the same provisions applicable to consumer transactions (2A-106 &108). After intense lobbying by various groups Article 2A was left substantially intact in New Mexico.

(3) Members of the subcommittee authored the annual UCC survey on equipment leasing for The Business Lawyer (August 2007), which should be published shortly.

(4) The co-chairs welcome ideas and suggestions from the general membership for the ABA Section of Business Law Spring Meeting in April 2008. Please contact either Barry Graynor at graynorba@cooley.com or Teresa Davidson at
Subcommittee on General Provisions

Kristen David Adams, Chair

The General Provisions Subcommittee sponsored a program at the Annual Meeting entitled, Deals, Dents & Deficiencies in Car Purchases and Financing – What Lawyers Representing Consumers Need to Know about the UCC. The program, which was moderated by Co-Chair Gail Hillebrand and presented by Professor Michael M. Greenfield, the Walter D. Coles Professor of Law at Washington University in St. Louis, was based on a single car sale raising issues of defects, financing, and repossession. The program highlighted and described the relevant Article 2 and Article 9 issues as a typical transaction might unfold. This program was presented in a "law school" fashion and was geared toward attorneys who are not UCC experts and who may find themselves needing to know how these portions of the Code work in representing consumers.

As part of a special program, the ABA will be making this program available on-line and is also in the process of preparing a limited number of audio recordings of the program, together with the course materials, to be distributed via compact disc to legal-services attorneys. If you are interested in either, please contact Kristen Adams, Chair of the General Provisions Subcommittee, at adams@law.stetson.edu.

Subcommittee on Letter of Credit

George Hiser, Chair

The Letter of Credit Subcommittee had a productive meeting in San Francisco. Topics included the use of letters of credit as substitutes for supersedeas bonds, the latest developments concerning UCP 600, the reestablishment of a Task Force on Governmentally Mandated Forms of Letters of Credit and new case law developments. Our future plans include continued work on the project concerning letters of credit as substitutes for supersedeas bonds and the Task Force on Governmentally Mandated Forms of Letters of Credit. The Subcommittee is also considering the drafting of a model Reimbursement Agreement.

Subcommittee on Payments

Sarah Howard Jenkins, Charles C. Baum., Co-Chairs and Greg Cavanagh, Vice-Chair

In April of 2007, NACHA, the Electronic Payments Association reported that approximately 16 billion automated clearing house (ACH) payments, valued at 30.3 trillion dollars, were made in 2006, a 14.5% increase over 2005. Approximately half of these payments were consumer bills including pre-authorized debits, internet and telephone payments, and checks converted into ACH payments. Attendees at the August 12th meeting of the Subcommittee on Payments heard an engaging panel presentation on Electronic Payments Systems --The Death Knell for UCC Article 4 or a Clarion Call for Modernization? by UCC and Banking Law experts Stephanie Heller, Counsel and Vice President of the Federal Reserve Bank of New York; Fred Miller, Professor Emeritus and Of Counsel Phillips, McFall, McCaffrey, McVay and Murrah, P.C.; Linda Rusch, Frederick N. & Barbara T. Curley Professor of Commercial Law at Gonzaga University School of Law; and Carlyle Ring, Jr., Of Counsel Ober, Kaler, Graves & Shriver. The panel described the electronic payments innovations constraining the continued relevancy of UCC Article 4;
identified inconsistencies in prevailing payment law on issues such as unauthorized transfers, error resolution, and finality; debated alternatives available for resolving the current complexity of domestic payment law; and revisited the coordinated state and federal process that produced Article 4A. Future meetings of the Subcommittee on Payments will continue the dialogue on the prevailing legal regimes, the burgeoning electronic payment innovations, and the need, if any, to foster the continued viability of the state payment laws.

**Article 9 Forms Task Force**

*Cindy Chernuchin, Chair*

We are actively gathering, editing and compiling documents and articles for the 2nd Edition of Forms Under Article 9. The goal is to publish in 2008.

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**Joint Subcommittee Reports**

**Subcommittees on** [Secured Lending (ComFin)] and [Secured Transactions (UCC)]

*Katherine Simpson Allen, Chair (ComFin), Leianne S. Crittenden, Chair (UCC), Wansun Song, Vice-Chair (ComFin), Pauline M. Stevens, Vice-Chair (UCC)*

The Secured Lending subcommittee of the ComFin Committee and the Secured Transactions subcommittee of the UCC Committee held a joint meeting at the 2007 annual meeting. The program entitled *New Players/New Games/New Foreclosure Strategies: Handicapping Second Lien vs. Senior Lien Foreclosure Disputes* featured Larry Engel, a workout and insolvency partner at Morrison & Foerster LLP, Gary Chamblee, a finance attorney at Womble Carlyle Sandridge & Rice, PLLC and Chair of the ABA Model Intercreditor Agreement Task Force, and Mike Gillfillan, a partner at Meriturn Partners which specializes in buyouts and restructurings. The seasoned practitioners discussed issues they foresee arising as the second lien craze moves its way through an economic life cycle. The program materials can be found on the [Secured Lending subcommittee's website](http://www.abanet.org/buslaw/committees/CL190000pub/newsletter/200712/home.shtml).

As we prepare for the spring meeting in Dallas, we welcome suggestions for program topics.

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**Joint Task Force Reports**

**Joint Task Force on Filing Office Operations and Search Logic**

*James D. Prendergast, Co-Chair, Paul Hodnefield, Co-Chair*

The Task Force on Filing Office Operations and Search Logic is formed from two committees of the Business Law Section of the ABA - the Uniform Commercial Code Committee and the Committee on Commercial Finance. The Task Force was formed to address issues relating to filing and searching under Article 9 of the Uniform Commercial Code. The Taskforce will cooperate closely with IACA to (1) collect and disseminate information on how filing systems operate, with particular attention to differences among individual filing offices; (2) work with IACA and individual...
filing offices to develop, modify, and implement rules that will help filing offices perform their duties and serve their constituencies; (3) communicate IACA’s advice on how best to use the services of filing offices; and (4) make recommendations on whether and how the UCC should be amended to make filing and searching easier, uniform, and more certain to yield the best results.

At the Fall Meeting of the Commercial Finance Committee, held in Phoenix on Wednesday November 7, 2007, the day preceding the Commercial Finance Association Conference, the Task Force presented a panel on Search and Filing Issues. The panelists included the two co-chairs of the Task Force, Jim Prendergast of the UCC Division of First American and Paul Hodnefield of Corporate Service Company, and Kelly Kopyt, the UCC Administrator of the Commonwealth of Massachusetts. Ahead, the Task Force will join a roundtable discussion of filing office issues at the May meeting of IACA, will hold meetings of the Task Force with related presentations at the Spring and Annual meetings of the Section, will commence discussions with the IRS on lien filing and related issues, and will attempt to be involved in the deliberations over S. 1124 on improving public notice and access to tax lien information.

The Task Force is off to a good start.

UCC Scorecard

UNIFORM STATE LAWS SCORECARD
Survey of Adoptions of Revised Official Text of the UCC
As of September 27, 2007

Committee Leadership Rosters

- Committee on Commercial Finance
  (as of 11/2007)

- Committee on Uniform Commercial Code
  (as of 11/2007)
To review our privacy statement, go to http://www.abanet.org/privacy_statement.html.
MESSAGE FROM THE CHAIR:
COMMERCIAL FINANCE COMMITTEE (Fall 2007)

By: Lynn Soukup

Let me begin my first letter as chair of the Commercial Finance Committee by thanking the current and past leadership of the Committee for their many contributions. In particular thanks to Chris Rockers, our immediate past chair, for his leadership of the Committee and his leadership of a new taskforce working to enhance the Section’s offerings for commercial and corporate lawyers. I’d also like to recognize Don Rapson, one of the first members of the ComFin Committee and an outstanding commercial lawyer and educator. A remembrance of Don prepared by fellow members of the ComFin and UCC Committees reflects how much Don and his contributions will be missed.

During and since the 2007 Annual Meeting in August, the ComFin Committee has had a full schedule of programs and projects. I’d like to highlight our current projects and encourage you to participate in them:

- **Model Intercreditor Agreement Taskforce** seeks to develop a balanced, market-based model form of intercreditor agreement reflecting market expectations and standard practices. A podcast of the MICA Taskforce initial meeting can be accessed here and drafts of the agreement and related reports, as well as a link to join the Taskforce, can be accessed here.

- **Taskforce on Syndications Chapter for ABL Treatise** is preparing a discussion of the syndicated loan market for the leading asset-based lending treatise. Information about the project and a link to join the Taskforce can be accessed here.

- **Filing Office Operations and Search Logic Taskforce**, a joint taskforce with the UCC Committee, is involved in making the UCC filing and search functions more reliable for users (e.g. financial institutions and commercial lawyers). Materials from the FOOSL Taskforce presentation at the ComFin Fall meeting, information about the project and a link to join the Taskforce can be accessed here.

- **ADR in Commercial Finance Colloquium** is a collaborative effort of the UCC, ComFin and Dispute Resolution Committees, the ABA Dispute Resolution Section, the American College of Commercial Finance Lawyers and the College of Commercial Arbitrators to explore how ADR techniques can be structured to better address the legal and factual complexities and needs of the parties in disputes involving commercial finance transactions. Speakers and authors are needed – a CLE program is scheduled for the Spring 2008 meeting, and papers are being solicited for publication. Additional information about the project, including deadlines for submitting proposals for papers, can be accessed here.
• **Deposit Account Control Agreement Taskforce**, a joint taskforce with the UCC, Banking and Consumer Financial Services Committees, continues its work on adapting the model control agreement to specific transactions, including securitizations. The DACA Taskforce met on November 29, 2007 in New York. The model agreement and supplements, Taskforce reports and drafts of additional agreements, as well as a link to join the Taskforce, can be found here.

• **Business Law Today**, the Section’s news magazine for business lawyers, is planning a symposium of brief articles on “Weird Collateral” for the July/August 2008 issue. If you are interested in contributing an article or have thoughts on what would be “weird” please contact Kathleen Hopkins (khopkins@rp-lawgroup.com).

ComFin held its Fall Meeting on November 7. In connection with the Fall meeting, the MICA Taskforce held its first working session on November 8 and ComFin made its annual presentation at the CFA Convention on November 9 (on intercreditor agreements in the second lien market). In addition, the Creditors' Rights Subcommittee met at the National Conference of Bankruptcy Judges in October. Information about these events, including agendas, materials and speaker information, is posted on the ComFin Committee website. Thanks to all whose efforts made these programs and meetings possible.

ComFin and its subcommittees and taskforces have prepared brief “**mission statements**” describing their activities – please look over the variety of topics and industries that are covered by the Committee and join the groups that interest you. Also please help recruit new members to the Committee, subcommittees and taskforces by sharing those descriptions, this newsletter and the materials from the website with your colleagues (usually the newsletter is only accessible to UCC and ComFin Committee members, but for this issue we’ve made it an “open” publication).

Planning for the Spring 2008 meeting on April 10-12 in Dallas, Texas is well underway, as are arrangements for the joint UCC and ComFin dinner on Thursday April 10th. Please let me or other members of the Committee leadership know if you have suggestions for program or subcommittee meeting topics, projects or publications; if you have an item for the next Commercial Law Newsletter, Business Law Today or other Section publications; or if you are interested in being more involved in Committee activities. Our **leadership directory** is attached with contact information for our subcommittee and taskforce chairs and vice chairs.

The next issue of the Commercial Law Newsletter will be distributed in advance of the Spring 2008 meeting, with more details on the plans for programs and meetings (which will begin Thursday April 10 in the morning and conclude on Saturday April 12 in the afternoon) and a complete schedule for the ComFin and UCC Committees.

Finally, please welcome Professor Steven Schwarcz as an Advisor to the Section and the ComFin Committee. Professor Schwarcz brings the perspective of having been a leading practitioner and innovator in capital markets transactions as well as a scholar.
with a wide range of interests, including the role lawyers play (and should play) in the
integrity of financial markets. Information about Professor Schwarcz’s publications and
areas of interest can be found at http://www.law.duke.edu/fac/schwarcz. Professor
Schwarcz will be attending our Committee meetings and participating in our efforts to
coordinate the ComFin Committee activities with developments in commercial law and
financial markets.

Lynn
lynn.soukup@pillsburylaw.com
Chair’s Column

Although there are no longer any drafting committees working on revisions to the Uniform Commercial Code, the UCC Committee remains active in a variety of ways. In addition to planning CLE programming for the Spring Meeting of the Business Law Section, Committee members are involved in a variety of activities designed to provide timely and useful information to the practicing bar and ensure that commercial transactions can proceed smoothly. What follows is a brief description of some of the most recently inaugurated projects. This description also serves as a call for assistance; anyone interested in becoming involved should contact the person identified.

Two Book Projects

In cooperation with the Publications Committee, the UCC Committee has begun work on new editions to two of its best sellers: FORMS UNDER REVISED ARTICLE 9 (2002); and THE NEW ARTICLE 9 (2d ed. 2000).

The new edition of the Forms book is being edited by Cindy J. Chernuchin, and will include a variety of updated form security agreements, control agreements, opinion letters, as well as some form notifications and acknowledgment letters. Anyone interested in submitting a form or in reviewing those that have been submitted should contact Cindy.

The new edition of the Article 9 book (which will likely be renamed) will include the text and comments of revised Articles 1 and 9, relevant PEB Commentaries, a synopsis of Article 9 prepared by Ed Smith, an index to the provisions of Article 9, and a variety of charts designed to assist practitioners in understanding and applying Article 9. Chief among these will be a chart prepared by Professor Arnold Rosenberg of foreign filing systems and how they should be treated under § 9-307(c). Anyone interested in submitting additional material for the book should send it to me, Stephen L. Sepinuck.

Weird Collateral

The July/August edition of Business Law Today is hoping to include a symposium of brief articles on “Weird Collateral.” No doubt we will be soliciting submissions soon. For now, we are looking for someone willing to serve as the UCC Committee’s point person on the symposium. That person will work with one of the BLT board members and with a representative of the Committee on Commercial Finance to select and edit the submissions. Anyone interested should contact me.

New Regional Coordinators

The UCC Committee is in the process of appointing Regional Coordinators to serve as liaison between the UCC Committee of the ABA Business Law Section and state bar associations within their region. This is done primarily through each state bar association’s UCC Committee, if it has one. If a state bar association does not have a UCC Committee, then the Regional Coordinator works with whatever the most appropriate and applicable group or leader is. The Regional Coordinators tasks are:
(1) to ensure that the members of the bar within their respective regions are aware of the programming, resources, and publications provided by the UCC Committee and have input into the policies and projects of the UCC Committee.
(2) to assist state and local bars reprise UCC Committee programming at the local level; and
(3) to identify for those organizing CLE programs for the UCC Committee attorneys from the area where the programs will be offered who would be effective presenters.

The Regional Coordinators for three regions are already on board:

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<thead>
<tr>
<th>Jeremy S. Friedberg</th>
<th>Darrell W. Pierce</th>
<th>John A. Beckstead</th>
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<td><strong>Southeast Region</strong></td>
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Anyone interested in becoming a Regional Coordinator for either the Northeast or South Central Region should contact me.

**New Task Force**

The UCC Committee and the Committee on Commercial Finance have formed a new joint Task Force on Filing Office Operations and Search Logic. Its tasks are:

(1) to collect and disseminate to those who file and search financing statements information on how filing systems operate, with particular attention to differences among the various offices;
(2) to work with IACA (the International Association of Commercial Administrators) and individual filing offices to develop, modify, and implement rules that will help filing offices perform their duties and serve their constituencies;
(3) to share with the bar IACA’s advice on how best to use the services of filing offices; and
(4) to make recommendations on whether and how the Uniform Commercial Code should be amended to make filing and searching easier, uniform, and more certain to yield the best results.

Anyone interested in joining the Task Force is more than welcome. You may do so by going to the [Task Force’s web site](#).

Stephen L. Sepinuck
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On Saturday, October 6, 2007, Donald J. Rapson, one of the initial members of the Commercial Financial Services Committee, died. Assisting in the formation of the Commercial Finance Committee is but one of Don’s many, many contributions to our profession and to the law. Don was a successful lawyer in private practice, the Senior Vice President and Assistant General Counsel of The CIT Group for fifteen years and an adjunct professor of law at Columbia University and NYU.

Don was a lawyer’s lawyer. Those of us who had the privilege of benefiting from his wisdom and judgment are manifold. For over fifty years Don shared his expertise in the Uniform Commercial Code and in other issues relating to commercial finance with numerous groups, including the Commercial Finance and UCC Committees. He was an American Law Institute representative on the Permanent Editorial Board for the Uniform Commercial Code and on numerous Drafting Committees. In this latter role, he was actively involved in updating and revising Article 9 as well as Articles 3, 4, 4A and 6. He was often the conscience of the effort, advocating in behalf of interests that otherwise might not have been given due recognition. He held all to his own very high standards, always pushing for the “right” result. And he was always on the lookout for fresh talent, promoting lawyers of promise—motivating and assisting them to contribute to the public good. Don was a prodigious author and panelist. He was a past recipient of the Homer Kripke Award from the American College of Commercial Finance Lawyers. He was the third recipient of the American Law Institute’s John Minor Wisdom Award in recognition of his contributions to the work of the American Law Institute.

In 1999, Don “retired” from CIT but he never retired from making contributions to the development of commercial law and to our profession.

Throughout, he remained a loyal alum of Columbia University. Through many cold Fall days he attended virtually every Columbia home football game (including a long, long losing streak). But, as in the law, he was a doer, not merely an observer. He was a fine athlete who competed vigorously at tennis and was a strong swimmer. He is survived by his lovely wife, Ellen, whom he adored, and his sons David, a practicing lawyer, and Jeffrey, a teacher, both in the San Francisco Bay area, of whom he was very proud.

Don will be missed but never forgotten.

Maury Poscover
Harry Sigman
Steven Weise
SPOTLIGHT

The purpose of this column is to identify some of the most disconcerting 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 to shine a spotlight on analytical errors, and thereby provide practitioners and judges with reason to disregard the opinion.

In re Rowe,
369 B.R. 73 (D. Mass. 2007)

This case involves a very restrictive application of U.C.C. § 9-203(b)’s requirement of an authenticated security agreement. It is reminiscent of the well known, but widely disfavored, holding in American Card Co. v. H.M.H. Co., 196 A.2d 150 (R.I. 1963).

Lake Equipment Leasing, Inc. and Jeffrey M. Rowe executed an “equipment lease” by which Lake leased a plow with a digging attachment to Rowe for five years. The document identified Rowe’s Chevy truck as “collateral” – presumably for Rowe’s payment obligations – and listed the truck by its vehicle identification number. The title certificate for the truck also listed Lake as the “first lienholder.” In addition, Rowe executed a limited power of attorney that would permit a third party, Frank’s Far Rockaway Auto School, Inc., to sign certain documents to secure title to the truck. In spite of all this, the court concluded that there was no valid security agreement.

The court acknowledged, as a preliminary matter, that the parties’ failure to execute a document entitled “security agreement” was not dispositive of whether the parties had in fact created a security agreement. Nevertheless, the court ruled that the lease, title certificate, and limited power of attorney were insufficient to establish the existence of a security agreement because of the absence of “granting language” by which the debtor expressly transferred rights in the truck. The court cited In re Modafferi, 45 B.R. 370, 372 (S.D.N.Y. 1985), in support of this portion of its holding. The court correctly quoted Modafferi, but misapplied it. Modafferi involved a financing statement signed by the debtor together with a promissory note that was silent as to the existence of collateral. In essence, the only document in any way indicating the existence of collateral was the financing statement. Because the purpose of a financing statement is to put third parties on notice that the filer may have a security interest in the identified property, it has never played well as a security agreement and the Modafferi court ruled that it was insufficient. In doing so, it noted that “some language reflecting a desire to grant a security interest must be contained within the documents offered to establish a security agreement under U.C.C. § 9-203.”

But the facts in Rowe were substantially different. The transaction document between the parties which created the payment obligation expressly indicated that Rowe’s truck was to serve as “collateral.” Indeed, the references to “collateral” and “first lienholder” are otherwise nonsensical and the limited power of attorney is otherwise unnecessary. Nevertheless, the Rowe court seemed to equate “language reflecting a desire to grant a security interest” with “language granting a security
interest.” Because the documents contained no explicit “granting language,” the court held that no security interest was created. The court’s holding is overly restrictive and fails to respect the likely intent of the parties.


This case totally misconstrues the legal effect of a secured party’s failure to provide notice of a disposition of collateral pursuant to U.C.C. § 9-611.

Gould & Eberhardt Gear Machinery Corp. borrowed approximately $3 million from UPS Capital Business Credit. The loans were guaranteed by the United States Department of Agriculture and were secured by G&E’s business assets as well as certain real estate owned by G&E’s president and owner. After G&E defaulted on its repayment obligations, UPS and the USDA decided to accelerate the indebtedness and liquidate the collateral. As part of this process, UPS asked G&E to execute a “Waiver of Notice Regarding Disposition of Collateral,” and G&E did so. The court ruled that this waiver was insufficient because it referred only to a non-U.C.C. portion of the Massachusetts General Laws and did not purport to waive the notification requirement of Article 9.

Despite the default, G&E and UPS continued to discuss alternatives to foreclosure on the business assets (the real estate was foreclosed upon separately). As part of these discussions, G&E located a potential purchaser for the company’s business assets – RP Machine Enterprises, Inc. RP offered to purchase G&E’s assets as part of a joint-venture arrangement with G&E. UPS verbally accepted the offer, and the parties entered into a secured party bill of sale whereby UPS purported to transfer its interests in the G&E assets for $700,000.

After the agreement was executed, and while G&E’s president was out of the country, RP’s personnel entered G&E’s premises and began removing property from the premises. In response, G&E sought protection through a Chapter 11 bankruptcy proceeding, claiming that the notification of the sale was insufficient. The bankruptcy court agreed, ruled that the defective notice rendered the sale ineffective to transfer title, and ordered turnover of the property. This was patently in error. While it would have been appropriate for the court to have considered the defective nature of the notification in determining G&E’s liability, if any, for a deficiency, Article 9 provides no support for using it to invalidate the sale. Indeed, just the opposite; both the Code and the comments expressly provide that a good faith transferee in a disposition gets to keep the property even if the secured party failed to comply with Article 9. See § 9-617 & comment 2.

Nevertheless, the ruling was apparently never appealed and RP ultimately purchased the assets through the bankruptcy process, albeit for a much higher price. It then sued UPS for breach of contract to recover the difference. In ruling on RP’s motion for summary judgment, the district court then compounded the bankruptcy court’s mistake. It not only accepted without question the bankruptcy court’s conclusion that the sale was invalid (although in fairness the issue was not before it), but somehow also concluded that RP had no cause of action for breach against UPS. In doing so, the court never cited § 9-610(d), which provides that a secured party makes a warranty of title
in a disposition contract unless it follows the normal to disclaim that warranty. The court’s holding may be explained at least in part by the fact that none of the cases in this portion of the court’s opinion arose under the U.C.C. One case involved the sale of electricity, one involved a pre-U.C.C. conditional sale of an automobile, and the others all involved real estate. Nevertheless, the court seems to have assumed – without any reasoned analysis – that because the bankruptcy court had invalidated the sale, no valid contract ever existed.

**Attorney’s Title Insurance Fund, Inc. v. Regions Bank,**

*491 F. Supp. 2d 1087 (S.D. Fla. 2007)*

This last case illustrates a common misconception: that any payment transaction can be reversed if the underlying transaction to which it is connected is fraudulent. The decision reflects no error of analysis by the court, but instead a rather pointless litigation tactic.

In the case, two unnamed imposters purported to sell certain real property that belonged to Mr. and Mrs. Chuven to an individual named Jacobs, who apparently had no knowledge of the fraudulent scheme. Home Equity Mortgage Company financed Jacobs’ purchase, and Attorney’s Title Insurance Fund, Inc. provided the title insurance for the transaction. At the closing, the closing agent delivered to the imposters a check for the purchase price, made payable to Mr. and Mrs. Chuven. The check was drawn upon Regions Bank. The imposters forged the Chuven’s endorsement, and Regions Bank paid the check.

After the Chuvens learned of the fraudulent transaction, they got the deed to Jacob cancelled. Attorney’s Title paid the unpaid balance of Home Equity Mortgage’s loan to Jacob and thereby acquired any cause of action the Chuvens (or, for that matter, Home Equity Mortgage) might have based upon the fraud. Attorney’s Title then sued Regions Bank to recover based upon the bank’s payment of the check. Although, as the court noted, Attorney’s Title failed to identify any particular legal theory under which it was entitled to recovery, the suit was apparently based upon a theory of conversion; specifically, that Regions Bank had converted the Chuvens’ funds by paying the check to the fraudfeasors. (As is ordinarily the case in Article 3 litigation, the fraudfeasors were apparently judgment-proof or unavailable for suit and were therefore not part of the litigation.)

Because the check was never delivered to the Chuvens, however, the Chuvens had no rights in the check and therefore no cause of action in conversion. Instead, the only rights they had in this transaction stemmed from the underlying transaction – that is, the fraudulent scheme to sell their property. Attorney’s Title argued that the Chuvens had received constructive delivery of the check when it was given to the fraudfeasors. For this argument to succeed, the fraudfeasors must have been acting as agents for the Chuvens. Since the Chuvens were not involved in the scheme, the fraudfeasors could not have been acting as their agents, and the constructive delivery argument therefore fails.

To recap, the Chuvens— and by assignment, Attorney’s Title – had no cause of action based upon the payment transaction because the check was never delivered to them or to their agent. *See § 3-420(a)(ii).* Indeed, the imposters’ indorsement of the check was valid. *See § 3-404(a).* The
Chuvens’ only cause of action related to the unauthorized and fraudulent land sale, and that action was satisfied by cancellation of the deed. Thus, subrogation to the Chuvens’ rights provided no cause of action to Attorney’s Title. It is, however, possible that Attorney’s Title has its own cause of action against the closing agent if she knew or should have known of the fraudulent scheme. The specific contours of any such cause of action would depend upon the relationship, if any, between the closing agent and Attorney’s Title, which is not revealed in the facts of the case.

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A recent decision by the United States District Court for Massachusetts held that a commercial mortgage lender was entitled to enforce a “springing guaranty” against the borrower’s principals who had executed a guaranty with the traditional “carve outs” for certain acts, and made other rulings favorable to commercial mortgage lenders concerning separateness covenants, the right to accelerate a mortgage loan without notice or an opportunity to cure, and the measure of damages for breach of a springing guarantee. Blue Hills Office Park LLC v J.P. Morgan Chase Bank, 477 F.Supp. 2d 366 (D. Mass. 2007).

Blue Hills is significant for at least three key reasons; one, it permitted strict enforcement of the typical separateness covenants contained in securitized commercial mortgages; two, the court did not accept the borrower’s superficial compliance with the independent director requirement; and three, the court permitted the lenders to recover the “full amount” of the deficiency after a foreclosure, without regard to whether the covenant breach caused the full loss. The Blue Hills case is particularly important given the relative paucity of cases dealing with “carve outs” and “springing guarantees,” and the continuing debate over their enforceability. If applied wisely, it will be a valuable addition to a lender’s enforcement arsenal and bankruptcy strategy.

The facts. Blue Hills Office Park LLC (“Blue Hills”) entered into a non-recourse mortgage loan with Credit Suisse First Boston Mortgage Capital LLC (“Credit Suisse”) for $33,149,000 in 1999. The loan was secured by a first trust on an office building located at 150 Royall Street. The loan was guaranteed by William Langelier and Gerald Fineberg. J.P. Morgan Chase Bank (“JP Morgan”) was the trustee for investors in the securitization trust which held the mortgage. The mortgage contained the conventional “carve-outs” from the non-recourse provisions, such as fraud, waste and the like.3

Loan default. Blue Hill’s troubles began in April 2003 when it reached a settlement with an adjoining property owner over a requested permit to construct a parking garage. The

1 David R. Kuney is a partner at Sidley Austin, LLP, where he is a member of the Corporate Reorganization and Restructuring Group. He specializes in real estate bankruptcies and loan enforcement issues. He is a member of the American College of Real Estate Lawyers and an Adjunct Professor at Georgetown University Law Center.


But see Alvin L. Arnold and Marshall Tracht, Construction and Development Financing, §6:72 (3d ed.), [Westlaw citation is CDF §6:72] stating that “The enforceability of these instruments [springing and exploding guaranties] is an open question, and one that we can expect will be hotly contested come the next recession.”

3 A nonrecourse loan is one where the borrower is not personally liable for the debt upon default, but rather, the creditor’s recourse is to the property granted as security for the loan. See Heller Fin., Inc. v. Leg, 2002 U.S. Dist. LEXIS 15183, *2-5, 11 (N.D. Ill. Aug. 12, 2002).
settlement resulted in the payment of $2.0 million to Blue Hills. The settlement monies were wired to an account at the law firm of the guarantor’s lawyers, where they were later used to prosecute a claim against the lender.\textsuperscript{4} Blue Hills did not notify JP Morgan of its receipt of the settlement funds. The mortgage lender later claimed the proceeds were part of the “Mortgaged Property” and should have been deposited into the borrower’s account, and accused Blue Hills of “hiding the money in an attorney client funds account.”\textsuperscript{5} Later, it called it a “theft” of money.\textsuperscript{6}

In May 2003, Blue Hills’ major tenant, which leased over 96% of the building, announced it was moving. Without this major tenant, Blue Hills claimed it did not have the funds necessary to pay the loan payment due in August 2004, nor the real estate taxes. JP Morgan would later argue that Blue Hills had ample funds but had improperly secreted the monies in a non-borrower account. Blue Hills’ chief financial officer asked Wells Fargo Commercial Mortgage Servicing (“Wells Fargo”) the loan servicer, to pay the principal, interest and real estate taxes from the mortgage reserve account.\textsuperscript{7} Wells Fargo did not respond to the letter, but it did pay the real estate taxes, and did agree in a letter that it would meet and discuss the “status of the loan.”

Wells Fargo never met with Blue Hills, despite saying it would. In September, Blue Hills again failed to make its principal and interest payment and requested that Wells Fargo make the payment from the mortgage reserve account. Wells Fargo did not do so, but instead wrote a letter to Blue Hills stating that the loan had been in default since August 2004 (although no notice of default had been sent at that time) and had been fully accelerated, and making demand for full payment of the entire loan balance. A letter was sent to the guarantors in November 2004 advising them of the lender’s intention to foreclose. No prior default notice and no opportunity to cure had been given to either Blue Hills or the guarantors.

Credit Suisse, which had reacquired the loan, foreclosed on the office building on November 19, 2004. The property was sold for $23 million, leaving a deficiency claim of over $10 million. Blue Hills then sued Credit Suisse and JP Morgan (the “Lenders”) alleging that the Lenders breached the loan contract by declaring a default, wrongfully foreclosing, breached the duty of good faith, and violated the Massachusetts Consumer Protection Act. The Lenders counterclaimed against Blue Hills and the guarantors. A nine day trial ensued. The court granted judgment on all counts in favor of the Lenders.

**Enforcement of Special Purpose Entity covenants (“SPE”); the independent director.** The court in Blue Hills found in favor of the mortgage lender, and made several rulings concerning a borrower’s covenant to maintain its status as single purpose entity (known

\textsuperscript{4} The court appeared to go out of its way to be critical of the borrower’s legal counsel.

\textsuperscript{5} J.P. Morgan’s Opposition of Plaintiffs-in-Counterclaim to Motion of Defendants–in-counterclaim for summary judgment, filed on May 31, 2006. 2006 WL 1726432.

\textsuperscript{6} \textit{Id.} at p.3.

\textsuperscript{7} The Mortgage allowed up to $1.0 million of the Leasing Escrow Funds to be used “solely” for application toward principal and interest under certain conditions. A significant portion of the litigation focused on whether J.P. Morgan wrongfully refused to permit the borrower to draw against the reserve. \textit{See} \textit{e.g.}, Memorandum in Support for Summary Judgment of Defendant and Plaintiff-in-Counterclaim J.P. Morgan Chase Bank, as Trustee for the Registered Holders of Credit Suisse First Boston Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 1999-C1, filed May 17, 2006.
The covenants at issue in Blue Hills included the obligation to have an independent director and not to commingle funds of the borrower with another entity. The requirement to maintain an independent director is typically required in a securitized transaction and requires that the independent director approve any decision by the borrowing entity to file for bankruptcy. The independent director, being more “objective” may decline to approve a bankruptcy filing. It may be safe to assume that many borrowers do not strictly comply with this requirement, or do so with a director who bears only the title, but none of the true responsibility.

The court in Blue Hills found that both the borrower and the guarantor breached the duty to have an independent director at all times. Blue Hills did in fact have a person who had the title of “director.” However, the court found that the director did not actually participate in the management of Blue Hills and had recently worked as a paralegal or secretary for one of the defense firms. The director’s failure to participate in the business caused the court to find that there was, in essence, a failure to have someone who truly functioned as an independent director. The court essentially disregarded the existence of a corporate officer.

Blue Hills suggests that merely having an ostensible director, who does not function in that role, may be viewed as having no director. This ruling by the court may prove useful in the context of a mortgage lender seeking to dismiss a single asset bankruptcy case on the grounds of “bad faith” or failure to obtain proper corporate authority to file the case. A lender might be able to argue that a debtor was not eligible to file for Chapter 11 because it lacked the required corporate authority. Case law suggests that a debtor which files for bankruptcy without complying with the entity’s organic documents, such as the operating agreement of a limited liability company, may face dismissal. Because many developers have independent directors who are remote from the business operations, Blue Hills might provide a basis to seek dismissal of a bankruptcy filing.

A more basic lesson from the Blue Hills decision is that the guaranty agreement itself should expressly incorporate the various separateness covenants. Many troubled borrowers may have equally passive or inactive directors, and this case helps create another basis to establish recourse liability on a springing guaranty where the recourse is limited to specific acts of misconduct.

**Breach of the duty not to commingle assets.** In Blue Hills, the court found that the borrower and guarantors had breached the separateness covenant by commingling the settlement funds of $2.0 million from the zoning dispute by transferring them to an account held by the guarantor’s lawyers. An important part of the decision was the court’s determination that the monies received from the settlement of the zoning dispute constituted part of the lender’s collateral, and came within the definition of the “Mortgaged Property.” The court was also

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8 Blue Hills, 477 F.Supp. 2d at 382.
9 See In re Orchard at Hansen Park, LLC, 347 B.R. 822 (Bankr. N.D. Tex. 2006) dismissing Chapter 11 bankruptcy case of limited liability company where only one member approved the filing contrary to provisions in operating agreement that required unanimous consent.
10 Lender’s Opposition to Summary Judgment, p.15.
willing to find that the Lenders could rely on this as a default even though it was unaware of the misapplication of the funds at the time it accelerated the loan.11

Blue Hills is important because these separateness covenants create a barrier, even if partial, to the substantive consolidation of a borrower and its affiliates in a bankruptcy proceeding. This is to avoid the risk that the assets of the borrower will be claimed by creditors of an affiliate. Although a recent decision from the Third Circuit seems to limit the availability of the doctrine of substantive consolidation, and stated that the remedy should be used only in “rare” cases and as a “last resort,”12 a recent statistical analysis shows that substantive consolidation in major cases remains very prevalent, and even dominant.13 Substantive consolidation, however, can occur in smaller business cases,14 and is certainly a possibility in real estate development, where the principals may have an ownership interest in many affiliated entities.

Amount of damages. An important issue in Blue Hills was whether the breach of the covenants created liability for the “full amount” of the debt (or deficiency) or only for the loss actually “caused” by the specific breach. The guaranty agreement in Blue Hills provided that the “guarantor shall be liable for the full amount of the Debt” in the event that the borrower transferred or conveyed any of the mortgaged property. However, another section of the guaranty agreement provided that in the event of certain actions, such as fraud or physical waste then the guarantor would be liable for “any loss or damage. . . caused thereby.”

The court in Blue Hills noted the distinction between a guaranty which requires the guarantor to pay for any “loss or damage” caused by a covenant breach and one which requires the guarantor to pay the “full amount of the Debt.”15 The court found that the guarantor was expressly liable for the “full amount of the debt” based on the nature of the default and the language of the guaranty agreement. The court did not reach the issue of how the more limited damage remedy might apply. The Lenders, however, expressly recognized that a “loss or damage” interpretation could have significantly lowered their claim.16 Thus, Blue Hills is significant in that it permitted enforcement of a covenant in a guarantee that permits the “full debt” liability to spring or “explode” even where the amount of damage directly caused by the breach is less.

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11 The Lenders specifically argued that a lender can rely on defaults not then known unless the borrower can establish detrimental reliance on the default notice specifying only certain defaults. JP Morgan’s Memorandum in Support of Summary Judgment, p.3.
12 In re Owens Corning, 419 F.3d 195, 211 (3rd Cir. 2005).
14 See, e.g., Wells Fargo v. Sommers (In re Amco Insurance), 444 F.3d 690 (5th Cir. 2006).
15 Blue Hills, 477 F.Supp. 2d at 381.
16 The differences in the two theories was potentially significant in Blue Hills. For example, if the liability was only for loss or damaged “caused thereby” then the Lenders recognized that their claim might be only for the $2.0 million wrongfully placed into the principal’s account. See JP Morgan’s Opposition to Summary Judgment, p.15, n.9. However, if the covenant default triggered full recourse then the guarantors were liable for the full mortgage deficiency of over $10 million.
This ruling highlights an important issue that might arise where a lender seeks to enforce a springing guaranty based on the borrower’s filing of a bankruptcy proceeding. The issue is the amount of recoverable damages where a guarantor is sued after a plan of reorganization has restructured a mortgage loan by reducing the principal amount of the loan, which is permitted under the “cram down” provisions found in 11 U.S.C. § 1129(b) of the Code. Could an argument be made that there was no “loss or damage” because the lender received the full amount to which it was entitled under federal bankruptcy law, and that “cram down” does not result in a “loss or damage?” Similar arguments have been made with success. The decision in Blue Hills did not address this issue, but it does give voice to the distinction between a damages provision which permits recovery of a “loss” and one which makes the guarantor liable for the “full” debt. Lenders drafting guaranties should be careful to eliminate any ambiguity on what they intend.

**Notice and cure issue.** The Blue Hills case also made several key rulings concerning a lender’s duty to provide notice and an opportunity to cure. The case is significant because it strictly construed the contract language in favor of the Lenders, and was not willing to import a “notice and cure” obligation from other parts of the mortgage instrument.

Blue Hills argued that the lender was in breach of contract for failing to provide the proper notice of default and an opportunity to cure. The mortgage stated that, “the Debt shall become immediately due and payable at the option of [Lender] upon the happening of any one” Event of Default. The non-payment of real estate taxes was one of the twelve asserted defaults. However, another section of the mortgage provided that an Event of Default would occur if the Mortgagor “shall continue to be in default of any term, covenant or provision of the Note” beyond any applicable cure period, and if none, for thirty days after notice.

Blue Hills argued that the broader provision required notice and an opportunity to cure for “any” covenant. The argument was not frivolous. However, the court accepted the Lender’s view that the broader provision was a “catch-all for other defaults that the Lender had not foreseen or specified in the mortgage agreement.” Thus, it held that the failure to pay taxes amounted to an immediate default and did not require notice or an opportunity to cure.

The Blue Hills decision is support for lenders seeking to enforce mortgage defaults and loan acceleration where the loan agreement does not expressly require notice or an opportunity to cure and by not importing onto some defaults the required notice and cure found in other sections of the loan agreement or mortgage.

A word of caution seems fair, however. Although the Lender prevailed, it might be better drafting to state precisely that certain defined acts give rise to an Event of Default, and that such

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17 For a similar argument, see In re PPI Enterprises (U.S.) Inc., 324 F.3d 197 (3rd Cir. 2003), holding that a landlord was not “impaired” and hence could not vote on a plan where its claim was reduced by the statutory cap which is imposed on claims for unpaid future rent. The underlying logic of such a case is that the rights of a landlord are not altered or damaged by imposing the lawful cap on a claim.

18 Mortgage, ¶23.

19 The court did not address, and no one argued that the exercise of the “option” required some affirmative act, and that such act had to be manifested to the borrower. Other courts might have found that the “catch all” provision pertained to all events of default, or that the agreement was ambiguous, and would have permitted the parties to offer testimony on their intent.
events do not require notice or a cure. Further, relying on the lender’s “option” to accelerate may invite an argument that the option had to be manifested in some way. A well defined body of case law holds that where a note provides for acceleration at the “option” of the holder “the note does not become due and payable by default alone,” but rather requires an outward manifestation of such.  

**Duty of good faith.** Finally, Blue Hills addressed the covenant of good faith. A persistent defense by both borrowers and guarantors is the claim that the lender breached the implied duty of good faith and fair dealing. The implied duty of good faith is found in the Uniform Commercial Code and the common law of virtually every state would recognize the principle that, “[e]very contract implies good faith and fair dealing between the parties to it.”21 Broadly, this implied covenant of good faith provides that neither party may do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.22

K.M.C. Co., Inc. v. Irving Trust, 757 F.2d 752 (6th Cir. 1985)(“K.M.C.”), gave the defense of breach of the duty of good faith high visibility, and since it was decided, many borrowers and guarantors have used an alleged breach of the implied duty of good faith and fair dealing as a defense to the enforcement of a loan or guaranty. K.M.C. involved allegations that a lender under a revolving line of credit, which had the right to stop making advances, breached the implied duty of good faith by refusing to make further advances (even though not required to do so) without first giving the borrower a reasonable opportunity to seek alternative financing. The Sixth Circuit held that this was a valid defense because the contract would be “illusory” if it placed one party wholly at the mercy of the other.

Blue Hills argued that K.M.C. should apply because the lender initially stated it would meet and discuss the status of the loan and then suddenly announced the loan had been accelerated without prior notice.23 The court distinguished K.M.C. because that case involved a revolving line of credit, with a continuing duty to disburse, and not a mortgage loan which had been fully disbursed. Borrowers will argue that the “course of conduct” of the parties creates a waiver and that expressing a willingness to meet creates an obligation to do so. Blue Hills rejected such arguments. Nevertheless K.M.C. and the implied duty of good faith remain potent defenses for borrowers, and lenders are likely to see similar issues being asserted in enforcement actions.

**Conclusion.** The Blue Hills decision covered a broad array of borrower/guarantor defenses to loan and guaranty enforcement. Not only did the court reject many of them, but it showed a willingness to permit acceleration without notice, and to use violations of the

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20 See e.g., 11 Am. Jur. 2d Bills and Notes § 196 (West 2007): “A note or other instrument providing for acceleration at the option of the holder does not become due and payable by a default alone; rather, some outward manifestation of the holder’s intent to exercise that option is required. The creditor must perform some clear, unequivocal affirmative act evidencing an intention to take advantage of the acceleration provision, so as to leave no doubt as to the holder’s intention and to apprise the maker effectively of the fact that the option has been exercised.”


23 Blue Hills argued, among other things, that the Lender had sent a pre-negotiation letter also stating that it was authorized to “discuss and meet” and that it thereafter refused to meet. See J.P. Morgan Memorandum in Support of Summary Judgment, p.12.
separateness covenants as a basis to support the acceleration. Equally important, the court found the guarantors liable for the full amount of the loan, not just for damages “caused” by the breach of the covenant. Blue Hills may be the first in many cases in which borrowers seek to defeat loan covenants by arguing “bad faith” and defects in the notice and cure. Because Blue Hills requires a borrower to comply strictly with the terms of the mortgage, it represents an important case for the lending community.

As noted above, Arnold and Tracht, write that, “The enforceability of these instruments [springing and exploding guaranties] is an open question, and one that we can expect will be hotly contested come the next recession.” Since the “next recession” may be closer than before, Blue Hills should be a significant precedent for mortgage lenders, as well as a guide for drafting techniques.
As an attorney who advises law firms and lawyers on ethics, I frequently hear complaints from transactional lawyers that the ethics rules appear to have been written by litigators and are ill-suited to the realities of transactional practice. For many, the ethics rules concerning conflicts of interest seem particularly geared towards litigation. But with some basic background and a few practice tips, transactional attorneys can avoid the pitfalls of the conflicts rules.

I. Background: The Basic Conflicts Rules

The conflict of interest rules revolve around four basic concepts. First, a lawyer cannot be adverse to a current client, even on an unrelated matter. Second, a lawyer may be adverse to a former client but not if the new matter is “substantially related” to the matter that the lawyer handled for the former client. Third, a conflict that precludes any lawyer in a firm from taking a matter applies to all other lawyers within that firm. Fourth, clients can waive conflicts with adequate disclosure and consent. See generally ABA Model Rules of Professional Conduct (“Model Rules”) 1.7, 1.9 and 1.10.

Each of these four concepts has exceptions, which may differ by jurisdiction. For example, some conflicts cannot be waived, and a lawyer cannot negotiate business terms on behalf of a buyer and also represent the seller. There also are specific do’s and don’ts involving business transactions with clients, testamentary gifts, media rights and the like. For example, a business transaction with a client is subject to an objective test for fairness and the lawyer is required to advise the client to seek independent representation. See generally Model Rules 1.8, 1.11, 1.12 and 8.5. It is also helpful to keep in mind that conflicts can be waived “in advance.” The validity of such “advance waivers” depends upon the specificity and degree of the disclosure by the lawyer of the types of conflicts being waived, and the sophistication of the party agreeing to the waiver.

II. Practice Tips

A. Identifying the Client and Avoiding “De Facto” or “Accidental” Clients

Transactional lawyers frequently confront situations where they are representing entities – corporations, trade associations, institutions that are part of syndicates – that are related to other entities. In addition, transactional lawyers dealing with closed corporations often encounter situations where one individual controls the entity and directs the representation, but the transaction is for the benefit of the entity. One of the first steps to avoid conflicts in these situations is to identify those individuals or entities that are clients of the lawyer and similarly to identify those individuals or entities that are not clients. If there is no attorney-client relationship, then the conflict rules simply do not apply.

The formation of an attorney-client relationship is frequently judged from the reasonable perspective of the putative client, not from the subjective or even reasonable belief of the lawyer. Further, courts frequently brush aside the lack of an engagement letter or the fact that a putative client is not paying the lawyer’s fees. The courts have found that an attorney-client relationship can be created in the absence of an engagement letter or fee paying arrangement when the lawyer provides legal advice, receives confidential information or otherwise treats the entity or
individual as a client. Sending a copy of a letter marked “attorney-client privilege” may result in
the lawyer slipping unawares into an attorney-client relationship. In the corporate family
context, such “de facto” clients can be acquired when the lawyer’s de jure client has overlapping
boards, officers or, particularly, in-house counsel, with subsidiaries, parents or affiliates. The
situations in which “de facto” clients can arise in the corporate family context have been outlined
recently by the New York City Bar Association. Formal Op. 2007-03, Corporate Family
Conflicts; duty of loyalty; duty to preserve confidences and secrets (September 2007).

The best way to ensure that there is no misunderstanding about the identity of the client is
to specify in the engagement letter who the client is and also to identify any related individuals
or entities that the lawyer is not representing. A statement in an engagement letter that the
lawyer represents a particular entity and not its affiliates, parents, subsidiaries or the like can
save much anguish if, later on, the lawyer or a colleague becomes adverse to one of the related
entities. This approach is not fool-proof, however, as statements in an engagement letter that
certain individuals or entities are not clients can be of limited utility if the individuals or entities
referenced in the engagement letter do not receive it. For example, a statement in an engagement
letter to a trade association that the lawyer represents only the association or the lead bank in a
lending syndicate and not its members or other participants is unlikely to have much force as to
those members who do not receive the letter. In such situations, the lawyer should consider
whether affirmative statements concerning the lack of attorney-client relationship should be
made to those members with whom the lawyer has contact.

Clear statements by the lawyer concerning who the lawyer does and does not represent
can largely but not entirely avoid the frequently troublesome issue of “de facto” clients. During
the course of the engagement, the lawyer must respect the limitations set forth in the engagement
letter concerning those individuals or entities with whom the lawyer has disclaimed an attorney-
client relationship. All of this can become complicated in engagements with frequent conference
calls and rapid e-mail communication among large groups of parties whose interests are
generally aligned. The lawyer must be mindful, however, of the clients he actually represents.

B. Joint Representations

A joint representation is when a lawyer represents multiple clients in the same matter.
For example, when one lawyer represents two partners who want to purchase a business, or
multiple banks forming a single loan syndicate. Whenever a lawyer represents two or more
clients in the same matter, the opportunity for a conflict exists. The lawyer owes a duty of
loyalty and zealous representation to each client. A lawyer can fulfill that duty only if there is
basic agreement among the jointly represented clients concerning the goals and general
approach to the representation. Material disagreements among jointly represented clients may
require the lawyer to decline or terminate the representation. A lawyer cannot represent clients
whose interests are “fundamentally antagonistic.” Model Rule 1.7, Comment [28]. This does
not mean that the lawyer must withdraw in the event of any disagreement among jointly
represented clients, or that the client group cannot have frank discussions about the course of
the representation in which they express and consider different opinions. It does mean,
however, that the lawyer cannot continue with the representation if there are irreconcilable
material differences.
Frequently, jointly represented clients will tell the lawyer at the outset of a representation that they are in agreement about the goals and methods of the representation. Regardless, the lawyer has an independent obligation to validate the conclusion reached by his clients. Indeed, over the course of the representation the lawyer must periodically re-evaluate whether the jointly represented clients continue to be sufficiently of like mind and interests about the representation. A case where the lawyer’s clients are in complete agreement at the outset may have a radically different posture later in the representation; one of the jointly represented clients may change their mind about the deal or the developments in the negotiations may reveal differing positions among the jointly represented clients.

There are special rules concerning confidentiality in representations of multiple clients. Normally, a client is entitled to have the lawyer preserve his confidences and secrets from disclosure to any third party. In multiple representations, there is no privilege or secrecy among jointly represented clients. One client cannot tell their lawyer to keep relevant information from another client. Model Rule 1.7, Comment [30]. A client can always decide that he wishes his lawyer not to disclose a secret or confidence, but the cost of that decision may be an end to the joint representation.

Before embarking on a joint representation, the lawyer should consider what will occur if the clients no longer wish to be jointly represented, or, for whatever reason, the lawyer can no longer represent multiple clients. If the lawyer has not discussed this scenario with the clients in advance, the lawyer may find himself forced to withdraw from the representation of all clients in the matter. The lawyer should at the outset of a matter alert each client to the possibility that the joint representation will not survive and chart a path for how to determine the lawyer’s continued role in the case. Even when the lawyer has discussed this issue in advance, and secured the agreement of all clients for the lawyer to remain in the matter on behalf of some of the formerly jointly represented clients, the lawyer should understand that continuing to represent one client over the objection of a former client in the same matter can be problematic. A consent that a lawyer obtains from a client to continue to represent another client after the demise of the joint representation must be “informed.” A consent which is “informed” at the beginning of a representation may no longer be valid when judged in the light of developments over the course of the matter.

C. Waivers

Most conflicts can be waived. A lawyer can, for example, represent a bank on a real estate matter and still negotiate with that bank on behalf of a borrower, provided that there is a waiver by the bank (and the borrower). Under the Model Rules, the only conflicts that can never be waived are litigation conflicts where one lawyer seeks to represent two adverse parties in the same proceeding. Model Rule 1.7(b)(3). In non-litigation matters, there is no bright line rule but a lawyer still may not represent clients whose interests are “fundamentally antagonistic,” even with a waiver. Model Rule 1.7, Comment [28]. A waiver must be “informed,” which means that a lawyer must “communicate adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct.” Model Rule 1.0(e). It is worth pausing over this definition and understanding that one of the “reasonably available alternatives” that must almost always be
explained to the client by the lawyer is the option of declining the requested consent. Conflict waivers should be in writing. The Model Rules require that consent be confirmed in writing and most jurisdictions similarly require a writing or strongly encourage it.

Advance waivers or consents to future conflicts have received increasing acceptance by the ethics authorities. Unfortunately, many firms simply fold advance waiver boilerplate into the engagement letters without considering how to strengthen that waiver in a given matter. “[G]eneral and open-ended” advance waivers are “ordinarily . . . ineffective.” Model Rule 1.7, Comment [22]. On the other hand, advance waivers that result from a detailed explanation of the types of conflicts that may arise and reference specific foreseeable conflicts are more likely to withstand scrutiny. If there are specific circumstances that the lawyer is trying to guard against – for example, the inability to represent a long-time major client of the firm – those scenarios should be included in the waiver discussion. A lawyer might agree, for example, to represent a developer in a matter knowing that the developer is likely at some point to have loan negotiations with a bank for whom the lawyer’s firm regularly does lending work. This is a circumstance that should be specifically described in any advance waiver.

Waivers that are procured from parties represented by independent counsel are most likely to be upheld. Waivers procured from unsophisticated clients receive the greatest scrutiny, both in terms of the adequacy of the disclosure and the fairness to the client. One common pitfall is to assume that a waiver procured from a high-level corporate executive will be judged under the same standard as those procured from in-house counsel. No matter how successful or experienced the business executive, the lawyer takes a risk in getting a waiver from such an individual, when an in-house counsel or independent outside counsel is equally available. At a minimum, it is prudent to copy in-house counsel or other independent counsel on any waiver received from a non-lawyer.

Finally, while typically a wall or a screen does not cure a conflict, a wall or a screen is frequently part of the inducement offered by a lawyer to obtain a conflict waiver. In those circumstances, the components of the wall or screen can be established as a matter of agreement between the lawyer and the client. The lawyer should be aware that by promising a wall and screen they are referencing an entire body of jurisprudence about the components of an adequate screen or wall – locked file cabinets, electronic firewalls, timely implementation, written memoranda and the like. As a result, a lawyer should avoid promising a wall or a screen unless they are prepared to implement such a mechanism immediately and properly. Often clients are just as willing to provide a waiver based on a less elaborate commitment that certain lawyers will not work on a matter. In short, don’t use the terms “wall” or “screen” lightly, particularly when the client may well be satisfied with less formal procedures.

III. Conclusions

We have seen over the last few years how vulnerable lawyers are when a transaction that they worked on fails financially and investors lose money. In those situations, investors look to the lawyers, among others involved in structuring or negotiating the transaction, to be made whole. The lawyer who unwittingly violates the ethics rules, in general, or the conflicts rules in particular, hands the unhappy investor an advantage in pressing his claims, even though
the ethical misstep may have no connection with reasons for the financial collapse of the deal. Identifying and avoiding conflicts at the outset and over the course of a transaction protects the lawyer from being the insurer of last resort for a failed transaction.

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DELAWARE UPDATE – 2007 LEGISLATION AMENDING
CERTAIN ALTERNATIVE ENTITY LAWS
AND ARTICLES 8 & 9 OF DELAWARE’S UCC

by

Norman M. Powell, Esquire*

In its legislative session ended June 30, 2007, the Delaware General Assembly enacted amendments to the Delaware Limited Liability Company Act, 6 Del. C. § 18-101 et seq. (the “DLLC Act”), the Delaware Revised Uniform Limited Partnership Act, 6 Del. C. § 17-101 et seq. (the “DLP Act”), and Articles 8 and 9 of the Uniform Commercial Code as in effect in the State of Delaware, 6 Del. C. § 1-101 et seq. (respectively, “Delaware Article 8” and “Delaware Article 9”). The amendments to the DLLC Act and the DLP Act took effect on August 1, 2007; the amendments to Delaware Article 8 and Delaware Article 9 took effect upon enactment into law on July 5, 2007.

The amendments to the DLLC Act and the DLP Act are substantially similar. Most significant, perhaps, are those amendments relating to limited liability company agreements and partnership agreements, and those amendments dealing with series. Limited liability company agreements and partnership agreements, in addition to being written or oral, may be implied, and may be entered into or otherwise exist before, after, or at the time a certificate of formation or certificate of limited partnership is filed. Limited liability companies can have one or more designated series of members, managers, limited liability company interests, or assets, and limited partnerships can have one or more designated series of limited partners, general partners, partnership interests, or assets. Assets associated with a series may be held directly or indirectly, including in the name of such series, in the name of the limited liability company or limited partnership, through a nominee, or otherwise.

The amendments to Delaware Article 8 and Delaware Article 9 provide additional methods by which secured parties may obtain control of (and thus perfect security interests in) deposit accounts, securities accounts, uncertificated securities, and security entitlements.

This article summarizes these amendments to the DLLC Act (Senate Bill No. 96, 76 Del. Laws 105), the DLP Act (Senate Bill No. 95, 76 Del. Laws 104), and Delaware Article 8 and Delaware Article 9 (Senate Bill No. 120, 76 Del. Laws 92).

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The DLLC Act was amended by Senate Bill No. 96, 76 Del. Laws 105, effective August 1, 2007.

Certain definitions have been amended. Section 18-101(7) provides that limited liability company agreements can be not only written or oral, but implied, as well. Conforming changes appear in Section 18-201(d) and conforming and other technical changes appear in Section 18-101(11).

Section 18-104(a)(2) confirms that a registered agent’s business office address is to be identical to the limited liability company’s registered office address. Conforming changes appear in Section 18-904(b)(2) with respect to foreign limited liability companies, and also conform the eligibility requirements for such registered agents to those applicable with respect to domestic limited liability companies. Sections 18-104(d), 18-104(i)(4), 18-904(e), and 18-1108(a) now provide that in certain circumstances certificates of formation and registrations are cancelled, not “deemed to be” cancelled. Section 18-104(e) and (g) confirm that registered agents’ duties under such sections (i.e., to accept and forward service of process and statements for annual taxes, and to maintain current communications contacts) apply to foreign limited liability companies as well as Delaware limited liability companies.

Technical changes were made to Section 18-203 relating to cancellation of certificates of formation in connection with merger, consolidation, and transfer, and to clarify that good standing certificates shall not issue for a limited liability company whose certificate of formation is cancelled. Similarly, technical changes were made to Sections 18-206, 18-213(g), and 18-1105(a)(3) regarding transfer and domestic continuance. Section 18-209(a), relating to merger and consolidation, clarifies the broad definition of “other business entity” in the context of merger and consolidation. Section 18-209(c)(8) has been simplified, and provides that a certificate of merger need not contain a consent to jurisdiction where the surviving or resulting entity is a Delaware general partnership. Section 18-209(g) clarifies that merger or consolidation of a domestic limited liability company doesn’t constitute dissolution of such company unless otherwise agreed. Amendments to Sections 18-209(h), 18-213(h), and 18-216(i) confirm that a limited liability company agreement can specifically deny the limited liability company the power to merge or consolidate under Section 18-209, to transfer, domesticate or continue under Section 18-213, or to convert under Section 18-216. Section 18-216(h) reflects a technical change, deleting language duplicative of text appearing elsewhere (Section 18-216(c)) and providing that a business entity or form to which a limited liability company has been converted shall be deemed the same entity as the limited liability company for purposes of Delaware law.

Section 18-215 has been amended to permit establishment (or provision for establishment) of one or more designated series not only of members, managers, and limited liability company interests, but assets as well. It clarifies and continues the requirement that the records maintained for any series account for the assets associated with such series separately from other assets of the limited liability company or any other series thereof. New text provides that assets associated with a series may be held directly or indirectly, including in the name of such series, in the name of the limited liability company, through a nominee or otherwise, and
specifically empowers series to contract, hold title to assets, grant liens and security interests, and sue and be sued. Section 18-210 clarifies that contractual appraisal rights may be made available for any series, and are available in connection with continuance in any jurisdiction.

Section 18-702(c) specifically denies limited liability companies the right to issue certificates of limited liability company interest in bearer form. Section 18-906 contains technical amendments relating to cancellation of registration.

DLP ACT AMENDMENTS.

The DLP Act was amended by Senate Bill No. 95, 76 Del. Laws 104, effective August 1, 2007.

Certain definitions have been amended. Section 17-101(12) provides that limited liability company agreements can be not only written or oral, but implied, as well. Conforming changes appear in Section 17-201(d) and conforming and other technical changes appear in Sections 17-101(5) and 17-101(8).

Section 17-104(a)(2) confirms that a registered agent’s business office address is to be identical to the limited partnership’s registered office address. Conforming changes appear in Section 17-904(b)(2) with respect to foreign limited partnerships, and also conform the eligibility requirements for such registered agents to those applicable with respect to domestic limited partnerships. Sections 17-104(d), 17-104(i)(4), 17-904(e), and 17-1110(a) now provide that in certain circumstances certificates of formation and registrations are cancelled, not “deemed to be” cancelled. Sections 17-104(e) and (g) confirm that registered agents’ duties under such sections (i.e., to accept and forward service of process and statements for annual taxes, and to maintain current communications contacts) apply to foreign limited partnerships as well as Delaware limited partnerships.

Technical changes were made to Section 17-203 relating to cancellation of certificates of limited partnership in connection with merger, consolidation, and transfer, and to clarify that good standing certificates shall not issue for a limited partnership whose certificate of limited partnership is cancelled. Similarly, technical changes were made to Sections 17-204(a), 17-206, 17-207(a), 17-216(g) and 17-1107(a)(3) regarding transfer and domestic continuance. Section 17-211(a), relating to merger and consolidation, clarifies the broad definition of “other business entity” in the context of merger and consolidation. Section 17-211(c)(8) has been simplified, and provides that a certificate of merger need not contain a consent to jurisdiction where the surviving or resulting entity is a Delaware general partnership. Section 17-211(h) clarifies that merger or consolidation of a domestic limited partnership doesn’t constitute dissolution of such limited partnership unless otherwise agreed. Amendments to Sections 17-211(k), 17-216(h), and 17-219(i) confirm that a partnership agreement can specifically deny a domestic limited partnership the power to merge or consolidate under Section 17-211, to transfer, domesticate or continue under Section 17-216, or to convert under Section 17-219. Section 17-219(h) reflects a technical change, deleting language duplicative of text appearing elsewhere (Section 17-219(c)) and providing that a business entity or form to which a limited partnership has been converted shall be deemed the same entity as the limited partnership for purposes of Delaware law.
Section 17-218 has been amended to permit establishment (or provision for establishment) of one or more designated series not only of limited partners, general partners, or partnership interests, but assets as well. It clarifies and continues the requirement that the records maintained for any series account for the assets associated with such series separately from other assets of the limited partnership or any other series thereof. New text provides that assets associated with a series may be held directly or indirectly, including in the name of such series, in the name of the limited partnership, through a nominee or otherwise, and specifically empowers series to contract, hold title to assets, grant liens and security interests, and sue and be sued. Section 17-212 clarifies that contractual appraisal rights may be made available for any series, and are available in connection with continuance in any jurisdiction.

Section 17-702(b) specifically denies limited partnerships the right to issue certificates of partnership interest in bearer form. Section 17-906 contains technical amendments relating to cancellation of registration.

DELAWARE UCC AMENDMENTS.

Delaware Article 8 and Delaware Article 9 were amended by Senate Bill No. 120, 76 Del. Laws 92, effective upon its enactment into law.

New subsection 9-104(a)(4) facilitates “control” of a deposit account (and thus perfection of a security interest therein) by the debtor, secured party, and bank authenticating a record that (i) is conspicuously denominated a control agreement, (ii) identifies the deposit account, and (iii) addresses the disposition of funds in the deposit account or the right to direct such disposition. Parallel provisions have been added with respect to uncertificated securities (8-106(c)(3)) and security entitlements (8-106(d)(4)). New subsection 9-104(a)(5) facilitates “control” of a deposit account where the name on the deposit account is the name of the secured party or indicates that the secured party has a security interest therein. A parallel provision has been added with respect to securities accounts (9-106(d)).

New subsection 9-104(c) expressly provides that neither authentication of a record under subsection 9-104(a)(2) or new subsection 9-104(a)(4), nor naming or indicating a secured party under new subsection 9-104(a)(5), imposes upon a bank any duty not expressly agreed to by the bank. New subsections 9-106(e) and 8-106(h) similarly disclaim implied duties of a securities intermediary.

New subsection 9-104(d) expressly provides that any conditions to the bank’s duty to comply with instructions originated by the secured party (other than further consent by the debtor) is irrelevant to control of a bank account. New subsection 8-106(i) provides a similar statement with respect to uncertificated securities and security entitlements. Finally, new subsection 9-104(e) expressly provides that these new means of achieving control are not to be considered in assessing the achievement of control by other means.
UNIFORM STATE LAWS SCORECARD

Survey of Adoptions of Revised Official Text of the UCC

As of September 27, 2007

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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 as of September 27, 2007.

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.

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.

New York and South Carolina are the only states that still have the 1951 version of Articles 3 and 4.
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Section of Business Law
American Bar Association

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Term expires: Following Annual Meeting – August 2008
### UCC COMMITTEE LEADERSHIP

<table>
<thead>
<tr>
<th>Group</th>
<th>Chair(s) &amp; Vice-Chair(s)</th>
<th>Term Expires*</th>
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<tbody>
<tr>
<td>Uniform Commercial Code Committee</td>
<td>Stephen L. Sepinuck (c) Penelope Christophorou (vc) Mario J. Ippolito (vc)</td>
<td>2009 2009 2009</td>
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<tr>
<td>General Provisions &amp; Relations to Other Law</td>
<td>Kristen Adams (c)</td>
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<tr>
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<td>Larry I. Safran (c) Kate Sawyer (vc)</td>
<td>2008 2008</td>
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<tr>
<td>Investment Securities</td>
<td>Meredith S. Jackson (co-c) Howard Darmstadter</td>
<td>2010 2010</td>
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<td>Leasing</td>
<td>Barry Graynor (c) Teresa Davidson (vc)</td>
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<td>George A. Hisert (c)</td>
<td>2009</td>
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<td>Sarah H. Jenkins (c) Greg Cavanagh (vc)</td>
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<td>Leianne S. Crittenden (c) Pauline Stevens (vc)</td>
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<td>Russell A. Hakes Robyn Meadows Stephen L. Sepinuck</td>
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<td>Maria Milano</td>
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<td>Michael Ferry (co-c) William Woodward, Jr. (co-c)</td>
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<td>Deposit Account Control Agr.</td>
<td>R. Marshall Grodner (c-ComFS) Marvin D. Heileson (c-Banking) Edwin E. Smith (c-UCC) Roberta G. Torian (c-ConFS) John D. Pickering (vc)</td>
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<td>2010</td>
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<td>Alvin C. Harrell (c) Lee Anne Leathers-Lutz (vc)</td>
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<td>2008</td>
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<td><strong>Group</strong></td>
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<td>Mattias Hallendorf (c-Cyberspace) Richard M. Newman (c-UCC)</td>
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<td>Liaisons</td>
<td>Committee on Diversity</td>
<td>Emilie R. Ninan</td>
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<td>James J. Murphy</td>
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<td>Consumer Fellows</td>
<td>Gail Hillebrand Yvonne Rosmarin Alan White</td>
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<td>Publications Committee</td>
<td>Carl Bjerre</td>
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* All terms expire at the end of the ABA Annual Meeting in the year indicated.