Commercial Law Newsletter

Messages from the Chairs

Committee on Commercial Finance

Lynn Soukup, Chair, Pillsbury Winthrop Shaw Pittman LLP

I’ve been giving a lot of thought since the last newsletter to what the ComFin Committee offers for its members and (more importantly) what those members want. A survey that the Business Law Section recently conducted indicates that many members don't attend in-person meetings and are looking for information and networking through other means. So while there is much going on at upcoming meetings, from information on legal and market developments to networking opportunities, we've also been sending out more information via emails, listserves, newsletters, blogs and websites and will continue to do so. We've also highlighted in this issue a listserv used by many commercial finance lawyers to discuss issues and some web-based resources in the area of commercial law. If there are other ways we can provide information sharing, networking or other resources to ComFin Committee members, please let me know.

We’ve again made this issue of the newsletter "open access" so that you can forward it to colleagues who would be interested in the Committee. I’d like to enlist your help in publicizing ComFin's many activities, whether by forwarding the newsletter or emails on upcoming events of interest or bringing a colleague to a meeting or to attend the Committee dinner in Dallas on April 10th.

More...

Committee on Uniform Commercial Code

Stephen L. Sepinuck, Chair, Gonzaga University School of Law

The UCC Committee is continually striving to provide its members on a timely basis with important information about developments in commercial law and commercial practice. Anyone with a suggestion for a project the Committee should undertake or with an idea about how the Committee can better fulfill its mission should contact me.

Noteworthy Events at Spring Meeting

The UCC Committee is presenting two wonderful programs at the Spring meeting in Dallas:

Secured Transactions South of the Border (co-sponsored by the Commercial Finance Committee), Friday, April 11, 2008, 2:30pm–4:30pm

Successor Liability in § 363 Bankruptcy Sales and UCC Foreclosures (co-sponsored by the Commercial Finance and Business Bankruptcy Committees), Saturday, April 12, 2008,
Mark Your Calendars!

- **3/11/08 - Evolution of the Model Form Deposit Account Control Agreement: Use in the Marketplace and Using the New Inserts**
  If you are tired of problems with Deposit Account Control Agreements on the eve of closing, this CLE teleconference is for you. The original model form DACA, published by the ABA Joint Task Force on Deposit Account Control Agreements in 2006, dealt with the typical transaction & a demand deposit account where the debtor continued to have access to the account. Learn how the model form works and is being utilized currently in the marketplace, as well as how to use the recently finalized inserts for other types of transactions, including lock box arrangements, sweep accounts, time deposits, initially blocked accounts, and much more. Details and registration information are available at [http://www.abanet.org/cle/programs/t08emf1.html](http://www.abanet.org/cle/programs/t08emf1.html).

- **3/13-14/08 - Globalizing Secured Transactions Law ➕ Current Problems, New Directions**
  This CLE program, co-sponsored by the Business Law Section, will feature analysis of international sales of goods on credit, offshore project finance, securitization of non-U.S. receivables and other commercial transactions involving secured credit across international borders. Panelists also will discuss where the global credit crisis is spreading, and how litigators, transactional lawyers and financial institutions may be affected. For additional information, please visit [http://www.tsl.edu/GlobalizingSecuredCredit](http://www.tsl.edu/GlobalizingSecuredCredit).

- **3/17/08 - Filing Office Operations and Search Logic Taskforce**
  The Taskforce on Filing Office Operations and Search Logic ("FOOSL") will hold its next conference call on March 17, 2008. Details and a recap of the January and February 2008 calls are posted on the Taskforce website.

  ![Mark Your Calendars!](http://www.abanet.org/cle/events/2008emf.html)

Attending Your First Meeting?

If you'll be attending your first ABA meeting in Dallas, please join us for the UCC and ComFin dinner on Thursday, April 10. [Details on the dinner are available here](http://www.abanet.org/aba/calendar/event.php?eid=4925). Attending the UCC Committee or ComFin Committee meetings, forums and programs is a good way to meet people and get an overview of what the committees are doing:

- ComFin Committee Meeting will be held Thursday, April 10, at 10:00 a.m. ✅ 10:30 a.m.
- ComFin Committee Forum "Syndicated Loan Market Update" will be held Thursday, April 10, at 10:30 a.m. ✅ 12:30 p.m.
- UCC Committee Program "Made in Heaven or Oil and Water: ADR in Commercial Finance Disputes" will be held Thursday, April 10, at 2:30 p.m. ✅ 4:30 p.m.
- ComFin Committee Program "Earth Wind and Soybeans: The State of Alternative Energy Finance" will be held Friday, April 11, at 10:30 a.m. ✅ 12:30 p.m.
- UCC Committee Meeting will be held Friday, April 11, at 2:00 p.m. ✅ 2:30 p.m.
- UCC Committee Forum "Secured Transactions South of the Border," co-sponsored by the ComFin Committee, will be held Friday, April 11, at 2:30 p.m. ✅ 4:30 p.m.
- ComFin Committee Program "Commercial Law Developments" will be held Saturday, April 12, at 10:30 a.m. ✅ 12:30 p.m.
UCC Committee Program "Successor Liability in § 363 Bankruptcy Sales and UCC Foreclosures" will be held Saturday, April 12, at 1:00 p.m. – 3:00 p.m.

And, we'll be hosting a conference call in advance of the meeting to discuss how to navigate the multi-page meeting schedule to get the most out of the meeting. Email Susan M. Tyler (styler@mcglinchey.com), Norman M. Powell (npowell@ycst.com) or Sherman G. Helenese (sherman.helenese@wamu.net), the ComFin Membership Committee Liaisons, or Terri A. Motosue (tmotosue@carlsmith.com), the UCC Membership Committee Liaison, if you would like to be part of that call or have questions about the meeting.

Steven Weise Receives Lifetime Achievement Award

The Business Law Section of the State Bar of California awarded its Lifetime Achievement Award for 2007 to Steven O. Weise at the September Annual Meeting of the State Bar of California in Anaheim. The award is given each year to a member of the California State Bar who has made significant contributions to the Business Law Section and to business law generally in the State of California over an extended period and who has achieved high status in the legal community. Steve is a nationally recognized expert in all areas of commercial law and his résumé runs almost 40 pages and none of it filler. The Commercial Finance Committee and the UCC Committee warmly add their congratulations to Steve for a very well deserved award.

Tribute to Earl Glick

Once again we have lost one of the founding members of the Commercial Finance Committee as well as one of the leaders in the field of commercial finance, Earl Glick of Los Angeles. Earl died in early January just short of 78 years old. He was there at the beginning of the CFS committee in 1983 and served as the Program Committee Chair from 1988-1992. He was a regular participant on panels and an active member of the committee for many years.

Useful Links and Websites

Maria Ann Milano, UCC Committee Editor

We are adding a new feature to the Commercial Law Newsletter. The electronic links provided below are not ABA-affiliated sites, but are resources our members find useful:

1. The UCCLAWL listserv, which is sponsored by Thomson West, publisher of the "UCC Reporting Service." To subscribe to the UCCLAWL listserv, go to http://lists.washlaw.edu/mailman/listinfo/ucclaw-l;
2. U. Penn's archive of NCCUSL final acts and drafts can be accessed at...
http://www.law.upenn.edu/bll/archives/ulc/ulc.htm;
3. Pace University’s database of CISG decisions can be accessed at http://cisgw3.law.pace.edu; and
4. Gonzaga University’s new Commercial Law Center has a variety of links to useful sites and can be accessed at http://www.law.gonzaga.edu/About-Gonzaga-Law/Commercial-Law-Center/default.asp.

If you have other electronic resources you would like to see included in future editions of the Commercial Law Newsletter, please submit them to either Christine Gould Hamm, the Commercial Finance Editor, or Maria Ann Milano, the Uniform Commercial Code Editor.

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 or related commercial laws. 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.


This case presents a priority dispute between a creditor with a security interest in equipment and a buyer located in a jurisdiction different from the original debtor. Unfortunately, what should have been a fairly straightforward application of § 9-316(a)(3), and § 9-317(b) became muddled with analysis of irrelevant issues and inapplicable law. Nevertheless, the court’s ultimate conclusion in favor of the buyer was correct.

More...

Featured Articles

Loan Syndications and Trading: An Overview of the Loan Syndications & Trading Association and the Leveraged Loan Market
Bridget Marsh and Ted Basta, Loan Syndications & Trading Association

The business of corporate loan syndications, trading, and investing has changed dramatically over the past 15 to 20 years. Up until then, banks made loans to their corporate borrowers and typically held those loans on their books. It was never contemplated that loans would be traded and managed by investors like stocks and bonds in a portfolio. Eventually, however, investors were drawn to the attractive features of loans - unlike bonds, loans were senior secured debt obligations with a floating rate of return - and, over the years, a full institutional asset class emerged. Today, such loans are not just held by banks but typically sold to other banks, institutional investors, mutual funds, insurance companies, structured vehicles, pension
funds, and hedge funds. Consequently, the past 15 years has witnessed an explosion in the volume of loans being issued in the primary market and traded in the secondary market.

More...

If the Land Is Here, You May Be Practicing Law Here: UPL and Ethics Issues in Multi-State Real Estate Closings
Norman M. Powell, Young Conaway Stargatt & Taylor, LLP

Law firms and title companies throughout the country conduct and facilitate complex, multi-state real estate closings. They often do so from main offices, national accounts offices, or other central locations. But they may face charges of unauthorized practice of law, and their in-house counsel may be charged with violating ethics rules, if any of the real estate is located in certain jurisdictions.

Some jurisdictions regulate certain aspects of the real estate transaction as the practice of law, and prosecute non-lawyers for violations.

More...

Made in Heaven or Oil and Water: ADR in Commercial Finance Disputes
Thomas J. Welsh, Brown & Welsh, P.C.

Commentators have reported that with trillions of dollars of financing activity in the United States each year, commercial finance disputes make up a disproportionately small proportion of the cases decided using alternative dispute resolution ("ADR") techniques. Hostility to use of these techniques is legend – an informal poll taken of the members of the equipment lender's association in 2006 found an overwhelming proportion of their members rejected ADR out-of-hand. Share a cocktail with a business finance lawyer and mention ADR and you will be regaled with stories of arbitration proceedings run amok or fear of 'split the baby' decisions by arbitrators that wouldn't recognize a security interest if it introduced itself.

Under this situation, why should lenders, borrower and their counsel care about ADR? Simply because ADR is immensely powerful and has the potential to simplify, streamline and substantially reduce the cost of resolving commercial finance disputes.

More...

Earth, Wind and Soybeans: The State of Alternative Energy Finance
Arthur A. Cohen, Haynes and Boone, LLP

Alternative energy is one of the hottest topics in the news, and the Commercial Finance Committee is right in the middle of this important issue, as the sponsor of a major CLE program at the Spring Meeting in Dallas this year. On Friday, April 11, 2008, 10:30 a.m. - 12:30 p.m., we are co-sponsoring a CLE program called "Earth, Wind and Soybeans: The State of Alternative Energy Finance." This program will look at the current state of the finance market for alternative/renewable power, how and why things have changed over the last year and where the market is going in the months and year ahead.
Committee on Commercial Finance: Subcommittee, Task Force and Liaison Reports

Subcommittee on Aircraft Financing
Michael K. Vernier, Chair, Peter B. Barlow, Vice Chair

We have an exciting program of speakers and panels this spring. The Treasurer of Southwest Airlines will join us to discuss Southwest's approach to aircraft financing in these turbulent times. We have a panel of lessors' representatives that will discuss leasing opportunities and challenges in the Asian markets. We also will have an update on recent aircraft financing developments in Ireland.

FAA Aeronautical Center Counsel will provide an FAA update, and we expect that Kerry Long, the FAA Chief Counsel (and a long-time member of our Subcommittee), will be on hand to introduce some of his Regional Office staff. We will have an update on Cape Town International Registry issues from our representatives on the International Registry Advisory Board and a discussion of FAA and Cape Town filing and registration issues from Oklahoma City counsel. We also will have more detailed discussions of issues arising with respect to FAA recordation of artisan liens and Cape Town registration of lease assignments.

Thursday morning, April 10th, we have a tour of Southwest Airlines at Love Field. We will have an opportunity to tour Southwest's Headquarters and dispatch operations and, as time and availability permit, certain training and maintenance facilities. This is a great opportunity to get "up close and personal" with this unique airline's operations. Thursday evening, April 10th, our Subcommittee dinner will be held at the restaurant Dallas Fish Market. The menu at this lively newcomer has an "invigorating perspective" that makes it one of the "most promising" new restaurants in Dallas. Our dinner will be held in the private Banquet Room at the restaurant, beginning at 7:00 p.m.

Subcommittee on Creditors' Rights
Carolyn P. Richter, Chair, Shannon Lowry Nagle and Elizabeth M. Bohn, Vice Chairs

We have a great topic lined up for our subcommittee meeting in Dallas. We hope you can join us. Our topic is "Repurchase Agreements: Extending Credit Without Risking a Trip to Bankruptcy Court (and Limitations that may Foil that Goal)."

This program will discuss the benefits repurchase agreements offer to a secured creditor, limitations imposed by the Bankruptcy Code and the courts in recent bankruptcy cases, and pitfalls to be aware of in documenting a repurchase transaction. The panel will also explore the benefits of structuring a transaction as a repurchase rather than a secured loan to allow the creditor to avoid the automatic stay in levying against a variety of asset types, beyond those traditionally seen in repurchase transactions. The impact of the UCC and state law foreclosure rules will also be discussed. Come and learn about what may be the next wave in commercial finance and whether that trend may lead courts to recharacterize certain types of repurchase agreements as disguised loans.

Our speakers are Gerald C. Bender, a partner with O'Melveny & Myers LLP in New York, and Lyman R. Paden and James W. Robertson, partners with Locke Lord Bissell & Liddell LLP in Houston.
We will meet on Thursday, April 10, 2008, from 1:00 p.m. – 2:30 p.m.

Last November, we met at the National Conference of Bankruptcy Judges, which was in Orlando, Florida. Our meeting focused on 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.

Subcommittee on Cross-Border and Trade Financing
Daryl Clark, Chair

At the upcoming Spring meeting of the American Bar Association in Dallas, our subcommittee will hold a joint meeting with the International Commercial Law subcommittee of the UCC Committee. This meeting will be held on Friday, April 11, from 10:00 a.m. to 10:30 a.m. and will follow the International Coordinating Committee and Commercial Finance Committee program on UNCITRAL to be held from 8:00 a.m. to 10:00 a.m.

Following the Spring meeting, our subcommittee will be participating in the Global Business Law Conference to be put on by the Business Law Section of the American Bar Association on May 29-30 in Frankfurt, Germany. This will be the first conference of the Business Law Section to be held outside of the United States. Our subcommittee will be co-sponsoring with the UCC International Commercial Law subcommittee a program that will focus on recent developments in tax law in Canada and other foreign jurisdictions and the impact of such developments on the finance and M & A practices in those jurisdictions. Further updates on this program will be made available to our subcommittee members.

Hope to see many of you in Dallas in April and in Frankfurt in May!

Intellectual Property Financing Subcommittee
Matthew W. Kavanaugh, Chair, John E. Murdock, III, Vice Chair

The Subcommittee will hold a meeting at the ABA Business Law Section Spring Meeting in Dallas on Friday, April 11, 2008, 4:30 - 6:00 p.m. The topic will be "Hot IP Lien Issues: USPTO Filing Project, URLs as Collateral, and UNCITRAL IP Collateral Project." Professor Tom Ward will speak on the USPTO lien filing project and other IP current developments. Matt Kavanaugh will present a paper co-authored by Chris Dorman on internet domain names as collateral. Professor Neil Cohen and Kiriakoula Hatzikiriakos will provide an update on the UNCITRAL Secured Transactions Guide proposed IP annex.

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

The Lender Liability Subcommittee will host a program at the Spring Meeting, "Recent Updates: Lender Liability Theories, Trends and Defenses." This panel (Ed Dobbs of Parker, Hudson, Rainer & Dobbs LLP and Vivien Kelley of Troutman Sanders LLP) will help us identify and negotiate the lender liability issues that are often encountered in commercial and consumer transactions. They will analyze the most common lender liability claims and examine recent case-law and emerging trends in theories of liability. Topics will include: bank group liability;
securities law violations; deepening insolvency developments; antitrust issues and consumer law theories.

**Subcommittee on Loan Documentation**  
Jeremy S. Friedberg, Chair, Bobbi Acord, Stuart D. Ames and Scott Lessne, Vice Chairs

"Insurance and Equity and Everything Else..." will be our topic at the Spring 2008 Loan Documentation Subcommittee meeting.

Jeremy Friedberg, Bobbi Acord and Scott Lessne will explore documentation and diligence requirements relating to "non-uniform" collateral – insurance, equity interests and "everything else" – including certificates of deposit, boats, aircrafts, motor vehicles, intellectual property, farm products, regulated collateral (liquor, firearms, pharmaceuticals).

Please join us on Thursday April 10, 2008 at 1:00 p.m.– 2:30 p.m.

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

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., serve as Chair and Vice-Chair of the Subcommittee. Steve and Cathy have organized a panel presentation for the Spring Meeting in Dallas, Texas entitled: Current Issues and Developments in Dealing with Distressed Real Estate. The panel will be moderated by Steve and will include presentations by Cathy, William K. Snyder, Managing Partner of CRG Partners and Daren Wayne Perkins, Vice President/Assistant General Counsel, JPMorgan Chase & Co. The panelists will explore the major issues, concerns and alternative strategies which arise in working out defaulted real estate loans in a diverse range of real estate transactions.

Steve, Cathy and John R. Clemency, a Partner at Greenberg Traurig, LLC, presented a panel at the Fall Commercial Finance Committee Meeting in Phoenix entitled: On the Downturn: Transaction Issues in Loan-to-Owner, Workouts and Foreclosures on Equity Interests which panel was moderated by James Schulwolf, a Member of the Firm of Shipman & Goodman LLP. Steve and Cathy desire to organize panel presentations by the Subcommittee on a regular basis. Active participation by Subcommittee members is sought, and we welcome suggestions for program topics, as well as volunteers for future panels. Please contact Steve at 212-661-9100/ssoll@oshr.com or Cathy at 602-916-5343/crearce@fclaw.com with your thoughts, comments and suggestions.

**Subcommittee on Real Estate Financing**  
Kathleen J. Hopkins, Chair, Edgel C. Lester, Jr., Vice Chair

At the Spring meeting we have decided to recap and continue the discussion started at the CFA meeting on "Avoiding Jail, Disbarment and Other Bad Consequences: What You Need to Know About Real Estate Collateral". We will conduct our meeting/program on Friday, April 11, 2008 from 3:00 p.m. - 4:30 p.m. in the Media Room on the Mezzanine Level of the Anatole
Hilton (Dallas). Our subcommittee vice-chair Ed Lester from Carlton Fields will continue our moderated discussion, with our distinguished panel including Ray Carpenter from Holland & Knight (a state and federal tax law guru), Wilhelmina F. Kightlinger, Vice President Florida Commercial Underwriting at Stewart Title (our title insurance guru), Kevin Napper from Carlton Fields (a truly wise man on issues of white collar criminal law) and Norm Powell from Young Conaway Stargatt & Taylor (all-knowing master of issues relating to ethics and unauthorized practice of law).

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

The Securitization and Derivatives Subcommittee of ComFin will meet in Dallas, in a joint meeting with the Structured Financings Subcommittee of the Federal Regulation of Securities Committee and Securitization of Assets Subcommittee of the Developments in Business Financing Committee. Topics for discussion will include recent developments in securities law liability and mortgage securitization cases. The Subcommittee will also meet in New York City for the ABA annual meeting this summer. We hope to see you there as well as in Dallas.

The subcommittee has also been active in preparing a securitization version of the ABA Model Deposit Account Control Agreement – many thanks to Eric Marcus for his work in this regard.

Please contact Teresa Harmon or Anthony Nolan if you would like to become more involved in the Subcommittee. We need more input on programs and ongoing activities. Future projects in need of volunteers include our effort to encourage securitization lawyers to become more involved in pro bono activities and the possible launch of a securitization and derivatives listserv on the ABA's website.

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

The Syndications and Lender Relations Subcommittee of the Commercial Finance Committee and the Syndicated Bank Financing Subcommittee of the Developments in Business Financing Committee will present a joint CLE panel presentation entitled, "Syndicated Loan Market Update." The presentation will be held on Thursday, April 10, 2008 from 10:30 a.m. to 12:30 p.m. in connection with the Spring Meeting of the Business Law Section in Dallas. Bridget Marsh, Associate General Counsel of the Loan Syndications and Trading Association and a vice-chair of the Syndicated Bank Financing Subcommittee, will be the program moderator. Panelists will include Alex Spiro, Esq. of Bank of America, N.A. and Peter Wasserman, Esq. of JPMorgan Chase Bank, N.A. We anticipate that, given the current credit climate, this program will provide a very robust and topical discussion of the current state of and anticipated developments in market for syndicated loans.

Model Intercreditor Agreement Taskforce
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 will meet at the Spring Meeting in Dallas on Friday, April 11, 2008 from 12:30 p.m. to 2:00 p.m. The meeting is open to all. The Task Force met last November in Scottsdale, Arizona for an all-day working session to discuss and revise the Model Intercreditor Agreement. A revised draft of the Model Intercreditor Agreement based on the discussions in Scottsdale will be available at the Spring Meeting. The Task Force was formed to develop a market-based form of intercreditor agreement for intercreditor arrangements between first and second lien institutional lenders holding liens on the same collateral. Second lien loans are usually structured as term loans, bear interest at a rate based on a margin above LIBOR and can offer a borrower an alternative to traditional unsecured mezzanine financing, without the need to issue stock warrants or other equity interests. With the credit crunch continuing and an economic downturn in the wind, the carefully negotiated arrangements between senior lien holders and junior lien holders represented by intercreditor agreements are likely to be severely tested over the next year both inside and outside of bankruptcy. The Task Force meeting will include a discussion of the latest draft of the Model Agreement, recent trends in second lien financing, the state of the second lien loan market, recent cases regarding the enforceability of intercreditor arrangements in bankruptcy and the effects of first lien/second lien loans on the ability of borrowers to successfully restructure their businesses.

New members are welcome. In particular, the Task Force would like to encourage in-house counsel at banks and other 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.

ABA Section of Business Law Legal Opinions Committee: Cross-Border Opinion Initiative
Larry Safran

The Cross-Border Legal Opinions Subcommittee of the ABA Legal Opinions Committee is studying outbound legal opinions (opinions by U.S. counsel addressed to non-U.S. recipients) in cross-border transactions. As a result of this study, the Subcommittee may propose guidelines for such opinions. The ComFin Committee is participating in this project and is represented on the Legal Opinions Committee Cross-Border subcommittee.

At its meeting on January 31, 2008, the ComFin Committee was represented by Larry Safran and the following items were among the issues discussed with respect to outbound legal opinions:

More...
Howard Damstater, Co-Chair and Meredith Jackson, Co-Chair

On Friday, April 11, 2008, the Investment Securities Subcommittee of the Uniform Commercial Code Committee will host three presentations. Norm Powell, a partner with Young Conaway Stargatt & Taylor, LLP in Wilmington, Delaware, will present Delaware's Clearer Path to Perfection. Sandra M. Rocks, counsel at Cleary Gottlieb Steen & Hamilton in New York, New York, will present Life Insurance Under the UCC and Perry Hicks, an Associate with Cadwalader, Wickersham & Taft in Charlotte, North Carolina, will present Concerns Arising from Issuers' Restrictions on Transfer on Securities in the Indirect Holding System.

Delaware's Clearer Path to Perfection will discuss Delaware's 2007 legislation enacted to provide additional methods of perfection of security interests and to limit the impact on perfection of conditions placed on the secured party's ability to direct disposition of the collateral. Life Insurance Under the UCC will discuss the treatment of life insurance policies under the Uniform Commercial Code, with particular focus on their inclusion as investment property through "financial asset" treatment. Concerns Arising from Issuers' Restrictions on Transfer on Securities in the Indirect Holding System will address the broad transfer restrictions on securities that underlie security entitlements. These transfer restrictions present attachment and perfection issues in transactions secured by pledges of security entitlements. Equity interests in hedge funds are often subject to these broad transfer restrictions and therefore, pledges of hedge fund equity pose unique challenges for the lenders, borrowers and counsel. This presentation will also provide potential solutions to the more common questions posed by counsel involved in such transactions while highlighting the dire consequences of failing to address these issues.

Subcommittee on General Provisions and Relations to Other Law
Kristen David Adams, Chair

The General Provisions and Relations to Other Law Subcommittee will be meeting in Dallas at the Business Law Section's Spring Meeting, on Friday, April 11 from 11:00 am until noon in the Ming Room in the Tower of the Hilton Anatole, Mezzanine Level. The topic will be "Are We Giving Good Faith a Bad Name?" There will be a panel discussion on the 2001 revision to Article One's definition of good faith, which extended the "commercial reasonableness" standard to nonmerchants and has been nonuniformly enacted by a number of jurisdictions. The discussion will be primarily geared toward addressing the following issues: (1) The purpose behind the change; (2) why some legislatures have balked at the change; and (3) what the language should or should not mean.

Subcommittee on Letters of Credit
George Hisert, Chair

The Letter of Credit Subcommittee is scheduled to meet from 12:30 p.m. to 2:00 p.m. on Friday, April 11 in Dallas at the ABA Spring Meeting of the Business Law Section. The tentative agenda will include the following items:

- Governmentally Mandated Forms of Letters of Credit;
• Recent case developments;
• Revisions to the Official Commentary to ISP98;
• Drafting of LCC Terms (Letter of Credit Contract Terms) that can be used in connection with letter of credit payment clauses or assurance clauses in contracts. This is intended to be a set of industry terms analogous to those contained in INCOTERMS with regard to shipping times. The project is being spearheaded by the Institute of International Banking Law & Practice; and
• Potential model Reimbursement Agreement.

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

The Subcommittee on Payments will participate in a presentation titled “Deposited Check Truncation – Check or Electronic Payment?” at the upcoming Spring meeting of the American Bar Association in Dallas. The presentation will take place on Friday, April 11th at 9:00 a.m. The distinguished panelists will discuss the proposed NACHA check truncation pilot program and whether it is a model for payment law convergence or simply a cheaper means of collecting low dollar value checks.

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

Please join our Subcommittee at the upcoming Spring meeting of the American Bar Association in Dallas, for the following presentation—"Electronic Sales Contracts: Even the Simple Can Be Complex." This program will explore developments in electronic contracting law and practice, emphasizing the legal, practical and policy issues in contracting electronically to sell goods. The presentation will take place on Thursday, April 10th at 10:00 a.m.

Task Force on Forms Under Revised Article 9
Cindy J. Cherchuchin, Chair

Our Task Force has been diligently working to prepare a first draft of all documents to be included in the 2nd Edition of Forms Under Article 9. The forms should be posted on the ABA site by the end of February. Please review these documents and share your comments at the Spring meeting in Dallas. If you have additional documents you wish to be included in the book please bring these documents to the Spring meeting in Dallas.

Task Force on State Certificate of Title Laws
Alvin C. Harrell, Chair, Lee Anne Leathers-Lutz, Vice Chair

The Task Force is nearing completion of the second edition Compendium of State Certificate of Title Laws, to be published by the ABA Section of Business Law. The Compendium will describe each state’s certificate of title law, how it works, and its relation to UCC Article 9 and the Uniform Certificate of Title Act (UCOTA).

The Task Force is also working with NCCUSL as it considers expansion of UCOTA to cover watercraft and manufactured housing.
Joint Subcommittee Report

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 Commercial Finance Committee and the Secured Transactions Subcommittee of the UCC Committee will hold a joint meeting at the Spring Meeting in Dallas on Saturday, April 12, 2008 from 8:30 a.m. to 10:00 a.m. We look forward to an interesting and timely discussion of “The ABC’s of Assignments for the Benefit of Creditors,” to be presented by our panel of experts: James C. Chadwick (moderator) and Brent R. McIlwain of Patton Boggs LLP, Michael W. Hilliard (moderator) and Jennifer D. Knapek of Winstead PC and Ronald Winters of Alvarez & Marsal.

As news of an economic downturn becomes more prevalent, we are all seeking to improve our skill sets. Here is an opportunity to add to your repertoire the long-established common law procedure known as assignment for the benefit of creditors. This kind of procedure is often significantly less costly and more flexible than a bankruptcy proceeding, and may allow creditors to achieve a greater recovery more quickly than in bankruptcy. After providing a broad overview of this state procedure, our panel will compare the ABC procedure with the bankruptcy process, focusing on common issues raised by both approaches. The presentation will place an emphasis on practical considerations for a secured creditor's effective utilization of this tool.

We will also be looking for suggestions as to future Subcommittee projects and programs. Please join us in Dallas!

Joint Task Force Reports

Joint Task Force on Commercial Finance Terms
Carl Bjerre and Meredith Jackson, Co-Chairs

The Commercial Finance Terms Taskforce has embarked on a plan to compile and publish a "dictionary" of terms used in commercial finance transactions. We are still soliciting additional finance terms for inclusion. Our first meeting is scheduled for Dallas at 10:00 a.m. on April 12, 2008. Please join us and bring any resource materials that include definitions of financing terms! We look forward to creating the last word in financial jargon.

Joint Taskforce on Deposit Account Control Agreements
R. Marshall Grodner, Marvin D. Heileson, Oliver I. Ireland, John D. Pickering and Edwin E. Smith, Co-Chairs

After the Joint Task Force on Deposit Account Control Agreements unveiled its new form of deposit account control agreement at the Section's 2006 Spring meeting in Tampa, Florida, and the initial report of the task force was published in 61 The Business Lawyer 745 (2006), the task force began to develop
a series of inserts designed to accommodate transactions other than the paradigm transaction originally contemplated by the deposit account control agreement (the "DACA") developed by the task force. These transactions include those involving a standing disposition instruction, lock box arrangements, a security interest in a time deposit or other deposit account not payable on demand, the blocking of the debtor's access to the deposit account without a standing disposition instruction, a deposit account from which funds are automatically swept into an omnibus investment account, and first and second lien arrangements over the same deposit account.

More...

Joint Taskforce on Filing Office Operations and Search Logic
James D. Prendergast and Paul Hodnefield, Co-Chairs

The Task Force on Filing Office Operations and Search Logic has been formed to address issues relating to filing and searching under Article 9 of the Uniform Commercial Code. The Task Force will cooperate closely with the International Association of Commercial Administrators ("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. In addition to the development of a cooperative and joint approach between the ABA through the Task Force and IACA, the Task Force will also work with the Internal Revenue Service and the appropriate Committees of the Congress with regard to the pending legislation to establish a central filing system for federal tax liens.

More...

UCC Scorecard

UNIFORM STATE LAWS SCORECARD
Survey of Adoptions of Revised Official Text of the UCC
As of February 1, 2008

Committee Leadership Rosters

- Committee on Commercial Finance
  (as of 02/2008)

- Committee on Uniform Commercial Code
  (as of 02/2008)
ComFin Chair’s Letter Spring 2008

I’ve been giving a lot of thought since the last newsletter to what the ComFin Committee offers for its members and (more importantly) what those members want. A survey that the Business Law Section recently conducted indicates that many members don’t attend in-person meetings and are looking for information and networking through other means. So while there is much going on at upcoming meetings, from information on legal and market developments to networking opportunities, we’ve also been sending out more information via emails, listserves, newsletters, blogs and websites and will continue to do so. We’ve also highlighted in this issue a listserve used by many commercial finance lawyers to discuss issues and some web-based resources in the area of commercial law. If there are other ways we can provide information sharing, networking or other resources to ComFin Committee members, please let me know.

We’ve again made this issue of the newsletter “open access” so that you can forward it to colleagues who would be interested in the Committee. I’d like to enlist your help in publicizing ComFin’s many activities, whether by forwarding the newsletter or emails on upcoming events of interest or bringing a colleague to a meeting or to attend the Committee dinner in Dallas on April 10th.

Membership in the Committee and its subcommittees and taskforces is open to any Business Law Section member. Attached is a description of the activities of the Committee, subcommittees and taskforces – please take a look and join the groups that interest you and let the contact people listed know how you’d like to be involved.

Before a discussion of upcoming events, including the 2008 Spring Meeting and 2008 Global Business Law Conference, I wanted to share some sad news. Earl Glick, one of the early members of the Committee and a leading commercial finance lawyer, passed away in January. The newsletter includes a remembrance of Earl and his contributions. Earl’s family has expressed thanks for the personal memories of Earl that his friends from the Committee have been sharing; if you have thoughts to share please let me know and I can provide contact information for Earl’s family members to you.

Spring Meeting (April 10-12, 2008, Dallas, Texas)
We’ll begin at 9:00 a.m. on Thursday, April 10, and conclude at 4:30 p.m. on Saturday, April 12. Our Committee meeting will be Thursday morning at 10:00 a.m. and a copy of our schedule (showing planned topics for all ComFin sessions and CLE programs) is attached.

One of the CLE programs ComFin will be co-sponsoring is Earth, Wind and Soybeans: Alternative Energy Finance (Friday, April 11, 10:30 a.m. – 12:30 p.m.). The Project Finance Subcommittee of Developments in Business Finance has been invaluable in putting together an expert panel on this timely topic, and will follow the program with a subcommittee meeting from 12:30 p.m. – 1:30 p.m. on Power and (Uncertain) Glory: Project Finance in Challenging Economic Times as well as discussion of future activities in the project financing area. Please visit the subcommittee website for more information. Rounding out our offerings on alternative energy, from 8:30 – 10:30 on Friday morning the ComFin Agricultural and Agri-Business
Financing Subcommittee will discuss Ethanol’s Huge Impact – Perspective from Lenders and Others.

Another CLE program I want to highlight is on the use (or non-use) of ADR in disputes involving commercial finance transactions. With jury trial waivers not enforceable in some jurisdictions (including California), and judges often not coming from a transactional practice background, ADR and business courts are avenues that are receiving more attention. Made in Heaven or Oil and Water: ADR in Commercial Finance Disputes (Thursday, April 10, 2:30 p.m. – 4:30 p.m.) will start a year long project in which ADR will be examined and adapted to commercial transactions. The project and planned related publication are described in detail on the ADR Colloquium website. For those with an interest in ADR, the Dispute Resolution Committee will present a program on Diversity in Mediation and Arbitration – The Corporate End-Users’ Challenge to the ADR Profession (Friday, April 11, 8:00 a.m. – 10:00 a.m.).

The ComFin Syndications and Lender Relations Subcommittee will present our Syndicated Loan Market Update CLE program (Thursday, April 10, 10:30 a.m. – 12:30 p.m.) with a roster of industry participants to provide information on current market and legal issues.

Other commercial law CLE programs at the Spring Meeting include World Law Reform: UNCITRAL’s Legislative Guide on Secured Transactions (Friday, April 11, 8:00 a.m. – 10:00 a.m.), Secured Transactions South of the Border (Friday, April 11, 2:30 p.m. – 4:30 p.m.) and Successor Liability in Section 363 Bankruptcy Sales and Foreclosures (Saturday, April 12, 1:00 p.m. – 3:00 p.m.). The ComFin Committee has been participating in the discussion of Cross-Border Opinions that will be part of the Legal Opinion Committee’s meeting (Friday, April 11, 9:30 a.m. – 10:30 a.m.). Also we’ll be presenting A Different View of Credit Agreements: Representing the Borrower, as part of the Institute for the Young Business Lawyer on April 10th.

Last and far from least, the annual Commercial Law Developments CLE program will be presented on Saturday, April 12, 10:30 a.m. – 12:30 p.m. Steve Weise, Teresa Harmon and a Texas-based “player to be named later” will provide in just two hours a concentrated and fun summary of cases of interest to commercial lawyers, backed by great materials.

Advance registration for the meeting is open through March 20, 2008 on the Section website – after that date registration can be handled on-site at the Spring Meeting. When you register for the meeting you can also register for the joint UCC Committee /Commercial Finance Committee dinner (if you already have registered for the meeting, you can now register for the dinner). The dinner will be held on Thursday, April 10, from 7:00 p.m. – 10:00 p.m. and guests are welcome to attend. Registration information for the dinner is attached. Thanks to Michelle White Suarez, Jim Prendergast and Bob Wittie for their help in planning our dinner.

For those who haven’t been regular meeting attendees, we’ll be providing a pre-meeting planning call to answer any questions and provide help navigating the schedule of programs and meeting and other events in Dallas. I hope that you’ll be able to join us for the call. The Committee dinner reservation form provides a place for you to indicate that you’d like to sit with
members of the UCC and ComFin Committees to get to know folks, and we acknowledge first time attendees at the dinner to help them network. Please get in touch with our membership liaisons (Norm Powell NPowell@ycst.com, Susan Tyler styler@mcglinchey.com, and Sherman Helenese sherman.helenese@wamu.net) if you have any questions about the meeting.

The Section is reaching out to Europe this year with the first of an annual series of Global Business Law Conferences. The conference will provide an opportunity for European-based lawyers, both in private practice and in corporate legal departments, to experience the programs and networking opportunities available through the Business Law Section. The Conference will feature programs in such fields as M&A (including a presentation of the Section’s “Deal Points” studies), corporate compliance, corporate governance, legal opinion practice, cross-border dispute resolution and cyberspace law (data security, user-generated content, internet governance). Additional information about events and registration can be accessed on the Section website. Neal Kling (NKling@SHERGARNER.com), one of the ComFin Committee vice chairs, will be attending the meeting and Daryl Clark (daryl.clark@blakes.com), chair of our Cross Border and Trade Financing Subcommittee, will be chairing one of the programs. Please contact Neal if you plan to attend and would like an update on sessions of interest.

Annual Meeting (August 9-11, 2008, New York, NY)
Planning is underway for a full schedule of meetings, programs and Committee events – details will be announced following the Spring meeting. Suggestion for programs (topics and speakers) are welcome – please contact ComFin vice chair Jim Schulwolf (JSchulwolf@goodwin.com) and Planning vice-chair Marshall Grodner (mgrodner@mcglinchey.com), who are heading up the Committee’s planning for the Annual Meeting.

Don Rapson Memorial Dinner (August 7, 2008, New York, NY)
A dinner in honor of the memory of our late colleague and friend Donald J. Rapson will be held on Thursday, August 7, at the Yale Club of New York City. The evening, sponsored by the American College of Commercial Finance Lawyers, the Association of Commercial Finance Attorneys and The CIT Group, Inc., will take place on the eve of the Annual Meeting, and the dinner venue is a few short blocks from our meeting hotel. We ask that you reply by March 21st if you plan to attend; additional information and reply instructions are attached.

Fall ComFin Meeting (November 12, 2008, San Francisco, California)
Our annual ComFin meeting held in conjunction with the CFA convention will provide three CLE programs and a networking lunch. If you have suggestions for topics or speakers please let me know.

Commercial Law Surveys
On the ComFin website there is a resource for all business lawyers – surveys of different aspects of commercial laws in each state, DC and Canada. The surveys can be accessed on the ComFin website and updates will be on the way.
Email and Listserves
For reasons known only to the technology gremlins, many of our Committee members are listed as not having provided an e-mail address to the Section and/or are not part of the Committee listserv. With the Section phasing out most non-email communication, those members won’t be receiving newsletters or updates on events of interest. For example, developments on adapting the UNCITRAL Secured Transactions Guide to IP Financing are being reported, and related materials and announcements are being distributed, only by email and on the ComFin website.

To get distributions of up-to-date information, please check that the Section has your email address using the Section website (click on “Member Login” in the upper left corner and after you have logged in edit your “Profile”). This will allow you to see what committees and other groups you are listed as a member of as well as to provide an email address and indicate which types of communications you want (and don’t want) to receive. Listserves are handled at the Committee, subcommittee and taskforce levels and you can sign up for listserves on the webpage for the groups that interest you. The attached description of the ComFin Committee contains links to all the groups.

You can also contact the ABA Service Center by email at service@abanet.org or phone at 800-285-2221 (from outside the US, Canada and Mexico, please call 312-988-5522). Customer Service Representative phone hours are Monday - Friday, 7:30 a.m. – 5:30 p.m. Central US Time).

And …
If you have other suggestions for making ComFin a resource for members, please let me know. We want your input and involvement – a list of contacts is included and please let us know what you are interested in.

I hope to see many of you in Dallas, New York and San Francisco this year, and to “virtually” keep in touch with all via the website and email.

Lynn
lynn.soukup@pillsburylaw.com
CHAIR’S COLUMN

March 2008

The UCC Committee is continually striving to provide its members on a timely basis with important information about developments in commercial law and commercial practice. Anyone with a suggestion for a project the Committee should undertake or with an idea about how the Committee can better fulfill its mission should contact me.

Noteworthy Events at Spring Meeting

The UCC Committee is presenting two wonderful programs at the Spring meeting in Dallas:

Secured Transactions South of the Border (co-sponsored by the Commercial Finance Committee), Friday, April 11, 2008, 2:30pm–4:30pm;

Successor Liability in § 363 Bankruptcy Sales and UCC Foreclosures (co-sponsored by the Commercial Finance and Business Bankruptcy Committees), Saturday, April 12, 2008, 1:00pm–3:00pm

The latter is particularly noteworthy because it will be structured as an oral argument based on a hypothetical set of facts before a mock tribunal consisting of U.S. District Court Judge Alvin Thompson, and U.S. Bankruptcy Judges Elizabeth Stong and Philip Brandt.

In addition, the Committee is co-sponsoring and recommends the following additional programs:

Syndicated Loan Market Update
    Thursday, April 10, 2008, 10:30am–12:30pm

Made in Heaven or Oil and Water: ADR in Commercial Finance Disputes,
    Thursday, April 10, 2008, 2:30pm–4:30pm

Earth, Wind and Soybeans: The State of Alternative Energy Financing
    Friday, April 11, 2008, 10:30am–12:30pm

Commercial Law Developments
    Saturday, April 12, 2008, 10:30am–12:30pm

For a detailed chart of all the events of the UCC Committee and the Commercial Finance Committee, click here.

Two New Books

The UCC Committee’s latest publication, Practice Under Article 9 of the Uniform Commercial Code, will be in print in advance of and available for purchase at the Spring meeting
of the Business Law Section. The book includes:

♦ Articles by Steve Weise and Ed Smith;
♦ More than a dozen charts to aid lawyers in understanding and applying Article 9’s rules;
♦ The text and comment of revised Articles 1 and 9;
♦ PEB commentaries that relate to Article 9; and
♦ A bibliography of Article 9 scholarship

Later in the year, probably in time for the ABA annual meeting, the Committee’s Task Force on Article 9 Forms will publish the second edition of one of its best sellers: FORMS UNDER REVISED ARTICLE 9 (2002). The new edition 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. As of March 1, drafts of several of the documents will be posted for comment on the Task Force’s web page. Committee members who are also members of the Task Force are encouraged to review the drafts and send their comments to Cindy.

Upcoming UCC CLE

The following continuing legal education programs will focus on the Uniform Commercial Code:

The Penn State Dickinson School of Law’s 41st Annual Uniform Commercial Code Institute, April 17-19, 2008 (Washington, DC)

ALI-ABA’s The UCC and Beyond, Current Developments in Commercial Law, June 12-13, 2008 (New York City) (may attend live or via web cast)

Invitation to Dinner in Honor of Don Rapson

When: August 7th, 2008 from 6:00pm - 10:00pm
Where: Yale Club of New York City, 50 Vanderbilt Avenue, between 44th and 45th Streets
Cost: $125 (includes cocktail reception and dinner) if received by March 21st; thereafter $160 (on a space available basis only).

The American College of Commercial Finance Lawyers, the Association of Commercial Finance Attorneys, and The CIT Group, Inc., invite you to join its members for cocktails followed by a dinner in honor of the memory of our late colleague and friend Donald J. Rapson on Thursday, August 7, at the Yale Club of New York City. The evening will take place on the eve of the annual meeting of the American Bar Association. A seat at the dinner requires a payment of $125 by March 21. Your prompt reservation will greatly facilitate planning and arrangements. Details are below.

As many of you know, Don served for many years as the assistant general counsel at The CIT Group, Inc, but he is primarily remembered by so many of us for his exceptional contributions to commercial law reform and the nurturing of younger lawyers in the commercial law field. For nearly
two decades Don was an American Law Institute representative on the Permanent Editorial Board for the Uniform Commercial Code, where he oversaw the development of a series of PEB commentaries aimed at clarifying and improving the understanding of various provisions of the UCC. He also served as an American Law Institute representative on several drafting committees engaged in updating and revising the UCC, including Article 9 (Secured Transactions), Article 3 (Negotiable Instruments), Article 4 (Bank Deposits and Collections), Article 4A (Funds Transfers) and Article 6 (Bulk Sales). He wrote numerous articles on aspects of the UCC and acted as the planning chair of ALI-ABA’s annual program on the “Emerged and Emerging New Uniform Commercial Code.” Don was also a key adviser for ALI’s recently completed Restatement of the Law of Suretyship and Guaranty, after having been instrumental in persuading the Institute’s leadership that the project needed to be undertaken. Don was a fellow of the American College of Commercial Finance Lawyers and spoke regularly at the annual continuing education weekends of the Association of Commercial Finance Lawyers.

A graduate of both Columbia College and Columbia Law School, Don was an adjunct professor of law at New York University and a lecturer-in-law at Columbia Law School. He was a member of the American Law Institute since 1968 and a life member since 1993. He received the Homer Kripke Award of the American College of Commercial Finance Lawyers and ALI’s John Minor Wisdom Award.

Don died in October 2007. Many of us in practice in the commercial law field today were inspired by Don’s continual quest to make the UCC as perfect as possible, to balance the academic with the practical and to bring within the field younger lawyers who were intellectually curious and willing to work hard towards law reform. We hope that this dinner will in a small measure recognize his extraordinary career and the treasured way in which we all remember him.

Please mark your calendar now and send your reservation with payment to Carlton Fields, P.A. The check, together with a notation that it is for the Donald J. Rapson Dinner and the individuals who will be attending, should be sent to Thomas A. Snow, Carlton Fields, P.A., PO Box 3239, Tampa, Florida 33601-3239, Attention: Nancy Golightly.

**Regional Coordinator Needed**

Four of the five new Regional Coordinator positions have been filled, but the UCC Committee is still looking for a Regional Coordinator for the Northeast Region (consisting of Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont). Each Regional Coordinator serves as a liaison between the UCC Committee of the ABA Business Law Section and state bar associations within the designated 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 to:

1. 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) assist state and local bars reprise UCC Committee programming at the local level; and
(3) 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.

Anyone interested in becoming a Regional Coordinator for the Northeast Region should contact me.

Stephen L. Sepinuck
Professor, Gonzaga University School of Law
ssepinuck@lawschool.gonzaga.edu
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<th>Time</th>
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<tr>
<td>9:00-9:30am</td>
<td>Joint Task Force Meeting: Deposit Account Control Agreements</td>
<td>Task Force Meeting: Certificate of Title Laws</td>
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<td>9:30-10:00am</td>
<td>Committee Meeting</td>
<td>Subcommittee Meeting: Sales:</td>
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<td>10:00-10:30am</td>
<td>Committee Forum: Syndicated Loan Market Update (UCC &amp; DBF co-sponsoring)</td>
<td>Joint Subcommittee Meeting: Leasing (with DBF Lease Financings Subcommittee)</td>
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<td>10:30-11:00am</td>
<td>Committee Meeting</td>
<td>Task Force Meeting: Consumer Involvement</td>
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<td>11:00-11:30am</td>
<td>Committee Forum: Syndicated Loan Market Update (UCC &amp; DBF co-sponsoring)</td>
<td>Task Force Meeting: Consumer Involvement (jointly with Cyberspace Working Group on Consumer Protection)</td>
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<td>1:00-1:30pm</td>
<td>Joint Subcommittee Meeting: Creditors Rights (w/ Bankr Litigation)</td>
<td>Working Group: Transferability of Electronic Assets</td>
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<td>1:30-2:00pm</td>
<td>Committee Meeting: Loan Documents</td>
<td>Program: Alternative Dispute Resolution Techniques for Use in Commercial Finance Transactions (ComFin Dispute Resolution, and ACFA co-sponsoring)</td>
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<td>Committee Meeting: Loan Workouts</td>
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<td>Subcommittee Meeting: Investment Securities:</td>
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<td>8:30-9:00am</td>
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<td>Subcommitteee Meeting: Payments:</td>
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<td>9:00-9:30am</td>
<td>Committee Meeting: Aircraft Financing (Part 2)</td>
<td>Program: Alternative Energy Finance (UCC co-sponsoring)</td>
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<td>9:30-10:00am</td>
<td>Joint Subcom. Mtg.: Int’l Com. Law (UCC) &amp; Cross-Border Secured Trans. (ComFin)</td>
<td>Subcommittee Meeting: General Provisions:</td>
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<td>10:00-10:30am</td>
<td>Task Force Meeting on Model Intercreditor Agreement</td>
<td>Subcommittee Meeting: Letters of Credit:</td>
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<td>7:30-8:00pm</td>
<td>Joint Subcommittee Meeting: Real Estate Finance (w/ Business Transactions Subcommittee of Business Bankruptcy)</td>
<td>Committee Forum: Secured Transactions South of the Border (ComFin co-sponsoring)</td>
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<tr>
<td>8:00-8:30pm</td>
<td>Joint Subcommittee Meeting: Real Estate Finance (w/ Business Transactions Subcommittee of Business Bankruptcy)</td>
<td>Committee Forum: Secured Transactions South of the Border (ComFin co-sponsoring)</td>
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<tr>
<td>8:30pm</td>
<td>Dinner: Aircraft Financing Subcommittee</td>
<td>Committee Forum: Secured Transactions South of the Border (ComFin co-sponsoring)</td>
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<td>Time</td>
<td>Com Fin</td>
<td>UCC</td>
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<tr>
<td>7:30-8:00am</td>
<td>Joint Subcommittee Meeting: Securitization and Derivatives (w/ Securitization of Assets Subcommittee of DBF)</td>
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<td>8:30-9:00am</td>
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<tr>
<td>9:00-9:30am</td>
<td>Joint Subcommittee Meeting: Secured Lending (Com Fin) &amp; Secured Transactions (UCC)</td>
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<td>10:00-10:30am</td>
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<td>Joint Task Force Meeting on Commercial Law Terms</td>
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<td>10:30-11:00am</td>
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<tr>
<td>11:00-11:30am</td>
<td>Program: Commercial Law Developments</td>
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<tr>
<td>1:30-2:00pm</td>
<td>Program: Successor Liability in § 363 Bankruptcy Sales and UCC Foreclosures (ComFin and Business Bankruptcy co-sponsoring)</td>
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<td>5:00-5:30pm</td>
<td>Leadership Meeting</td>
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### Mark Your Calendar!

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
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<tbody>
<tr>
<td>3/11/08</td>
<td><strong>Evolution of the Model Form Deposit Account Control Agreement: Use in the Marketplace and Using the New Inserts</strong></td>
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<td>If you are tired of problems with Deposit Account Control Agreements on the eve of closing, this CLE teleconference is for you. The original model form DACA, published by the ABA Joint Task Force on Deposit Account Control Agreements in 2006, dealt with the typical transaction – a demand deposit account where the debtor continued to have access to the account. Learn how the model form works and is being utilized currently in the marketplace, as well as how to use the recently finalized inserts for other types of transactions, including lock box arrangements, sweep accounts, time deposits, initially blocked accounts, and much more. Details and registration information are available at <a href="http://www.abanet.org/cle/programs/t08emf1.html">http://www.abanet.org/cle/programs/t08emf1.html</a>.</td>
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<tr>
<td>3/13-14/08</td>
<td><strong>Globalizing Secured Transactions Law – Current Problems, New Directions</strong></td>
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<td>This CLE program, co-sponsored by the Business Law Section, will feature analysis of international sales of goods on credit, off-shore project finance, securitization of non-U.S. receivables and other commercial transactions involving secured credit across international borders. Panelists also will discuss where the global credit crisis is spreading, and how litigators, transactional lawyers and financial institutions may be affected. For additional information, please visit <a href="http://www.TJSL.edu/GlobalizingSecuredCredit">www.TJSL.edu/GlobalizingSecuredCredit</a>.</td>
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<tr>
<td>3/17/08</td>
<td><strong>Filing Office Operations and Search Logic Taskforce</strong></td>
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<td>4/3/08</td>
<td><strong>Deposit Account Control Agreement Task Force</strong></td>
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<td>On April 3, 2008 the Deposit Account Control Agreement Taskforce will meet in New York City to discuss inserts to the model agreement. Information is available on the Taskforce website at <a href="http://www.abanet.org/dch/committee.cfm?com=CL710060">http://www.abanet.org/dch/committee.cfm?com=CL710060</a>.</td>
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<tr>
<td>4/10/08</td>
<td><strong>ADR in Commercial Finance Colloquium</strong></td>
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<td>The Colloquium will facilitate an exchange of knowledge and views between experts in financial transactions and in the use of ADR techniques. Papers for the Colloquium publication are being solicited. Past ABA Chair Mike Greco will chair the</td>
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<tr>
<td>4/10-12/08</td>
<td>Business Law Section Meeting – Dallas, TX</td>
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<td>The Spring Meeting will feature CLE programs on ADR in commercial finance transactions, 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. We have a full schedule of events, from Thursday morning until Saturday afternoon, and the joint UCC/ComFin Committees dinner will be held Thursday evening. Additional information is available at <a href="http://www.abanet.org/buslaw/meetings/2008/spring/">http://www.abanet.org/buslaw/meetings/2008/spring/</a> and the dinner reservation form can be accessed here.</td>
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<tr>
<td>4/17-19/08</td>
<td>41st Annual Uniform Commercial Code Institute</td>
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<td>This CLE program will address UCC developments in secured transactions, the interface between the UCC and the Bankruptcy Code, sales, commercial paper, letters of credit, electronic contracting, international transactions, investment securities, and data security and privacy. Details and registration information are available at <a href="http://www.dsl.psu.edu/centers/UCCInstitute/">http://www.dsl.psu.edu/centers/UCCInstitute/</a>.</td>
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<tr>
<td>5/19-20/08</td>
<td>Commercial Loan Workouts – Where Credit Meets the Law</td>
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<td>Bob Zadek, former ComFin Chair and the Asset-Based Lending Industry’s Educator of the Year, presents a CLE program on secured loan workouts May 19-20 in Las Vegas and June 23-24 in Washington, D.C. Additional information is available at <a href="http://www.lenderspodium.com">www.lenderspodium.com</a>.</td>
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<tr>
<td>6/9-10/08</td>
<td>Structuring and Documenting Asset-Based Loans</td>
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<td>Bob Zadek, former ComFin Chair and the Asset-Based Lending Industry’s Educator of the Year, presents a CLE program on loan documentation June 9-10 in San Diego, CA and June 26-27 in Washington, D.C. Additional information is available at <a href="http://www.lenderspodium.com">www.lenderspodium.com</a>.</td>
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<tr>
<td>6/12-13/08</td>
<td>The UCC and Beyond: Current Developments in Commercial Law</td>
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<td>An advanced CLE course addressing current developments in commercial law following the 15 year process of revision and amendment to the UCC, including an update on enactments and current developments in case law, opinion practice, and securitization. Additional information is available at <a href="http://www.ali-abga.org/index.cfm?fuseaction=courses.course&amp;course_code=CN086&amp;contenttype=11">http://www.ali-abga.org/index.cfm?fuseaction=courses.course&amp;course_code=CN086&amp;contenttype=11</a>.</td>
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<tr>
<td>8/7/08</td>
<td><strong>Donald Rapson Memorial Dinner</strong></td>
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<td>On August 7th please join Don’s family, friends and colleagues for a dinner at the Yale Club in New York City remembering Don’s many contributions and achievements. Information about the event can be <a href="#">accessed here</a>.</td>
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<tr>
<td>8/9-11/08</td>
<td><strong>ABA Annual Meeting, New York, NY</strong></td>
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<td>Save the dates – details will be announced.</td>
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</table>
Tribute to Earl Glick

Once again we have lost one of the founding members of the Commercial Finance Committee as well as one of the leaders in the field of commercial finance, Earl Glick of Los Angeles. Earl died in early January just short of 78 years old. He was there at the beginning of the CFS committee in 1983 and served as the Program Committee Chair from 1988-1992. He was a regular participant on panels and an active member of the committee for many years.

Earl grew up in Chicago and graduated from Northwestern’s School of Law in 1953 at age 23. After a stint as an assistant Attorney General, he started a firm in Chicago. As a result of the asthma of two of his children, he relocated to southern California where he ultimately joined the storied firm of Gendel, Raskof, Shapiro & Quittner. He worked there for 30 years and headed the commercial finance group. In 1990 he joined Orrick Herrington where he practiced until his retirement. In addition to the Commercial Finance Committee he was actively involved in the Financial Lawyers Conference and the Commercial Finance Association. He was a leading lawyer in our area nationally. He was on many, many panels on asset based lending including one of the first ABA satellite seminars.

Earl valued most his family including his wife of 51 years, Janet, his four children and numerous grandchildren (who regularly attended ABA meetings with him). He shared with them a rich quality of life. His sense of humor was legendary. He was a prankster with a ready smile and an even more ready warm handshake or hug. It is hard for me to say or write his name without breaking into a smile.

To me and many others, Earl was a mentor, a teacher and a friend. He will be missed but never forgotten.

Maury Poscover
SPOTLIGHT

March 2008

The purpose of this column is to identify some of the most disconcerting judicial decisions interpreting the Uniform Commercial Code or related commercial laws. 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.

First National Bank of Picayune v. Pearl River Fabricators, Inc.,
2007 WL 3407401 (La. 2007)

This case presents a priority dispute between a creditor with a security interest in equipment and a buyer located in a jurisdiction different from the original debtor. Unfortunately, what should have been a fairly straightforward application of § 9-316(a)(3), and § 9-317(b) became muddled with analysis of irrelevant issues and inapplicable law. Nevertheless, the court’s ultimate conclusion in favor of the buyer was correct.

The facts of the case are depicted in the following chart.

Pearl River (Mississippi corp.)
First National Bank
11/23/2001
Growth Fund, Inc. (Indiana corp.)
12/11/2001
Phoenix Associates (Nevada corp.)

Pearl River, a Mississippi corporation, manufactured some equipment and granted First National Bank of Picayune a security interest in that equipment. First National perfected its interest by filing a financing statement in Mississippi. A year later, in violation of the security agreement, Pearl River sold the equipment to Growth Fund, Inc. (“GFI”), an Indiana corporation. Less than three weeks later, GFI sold the equipment to Phoenix Associates Land Syndicate, Inc. (“Phoenix”), a Nevada corporation with its principal place of business in Louisiana. Pearl River then delivered the equipment directly to Phoenix.

Approximately two years later, First National filed a new financing statement in Louisiana. It then tried to enforce its security interest and Phoenix claimed to have taken free of First National’s security interest pursuant to § 9-317(b).

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1 That financing statement listed Pearl River as the debtor. There was no discussion of whether that would have been effective, given that Phoenix was now the debtor, as that term is defined in § 9-102(a)(28)(A), because it had purchased the collateral.
The court’s analysis is a bit difficult to follow, perhaps because the counsel had not framed the issues properly, perhaps because the court did not understand the argument. In any event, it appears that First National raised two related arguments. First, that it remained perfected despite the transfers. Specifically, it claimed that § 9-316(a)(3) did not apply because that provision requires re-filing in response to a sale only if the sale occurs after the collateral has been moved to a new state. Second, First National claimed that Phoenix knew of its security interest because it had purchased the equipment when it was located in Mississippi, where First National had an effective filing. From this, First National reasoned, Phoenix could not take free of First National’s security interest.

The court began its analysis by discussing – for reasons passing understanding – whether Phoenix’s purchase of the equipment occurred in Mississippi, where the equipment was located, or in Indiana, where GFI was located. In reality, of course, the location of the sale is immaterial. So too is the location of the collateral. The only thing relevant to the proper place to file is the location of the debtor. See § 9-301(1). Nevertheless, the court eventually and correctly rejected this argument, noting that nothing in § 9-316(a)(3) requires that the collateral be transferred “after removal.”

The court then turned to whether Phoenix took free of First National’s security interest despite alleged knowledge of it. The court noted that First National did not actually contend that Phoenix knew of the security interest, merely that Phoenix had received shipment of the equipment from Mississippi, and thus should be charged with knowledge of it. This, the court correctly concluded, did not satisfy the definition of “knowledge” in Article 1. To further support its conclusion, the court then pointed to Louisiana’s version of § 9-317(b), which contains non-uniform language. The official text allows a buyer of goods to take free of an unperfected security interest if the buyer gives value and takes delivery without knowledge of the security interest. Louisiana’s version omits the knowledge requirement and allows buyers to take free of an unperfected security interest regardless of the buyer’s knowledge.

The court’s analysis would be well taken if Louisiana law governed. What the court failed to appreciate, however, was that the collateral’s location in Louisiana did not make Louisiana the fount of governing law. Phoenix, as the owner of the equipment, was now the debtor. As a Nevada corporation, Phoenix was located in Nevada. Thus, Nevada law, not Louisiana law, should have governed perfection and the effect of perfection or nonperfection, and priority. First National was incorrect when it re-filed in Louisiana and the court was incorrect when it looked to Louisiana law to resolve the priority dispute. Nevada has no non-uniform variation to its enactment of § 9-317(b).

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2 Cf. pre-revision § 9-103(1)(d), which referred to “a person who became a purchaser after removal.”
3 See § 1-202(b). See also pre-revision § 1-201(25).
6 See § 9-307(c).
7 See § 9-301(1).
so the buyer’s knowledge of the security interest at the time of the sale should indeed been relevant to whether the buyer took free of the unperfected security interest.\(^8\)

So, to sum up, the court correctly ruled that § 9-316(a)(3) applies and that First National had lost perfection by not re-filing within one year. The court overlooked the fact that First National never re-filed in the appropriate state, but that is immaterial. The court also correctly ruled that the knowledge referred to in § 9-317(b) is not merely notice, but actual knowledge. Accordingly, the court was correct in ruling that Phoenix took free of First National’s security interest. Unfortunately, the court looked to the wrong law to reach its conclusion and, in the process, has given lenders and buyers the wrong signal about where to file and search for financing statements.

\textbf{In re Eckert,} 2007 WL 3243922 (D.N.J. 2007)

In 2002, Chinatrust Bank extended a line of credit to Eckert Enterprises. This line of credit was secured by Eckert Enterprises’ inventory and receivables and the home of Mr. and Mrs. Eckert. In 2004, Eckert Enterprises filed for bankruptcy protection. The trustee abandoned the inventory and accounts. Nevertheless, Chinatrust Bank never took possession of or foreclosed on the inventory or collected the accounts, believing that it had lost the right to do so and that the storage costs for the inventory would be more than the inventory was worth.

Approximately two years later, one of the Eckerts filed for bankruptcy under Chapter 13, and Chinatrust filed a proof of claim representing the value of its security interest in the Eckert home. In response, the debtor objected to Chinatrust’s claim and sought to avoid its lien due to its failure to pursue the inventory and receivables. The bankruptcy court ruled that Chinatrust had acted in a commercially unreasonable manner by failing to ascertain whether the costs of caring for and selling the business collateral exceeded its value and, having failed to pursue this collateral, could not now “cherry pick” among the items of collateral by proceeding against the Eckert home. It therefore “zeroed out” Chinatrust’s claim and avoided its security interest on the home.

On appeal, the district court affirmed. Citing § 9-602 comment 5, it acknowledged that there can be no constructive strict foreclosure. Nevertheless, it ruled that Chinatrust Bank had not acted in a commercially reasonable manner. In so doing, the court misconstrued Chinatrust’s rights and obligations. The obligations imposed by § 9-607(c) to act in a commercially reasonable manner when collecting on collateral and by § 9-610(b) to act in a commercially reasonable manner when disposing of collateral apply only when the secured party in fact undertakes to exercise those rights. The court’s ruling, in effect, converted Chinatrust’s right to foreclose into a duty to foreclose, a point clearly contrary to the permissive language in § 9-601(a).\(^1\) Moreover, § 9-610(a) refers expressly

\(^8\) See Nev. Rev. Stat. § 104.9317(2).

\(^1\) While liability could have been imposed under § 9-207 for failure to care for collateral in the secured party’s possession, see § 9-625 comment 2, Chinatrust Bank never took possession of any of the collateral. While it may have been possible to construe the bankruptcy court’s abandonment order in the first bankruptcy case as one abandoning the inventory and receivables to Chinatrust Bank, that argument was not developed and neither court purported to rely on § 9-207.
to a secured party’s right to dispose of “any or all” of the collateral. Thus, and contrary to the court’s holding, Article 9 does permit a secured party to “cherry pick” among the collateral, proceeding only after those items it chooses. The court’s holding to the contrary is simply erroneous and could significantly decrease the efficacy of obtaining a security interest in multiple items of collateral. There is no reason that Chinatrust should have been obliged to proceed against certain items of collateral to maintain its rights in the other.

*Peoples Bank v. Cornerstone Bank,*

*504 F.3d 549* (5th Cir. 2007)

This case pits two putative secured parties and a buyer against each other in a priority dispute. Unfortunately, the court’s partial resolution of the dispute contains three analytical flaws relating to: (1) the ability of an agent to bind a principal through a security agreement; (2) the efficacy of a financing statement that used the debtor’s nickname; and (3) the proper treatment of after-acquired livestock not expressly included within the written security agreement.

The parties’ relationships are depicted by the following chart:

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  Dickerson
    /   \
Cornerstone Bank /     \\
    Glenbrook /       \\
             (Cattle Co.)
    /   \
Bryan Bros. Cattle Co
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In 1999, Brooks L. Dickerson gave a security interest in his cattle, along with all “additions” and “replacements,” to Cornerstone Bank. Cornerstone filed a financing statement listing the debtor by his nickname, “Louie Dickerson.” In 2002, Dickerson gave a security interest in his existing and after-acquired cattle to Peoples Bank. Peoples Bank filed three financing statements, each using the debtor’s legal name, “Brooks L. Dickerson.”

In between those transactions, Dickerson established a bank account in the name of “Louie Dickerson, d/b/a Glenbrook Cattle Company.” Glenbrook was a business entity that Dickerson was in the process of establishing with three other individuals. Later on, a certificate of formation for a Limited Liability Corporation was filed for Glenbrook. Even so, the evidence was in conflict as to whether Glenbrook actually did business as an LLC, a sole proprietorship, or a partnership.

Bryan Brothers Cattle Co. was one of Glenbrook’s customers; Bryan Brothers purchased pre-conditioned cattle from Glenbrook. In 2003, the arrangement was changed so that, rather than purchasing cattle from Glenbrook at the end of the pre-conditioning program, Bryan paid for the cattle before Glenbrook acquired them, and then took delivery after Glenbrook completed the pre-conditioning.

In 2004, due to Glenbrook’s financial difficulties, Bryan Brothers sought to retrieve its cattle from the pre-conditioning program and was in the process of doing so when Peoples and Cornerstone
obtained a judicial order enjoining shipment of the cattle, contending their interests in the cattle had priority over the rights of Bryan Brothers. A priority battle among the parties ensued and the trial court ruled in favor of the buyer, Bryan Brothers.

On appeal, the Fifth Circuit first dealt with Bryan Brothers’ claim to priority under the Food Security Act. The court noted that a buyer in ordinary course of farm products normally takes free of a security interest created by the seller, but there is an exception if the buyer has failed to register and the security interest is perfected by the filing of a proper financing statement.1 Bryan Brothers had admittedly not registered, so the issue became whether the two Banks had properly filed. The court ruled that, if Glenbrook operated as a partnership or LLC, the bank’s financing statements naming Dickerson as the debtor could not cover the cattle in question because the banks could not have a valid security interest in them. While not incorrect, the court’s analysis on this point seems oversimplified as it relates to Article 9 and could be misleading to an attorney seeking to apply this case as precedent. As White & Summers have noted, financing statements and security agreements are to be treated differently on this point: for financing statements, including the debtor’s name is crucial for purposes of providing notice of the creditor’s interest; for the security agreement, however, the debtor’s authentication serves the purpose of a “statute of frauds” and should be deemed valid notwithstanding the absence of the true business name, so long as: (1) an authorized agent has authenticated the agreement; and (2) the evidence shows that the agent intended to bind the principal by its signature.2 Thus, if Dickerson were an agent of Glenbrook (as a matter of agency law), the fact that the security agreement bears his name rather than the name of the business entity should not prevent the security agreement from becoming effective. However, if the debtor truly were a partnership or LLC operating under the name of Glenbrook, then none of the filings would have properly identified the debtor.3 As a result, the court correctly noted that Bryan Brothers would have taken free of the banks’ security interests on such facts. Because the facts were in dispute, the court properly remanded the case for further proceedings on this issue.

The court then moved on to resolve the competing priorities between Cornerstone Bank and Peoples Bank, in the event Bryan Brothers did not take free of their interests. It was here where the court made its greatest error. Peoples Bank argued that Cornerstone’s filing using the debtor’s nickname, “Louie Dickerson” rather than his legal name, “Brooks L. Dickerson” was seriously misleading. The circuit court disagreed. Without discussing or even citing the exacting standard of § 9-506(c), and after quoting cases decided before the revision to Article 9, the court ruled perfect accuracy is not needed as long as the financing puts the searcher on inquiry notice. Because the debtor held himself out by his nickname and Peoples Bank knew of that, the court ruled that Cornerstone Bank’s filing was effective. This is, of course, patently wrong. To be effective, the filing must either use the debtor’s “correct name” or be revealed in a search under the debtor’s correct name.4 In short, revised Article 9 puts the burden on the filer to get it right, rather than on the searcher to check against an unknown number of incorrect variations. Moreover, the case law

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1 See 7 U.S.C. § 1631(d), (e)(2).
2 White & Summers, Uniform Commercial Code, Sec. 31-3 (5th ed. 2002).
3 See § 9-503(a)(1), (4)(A).
4 See § 9-506(c).
on this point is remarkably uniform; any deviation from this standard will render the financing statement ineffective.\[^5\]

Having concluded that Cornerstone Bank’s filing was effective, the court then moved on to a more fundamental issue: whether Cornerstone Bank’s security interest covered the cattle at issue. Because Dickerson’s security agreement with Cornerstone did not expressly include after-acquired property, although it did refer to “accessions,” “additions,” “replacements,” and “substitutions,” and because Dickerson had acquired the cattle more than five years after he executed the security agreement with Cornerstone, Peoples Bank claimed that Cornerstone had no interest in the cattle. The court rejected this argument, ruling that Cornerstone’s security interest included after-acquired cattle under the same theory that is commonly applied to inventory; namely, that after-acquired inventory is presumptively included unless the agreement makes it clear that only current inventory

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\[^5\] See In re Borden, 2007 WL 2407032 (D. Neb. 2007) (filing against “Michael R. Borden” that identified him as “Mike Borden” was seriously misleading because the filing apparently was not disclosed in a search using the longer first name, which the court identified as the debtor’s “legal name” and, therefore, his “correct name” under § 9-506(c)); In re Berry, 2006 WL 2795507 (Bankr. D. Kan. 2006) (financing statement must provide the legal name of an individual debtor, and hence listing the debtor’s first name as “Mike,” instead of “Michael,” will be inadequate if the filing is not uncovered in a search using the full name); In re Jones, 2006 WL 3590097 (Bankr. D. Kan 2006) (financing statement filed against a man whose “legal name” was “Christopher Gary Jones” that identified the debtor as “Chris Jones” was seriously misleading because a search under the fuller name did not disclose the filing); In re Kinderknecht, 308 B.R. 71 (10th Cir. BAP 2004) (filing against “Terry J. Kinderknecht” was ineffective against debtor whose legal name was Terrance Joseph Kinderknecht). See also In re Jim Ross Tires, Inc., 2007 WL 2264701 (Bankr. S.D. Tex. 2007) (filings against “Jim Ross Tire, Inc.” instead of “Jim Ross Tires, Inc.” was ineffective because the parties did not dispute that a search under the debtor’s correct name would not disclose the filings); In re John’s Bean Farm of Homestead, Inc., 2007 WL 3256579 (Bankr. S.D. Fla. 2007) (filing that identified the debtor as “John Bean Farms, Inc.” instead of its registered name, John’s Bean Farm of Homestead, Inc.,” was ineffective because an on-line search of the filing office’s database did not produce the filing unless the searcher pushed “previous” 60 times); In re Fuell, 2007 WL 4404643 (Bankr. D. Idaho 2007) (filing against Andrew Fuell that identified the debtor as “Andrew Fuel” was ineffective to perfect because the debtor’s on-line search failed to produce the filing); Pankratz Implement Co. v. Citizens National Bank, 130 P.3d 57 (Kan. 2006) (filing against “Roger House” not effective against debtor whose name was “Rodger House” because filing was not disclosed in official search); Host America Corp. v. Coastline Financial, Inc., 2006 WL 1579614 (D. Utah. 2006) (filing against “K W M Electronics Corporation” was inadequate against K.W.M. Electronics Corporation because standard search logic used by filing office did not compensate for any errors, even the absence of periods); In re Tyingham Holdings, Inc., 354 B.R. 363 (Bankr. E.D. Va. 2006) (financing statements filed against “Tyingham Holdings” was ineffective against debtor’s whose registered name was “Tytingham Holdings, Inc.” because an official search under correct name did not yield the filing even though an unofficial search using an abbreviated portion of the debtor’s name did yield the filing); Corona Fruits & Veggies, Inc. v. Frozsun Foods, Inc., 48 Cal Rptr. 3d 868 (Cal. Ct. App. 2006) (filing against “Armando Munoz” ineffective against Armando Munoz Juarez); In re Stewart, 2006 WL 3193374 (Bankr. D. Kan. 2006) (filing identifying the debtor as “Richard Stewart” was ineffective because the debtor’s legal name is “Richard Morgan Stewart IV” and a search under the debtor’s legal name did not uncover the filing).
should fall within the agreement. Notably, Article 9 leaves this issue to be addressed by the courts. White & Summers suggest that after-acquired property should be presumptively included even if not specifically mentioned in the written security agreement if “the property is contemplated to turn over during the loan.” This test has been commonly applied to inventory, but not to livestock in a preconditioning program. Moreover, the court never even mentioned what the original term was of Cornerstone’s loan to Dickerson, and thus whether turn over was contemplated. Therefore, the court’s reasoning on this point is a bit suspect. However, the security agreement’s express coverage of “additions” – a point which the court did not discuss or rely upon – may provide an independent basis for the court’s ultimate conclusion.

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6 Cf. In re Filtercorp, Inc., 163 F.3d 570 (9th Cir. 1998) (security interest covering inventory and accounts presumptively included after-acquired collateral; the presumption was rebutted for the inventory because of a reference to inventory on an attached list).

7 See 9-108 comment 3.

8 See White & Summers, Uniform Commercial Code, Sec. 31-3 (5th ed., 2002).
The business of corporate loan syndications, trading, and investing has changed dramatically over the past 15 to 20 years. Up until then, banks made loans to their corporate borrowers and typically held those loans on their books. It was never contemplated that loans would be traded and managed by investors like stocks and bonds in a portfolio. Eventually, however, investors were drawn to the attractive features of loans – unlike bonds, loans were senior secured debt obligations with a floating rate of return – and, over the years, a full institutional asset class emerged. Today, such loans are not just held by banks but typically sold to other banks, institutional investors, mutual funds, insurance companies, structured vehicles, pension funds, and hedge funds. Consequently, the past 15 years has witnessed an explosion in the volume of loans being issued in the primary market and traded in the secondary market.

Amidst these developments, loan traders recognized a need to develop best market practices and standard documentation that would allow them more easily to trade with each other. In 1995, certain institutions joined together to establish the Loan Syndications & Trading Association, Inc. (the “LSTA”). From its inception, the LSTA has played a prominent role in the development of such standards and has spearheaded efforts to increase the liquidity, efficiency, and transparency of the loan market.

This article will: (i) provide a general overview of the LSTA, our mission, and our goals, (ii) highlight some of the more recent developments in the leveraged loan market, in particular the volatility of the past six to eight months, and (iii) review some of the legal initiatives undertaken to help our members cope with such a market.

The Loan Syndications & Trading Association

The LSTA is a not-for-profit organization dedicated to promoting the orderly development of a fair, efficient, liquid, and professional trading market for corporate loans. We seek to enhance public understanding of the corporate loan market and serve the public interest by encouraging adherence to the highest ethical standards by all loan market participants. The LSTA is active in both the primary market, where agent banks originate syndicated loans, and the secondary trading market, where bank loan traders effectively buy and sell pieces of such syndicated loans. Unlike other trade associations, the LSTA’s membership consists of both buy-side institutions (e.g., insurance companies, hedge funds, prime funds, CLOS, etc.) and sell-side institutions (the agent banks and dealers) as well as law firms (which are the LSTA’s largest constituency) and vendors in the market.

1 The authors are employees of the LSTA. Bridget Marsh is Senior Vice President and Assistant General Counsel, and Ted Basta is Vice President, Market Data & Analysis.

2 Please see “An Introduction to the Loan Asset Class” by Scott Page and Payson Swaffield in the LSTA’s “Handbook of Loan Syndications & Trading” by Allison Taylor and Alicia Sansone.
The LSTA’s focus is attuned to the distinctive structural features of the loan market which stem from the fact that corporate loans are privately-negotiated debt obligations that are issued and traded subject to voluntary industry standards. No regulatory authority oversees or sets standards for the trading of loans. Instead, the LSTA acts as a forum for the analysis and discussion of issues and developments relating to the loan market. Through our involvement and guidance, loan market participants adhere to a unique consensus-building process to develop and ultimately adopt a set of market standards and legal documentation applicable to the primary market and the secondary market. Because of the diverse nature of the loan market, we have never sought to dictate specific policies or procedures; rather, we have expressed general principles and guidelines that are relevant to all market participants.

The LSTA undertakes a wide variety of activities which foster the development of trading policies and standards designed to promote just and equitable market practices and to encourage cooperation and coordination with firms facilitating transactions in loans. Those activities are pursued through several different channels – legal, analytical, and educational. First, the legal role of the LSTA is critical. The establishment of best market practices and the production of standard documentation, all of which are negotiated and vetted by LSTA members, for use in the primary market (e.g., commitment letters, funding letters, and model credit agreement provisions) and in the secondary market (e.g., trading documentation, purchase and sale agreements, and participation agreements) have contributed significantly to the liquidity of the market. The LSTA is also an advocate of the asset class, stepping in where necessary to file amicus briefs to support parties involved in litigation the outcome of which could influence the market. We are also willing to protect the interests of our members by lobbying for legislative change whenever necessary.3

Second, the LSTA’s market data and analysis team serves as a critical resource for members, providing quantitative and qualitative proprietary statistical studies and analytical deliverables covering key topics confronting industry participants (e.g., secondary market performance, trade volume, liquidity, settlement, and mark-to-market price accuracy). The team also manages third party relationships and data distribution from Reuters Loan Pricing Corp. (LPC) and Standard & Poor’s Leveraged Commentary and Data Division (LCD). Since 1999, LPC, under license from the LSTA, has facilitated the daily mark-to-market process between bank loan dealers and investors through the creation of the LSTA/LPC Mark-to-Market Pricing Service, the first independent third-party provider of daily secondary mark-to-market prices of loans. Additionally, the LSTA, in conjunction with LCD, developed the S&P/LSTA Leveraged Loan Index. Prior to 1999, there was no mark-to-market service available to the buy-side. Without a third party pricing source for loans, many institutional investors were unwilling to invest in loans. Shortly after the introduction of the Service, the market saw a dramatic shift in the type of entity that started to invest in loans. Nonbank lenders, more comfortable with the asset class, began to enter the market in significant numbers.

3 In October 2002, as a result of the LSTA’s lobbying efforts, the New York legislature passed a law exempting loan trading from the Statute of Frauds in New York.
Finally, the LSTA has actively advanced the asset class through its educational endeavors. By regularly hosting conferences, seminars, and roundtables throughout the U.S., Europe, and Asia, the LSTA successfully promotes the loan market and helps to broaden its appeal to a larger investor base. One of our most significant accomplishments in this area has been the publication of the only comprehensive textbook on the syndicated loan market. In 2006, we published the “The Handbook of Loan Syndications & Trading,” a complete guide to the primary and secondary market.

The Leveraged Loan Market

Over the past 20 years, the U.S. leveraged loan market, consisting of an efficient primary market and a liquid transparent secondary trading market, has become one of the most innovative and expanding sections of all U.S. capital markets. In the new millennium, the leveraged loan market has continued to develop and attract a new and diverse group of institutional investors, who appreciate the high risk-adjusted returns of the asset class and find trading in the secondary market to be a useful tool in managing credit risk and increasing portfolio diversification. In particular, between 2003 and 2005, there was a dramatic increase in demand for the loan asset, largely as a result of an increase in collateralized loan obligation (“CLO”) issuance. By the end of 2005, such issuance began to feed an already-forming supply and demand imbalance. From 2005 to 2007, the market underwent a period of rapid development and structural changes which enabled massive growth in both leveraged loan issuance (Figure 1), and secondary market trading (Figure 2). An elongated positive credit cycle coupled with this level of demand served as the backdrop for an extended rally in secondary market loan prices which continued through the first half of 2007.

![Fig.1: Leveraged Loan Issuance](source)
During the first half of 2007, leveraged loan issuance was poised to exceed the record levels of 2006,\textsuperscript{4} while the overwhelming majority of loans traded at a premium to par in the secondary market. As CLO demand continued to reach record levels,\textsuperscript{5} new issue supply changed accordingly – deals became larger and coupons trended lower. Loan structures loosened as covenants were relaxed, and, in some cases, removed entirely.

By the beginning of the third quarter of 2007, the subprime mortgage meltdown precipitated a credit crunch that spread across all structured finance and impacted the CLO sector. The aftereffects of the contagion, including the reassessment and re-pricing of credit risk, triggered a shutdown of CLO issuance. Meanwhile, however, syndicators had committed to a record number of large deals. Confronted by the absence of CLO issuance and the massive amount of new issue supply, the primary market became stalled. Coupled with a weakening economy, these factors meant that secondary market prices were poised to plummet. Thus, by mid-July 2007, bids began to fall in the secondary market, which suddenly became less liquid but considerably more volatile.

From month-end June to July 31, 2007, 96% of the LSTA market dataset (U.S. term loans priced in the secondary market by three or more trading desks) recorded mark-to-market losses on an advancer/decliner ratio of 1:65. The mean price fell 363 basis points to 95.06 as its average bid-ask spread widened to 140 basis points, from 66 basis points at the end of Second Quarter 2007. (Figure 3).

\textsuperscript{4} According to Reuters Loan Pricing Corp. leveraged issuance totaled $431.5 billion in the first half of 2007.
\textsuperscript{5} According to the S&P LCD 1H07 CLO issuance totaled $57.6 billion, on 2Q07’s record $32.8 billion.
This abrupt correction caused a plunge in the percentage of loans priced above 100 to 5% of the market dataset – as compared with 81% just four weeks earlier – while the percentage of loans priced between 90 and 98 grew to 67% from 4%. (Figure 4). Moreover, the prospect of rising mortgage default rates and rating agency downgrades on these structured assets heightened concerns regarding credit market stability. A number of leveraged deals were either postponed or downsized due to their inability to clear market. On the demand side, new CLO issuance remained mostly scarce. According to S&P LCD, the CLO market share of primary issuance fell to less than 25% from approximately 60% since the beginning of the third quarter of 2007. Conversely, the market share of hedge, high yield, and distressed funds in the primary market more than doubled to approximately 60% from less than 25%.

Taking advantage of the lucrative yields available in both the primary and secondary loan markets, such non-traditional lenders filled a sizable portion of the vacated CLO market share and provided much needed liquidity to the market; however, their participation was short-lived and the resulting rally brief. Reversing a two-month trend of rising prices and tighter bid-ask spreads, the secondary market recorded its worst month of 2007 in November.

As the year 2007 came to a close, loan market supply and demand in both the primary and secondary markets entered into a period of flux, as issuers and lenders carefully evaluated the future. With the investor base no longer dominated by the prominent CLO community, adjustments were made to the manner in which loans were structured, priced, and subsequently traded in the secondary market. New deals were downsized and once again included more aggressive covenant packages and higher coupons. Despite such higher coupons, to make new loan issuances more attractive to lenders, such loans were sold at deep discounts to par in the primary market (thereby increasing the yields on those loans) in order to clear the substantial new issue overhang. Within the secondary market, liquidity suffered as prices declined and
volatility increased to historical highs. By the end of 2007, the mean price had fallen 594 basis points (6%) to 92.77, while the average bid-ask spread, commonly used as a measure of liquidity, widened 71 basis points to 136 basis points. As bid levels continued to drop, the percentage of loans priced above par fell to 2%, while the 90 to 98 range grew to 60% from an average of 4% in the first half of 2007.

Despite the Federal Reserve Bank’s multiple rate cuts during January, the equity market tumbled, loan returns suffered as LIBOR rates were slashed, and prices in the secondary market once again retreated. The lower loan yields made loans less desirable to certain crossover lenders such as hedge funds and high yield accounts, which returned to higher yielding fixed income bonds. In addition to the lack of liquidity, the market suffered from a lack of leverage, with banks, dealing with their own balance sheet issues, less willing or less able to offer leverage. In January, mean prices fell an additional 315 basis points, ending the month at a record low of 89.62, while the average bid-ask spread widened to 174 basis points. The percentage of loans priced between 98 and 100 fell to 10%, while the percentage of loans priced between 90 and 98 fell to 58%. At the time of writing this article, these loans – which had previously been priced between 90 and 100 – have now migrated down into the below-90 range (which now comprises 31% of the LSTA market dataset).
Legal Challenges arising out of the Current Market Volatility

The recent volatility of the market raises a litany of new legal issues with which the LSTA must now contend. We are working to create new standard documents to help streamline the trading process and further refining the terms of trading documents. Recently, we published a new Distressed Participation Agreement and Collateral Annex (where an assignment is not possible, parties are required to settle via a participation). And efforts are already underway to draft a Par Participation Agreement. In addition, we are revising our Par/Near Par Trade Confirmation and Distressed Trade Confirmation, to address issues arising out of the market volatility. For example, we are reexamining the existing buy-in/sell-out provisions to allow them to be effectively used by parties and revisiting the LSTA’s corresponding arbitration provisions.

Most recently, the LSTA was called upon to help the market cope with one particular aspect of the unprecedented pricing of performing loans. With a significant number of performing loans priced well below 90, loan market participants are uncertain whether to trade such loans on par documentation or distressed documentation. We recently issued guidance on this topic, highlighting that although a price may be an important indicator of the likelihood of default, a price can be indicative of many other factors and therefore should not, in itself, be determinative of whether distressed or par/near par documentation is appropriate.

For use further ahead in the credit cycle, we are preparing a form of a Proceeds Letter, a complex standard which is intended to be used in instances where settling a distressed trade does not occur until after confirmation and the effective date of a borrower’s Chapter 11 plan. (Once the borrower’s plan has gone effective, settlement can no longer result in transfer of the traded loan, which will have been restructured and discharged by the plan but only in the transfer of the proceeds under the plan of the loan and the related claim.)

* * *

Today’s market certainly looks much different from one year ago and represents a new and more challenging period for not only investors, but also the LSTA. Loan prices are now said to be closely correlated to, and no longer shielded from, the daily price fluctuations of other asset classes. While the risk-adjusted returns of leveraged loans are still advantageous, today’s returns come with not only a higher level of volatility, but also an apprehension of rising default rates. In this environment, the LSTA remains committed to promoting a fair, efficient, and liquid market for loans and maintaining its position as the market’s principal advocate. We know that we will be called upon to address issues raised by our membership as a result of the market volatility and to help effectively and promptly resolve those issues to ensure the market continues to operate smoothly and efficiently. In all our pursuits and efforts to resolve those issues, we will continue to work efficiently – mindful of both buy-side and sell-side constituents – as we strive to resolve market challenges.

6 The Par/Near Par Trade Confirmation sets out the standard terms and conditions of a trade involving a performing loan. The Distressed Trade Confirmation sets out the standards terms and conditions of a trade involving a loan of a borrower in financial distress.
If the Land Is Here, You May Be Practicing Law Here: UPL and Ethics Issues in Multi-State Real Estate Closings

by

Norman M. Powell, Esquire*

Law firms and title companies throughout the country conduct and facilitate complex, multi-state real estate closings. They often do so from main offices, national accounts offices, or other central locations. But they may face charges of unauthorized practice of law, and their in-house counsel may be charged with violating ethics rules, if any of the real estate is located in certain jurisdictions.

Some jurisdictions regulate certain aspects of the real estate transaction as the practice of law, and prosecute non-lawyers for violations. Caselaw in Arkansas and Delaware establishes that drafting closing documents, including deeds, notes, and mortgages, constitutes the practice of law, and so must be done by attorneys. See Ark. Bar Ass’n v. Block, 323 S.W.2d 912 (Ark. 1959); In re Mid-Atlantic Settlement Services, Inc., 755 A.2d 389 (Del. 2000). Caselaw in Colorado recognizes such conduct as the practice of law, but permits non-lawyers to perform such tasks incident to transactions in which they are interested “provided no charge is made therefor.” Conway-Bogue Realty Investment Co. v. Denver Bar Ass’n, 312 P.2d 998 (Colo. 1957). Similarly, in Delaware and South Carolina, conducting a real estate settlement constitutes the practice of law. See In re Mid-Atlantic Settlement Services, Inc., 755 A.2d 389 (Del. 2000); Matter of Lester, 353 S.C. 246 (2003). A lower court decision in West Virginia reached the same conclusion, but on appeal the decision was voided for procedural reasons. McMahon v. Advanced Title Servs. of W.V., 607 S.E.2d 519 (W.V. 2003). Finally, Delaware regards the disbursing of funds from a real estate settlement as the practice of law. See In re Froelich, 838 A.2d 1117 (Del. 2003). Thus, title companies and other non-lawyers engaging in such activities in, or with respect to property located in, such jurisdictions may be at risk for unauthorized practice of law prosecution.

Some jurisdictions, including Delaware, Georgia, North Carolina, and Texas, generally require that lawyers admitted in those jurisdictions attend to those aspects of the real estate transaction regarded as the practice of law. See In re Mid-Atlantic Settlement Services, Inc., 755 A.2d 389 (Del. 2000); In re UPL Advisory Opinion 2003-2, 588 S.E.2d 741 (Ga. 2003), The North Carolina Bar, Authorized Practice Committee, Guidelines for Attorneys Licensed in Other Jurisdictions (July 2003); Texas Gov’t Code § 83.001. Often, these restrictions are imposed without regard to whether performance of the task at hand occurs within the subject jurisdiction or elsewhere.

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Rule 5.5 of the Model Rules of Professional Conduct\textsuperscript{1} provides in relevant part that “[a] lawyer admitted in another United States jurisdiction . . . may provide legal services on a temporary basis in this jurisdiction that . . . arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.” On its face, Rule 5.5 appears to provide a safe harbor for attorneys, allowing them to perform closings involving property in another jurisdiction in which they have not been admitted without fear of prosecution. However, Alabama, Alaska, the District of Columbia, Hawaii, Illinois, Kansas, Kentucky, Maine, Michigan, Mississippi, Montana, New Mexico, New York, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming do not have such provisions in their rules of professional conduct.

Certain other jurisdictions do have such provisions in their rules of professional conduct, but require for their application that other conditions be satisfied. These include California (allowing temporary transactions if certain notice is provided on a firm’s website), Connecticut (requiring that the attorney be admitted in a jurisdiction which allows Connecticut attorneys to practice temporarily in that jurisdiction), Nevada (requiring that an annual report be filed and reporting fee paid), New Jersey (requiring payment of an annual fee), and South Dakota (requiring an attorney to obtain a South Dakota sales tax license and pay the appropriate tax). And even in states where Model Rule 5.5 has been adopted verbatim, several opinions have been issued stating that an attorney licensed in such state must conduct the closing. See In re Mid-Atlantic Settlement Services, Inc., 755 A.2d 389 (Del. 2000); In re UPL Advisory Opinion 2003-2, 588 S.E.2d 741 (Ga. 2003).

In-house lawyers with title insurance companies who have certain supervisory responsibilities may be prosecuted in the subject jurisdiction for violation of its ethics rules arising from the title company’s conduct in the transaction. Rule 5.3 provides in relevant part that:

“a lawyer shall be responsible for conduct of . . . a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer . . . has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

Rule 8.5(a) provides in its second sentence that “A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.” The choice of law rule set forth in Rule 8.5(b)(2) provides that “if the predominant effect of the conduct is in a different jurisdiction [than the one in which the conduct actually occurred], the rules of that jurisdiction shall be

\textsuperscript{1} The Rules in any given jurisdiction may differ, or may be interpreted and applied differently. Unless otherwise specified, references in this article are to the Model Rules of Professional Conduct.
applied to the conduct.” Thus, lawyers may find themselves subject to disciplinary action in jurisdictions where they aren’t admitted, don’t maintain offices, and have never visited, whether professionally or otherwise.

Finally, under Rule 8.4 it is professional misconduct for a lawyer to “violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” So, most any lawyer involved in a transaction that presents possible violations may be at risk.

So, when a transaction includes the conveyancing or granting of a mortgage or other security interest in real estate in another state, competence (Model Rule 1.1) is just one, and a far from dispositive, question to ask in deciding who should handle what aspects of the transaction. *Caveat viator.*
MADE IN HEAVEN OR OIL AND WATER:
ADR IN COMMERCIAL FINANCE DISPUTES

Commentators have reported that with trillions of dollars of financing activity in the United States each year, commercial finance disputes make up a disproportionately small proportion of the cases decided using alternative dispute resolution (“ADR”) techniques. Hostility to use of these techniques is legend – an informal poll taken of the members of the equipment lender’s association in 2006 found an overwhelming proportion of their members rejected ADR out-of-hand. Share a cocktail with a business finance lawyer and mention ADR and you will be regaled with stories of arbitration proceedings run amok or fear of ‘split the baby’ decisions by arbitrators that wouldn’t recognize a security interest if it introduced itself.

Under this situation, why should lenders, borrower and their counsel care about ADR? Simply because ADR is immensely powerful and has the potential to simplify, streamline and substantially reduce the cost of resolving commercial finance disputes. This fact has been recognized in international transactions for decades – in fact, an arbitration award is recognized and given effect in over 120 countries (under the 1958 New York Convention on arbitration awards), while a similar judgment of a state or federal court of the United States would be ineffective. Share a similar cocktail with an ADR lawyer and you will hear a tale of the power and effectiveness of these techniques – including the wide latitude for the parties to draft the kind of dispute resolution mechanism that will be most effective for their transaction.

The problem up to now is that the business finance lawyers and the ADR lawyers rarely have cocktails with each other.

The purpose of this panel is to start a year-long “colloquium,” a process of discussion, between the ABA Business Law Section and the ABA Dispute Resolution Section on the potential uses of, and concerns of practitioners, lenders and borrowers relating to, ADR techniques in commercial finance transactions. ADR experts will discuss the power of ADR techniques at the opening panel on April 10, 2008 at the Spring Meeting of the Business Law Section in Dallas, Texas. The colloquium will conclude with a panel at the ABA Dispute Resolution Section meeting in New York City in April of 2009. Michael S. Greco, a K&L Gates partner and former President of the American Bar Association, will chair the colloquium panels and editorial board to underscore the importance and ABA cross-Section nature of this discussion.

The result of this discussion between business finance and ADR lawyers will be the development of techniques and model rules constructed specifically for commercial finance transactions. The opening panel on April 10, 2008 will feature, in addition to Mr. Greco, James N. Roethe, a Winthrop Pillsbury partner and former General Counsel of Bank of America, Sandra Partridge, Vice President of the American Arbitration Association’s New York City office, Professor Lela P. Love, of Benjamin N. Cardozo School of Law, and Thomas J. Welsh, a commercial law practitioner and Colloquium Reporter. Model Supplementary Arbitration Rules for commercial financial disputes will be presented and each of these speakers will provide the
latest information and perspectives on how these ADR techniques can, and should, be properly used in commercial finance transactions.

As you will hear, the use of ADR in these disputes is growing. The future of commercial finance dispute resolution is ADR. This panel will help you to be ready for it.

This colloquium is sponsored by the American College of Commercial Finance Lawyers, the ABA Business Law Section Committees on Commercial Finance and Alternative Dispute Resolution, as well as the College of Commercial Arbitrators and the ABA Dispute Resolution Section Arbitration Committee.

Thomas J. Welsh
Brown & Welsh, P.C.
“Earth, Wind and Soybeans: The State of Alternative Energy Finance”

by Arthur A. Cohen

Alternative energy is one of the hottest topics in the news, and the Commercial Finance Committee is right in the middle of this important issue, as the sponsor of a major CLE program at the Spring Meeting in Dallas this year. On Friday, April 11, 2008, 10:30 a.m. – 12:30 p.m., we are co-sponsoring a CLE program called “Earth, Wind and Soybeans: The State of Alternative Energy Finance.” This program will look at the current state of the finance market for alternative/renewable power, how and why things have changed over the last year and where the market is going in the months and year ahead.

The panel will be moderated by Arthur A. Cohen, a partner at Haynes and Boone in DC, who is the Chair of the Project Financing Subcommittee of the Developments in Business Financing Committee. He will look at who is now lending in this space, what new structures are being used, what terms are being seen in the market, and how people are getting deals done in the new less-liquid credit environment. Monty Humble, a partner at Vinson & Elkins in Dallas, will talk about timing issues that arise in renewables deals, and how careful planning can help to structure deals so as to avoid problems. Evelyn Lim, general counsel of UPC Wind, a large Boston-based wind developer, will make a presentation explaining how lenders are dealing with the risks presented by new technologies. George Haley, a partner at Pillsbury Winthrop Shaw Pittman LLP in San Francisco, will offer guidance on dangers faced by lenders when taking security interests in LLC membership interests in renewables deals. Kathleen Doll, of Stoll Rives in Portland, OR, will talk about emerging trends in financing biofuels and biomass projects, including an explanation of the drivers of this activity over the past year, an explanation of where deals are getting done, and what challenges they are facing, as well as the financing solutions that are being used to resolve these issues.

The panel will also include two distinguished business people. Glen Davis, EVP of Ausra, Inc., will talk about how financing solar projects differs from financing wind deals. Andy Bowman, SVP of Development at E.ON Wind, will talk about the basic issues wind deals will face in 2008 and beyond, and how value components are evaluated in wind transactions.

This program is intended to provide important and current market information to practitioners in the alternative/renewables field. It will be practically focused, with information and solutions regarding issues that are currently being faced in the field.

This program has been organized by, and is part of the ongoing expansion of, the Project Financing Subcommittee of the Developments in Business Financing Committee. Following the program, the Project Financing Subcommittee will meet from 12:30 p.m. - 1:30 p.m. on: “Power and (Uncertain) Glory: Project Finance in Challenging Economic Times.” This meeting will focus on the state of project finance in 2008’s challenging economic environment. In addition, it will kick off an effort to greatly expand the subcommittee’s membership and scope, allowing our members to (i) discuss issues of current relevance; (ii) sponsor and present educational
programs; and (iii) prepare and publish model agreements (with commentary), practice manuals and other reference works and resource materials relating to project finance transactions.

The Subcommittee seeks the involvement of lawyers representing a wide cross-section of parties involved in project finance transactions: sponsors/developers, contractors, vendors, export credit agencies, regional and national development banks, commercial and investment banks, credit enhancers and other providers of financing.

Please try to come and join us for what promises to be both an interesting and exciting program and an important subcommittee meeting.
ABA SECTION OF BUSINESS LAW LEGAL OPINIONS COMMITTEE:
CROSS-BORDER OPINION INITIATIVE

The Cross Border Legal Opinions Subcommittee of the ABA Legal Opinions Committee is studying outbound legal opinions (opinions by U.S. counsel addressed to non-U.S. recipients) in cross-border transactions. As a result of this study, the Subcommittee may propose guidelines for such opinions. The ComFin Committee is participating in this project and is represented on the Legal Opinions Committee Cross-Border subcommittee.

At its meeting on January 31, 2008, the ComFin Committee was represented by Larry Safran and the following items were among the issues discussed with respect to outbound legal opinions:

A. General Principles. General concepts that might be addressed include (i) the applicability of the golden rule, (ii) other customary practice issues (including what customary practice applies, that of the opinion giver or that of the opinion recipient?), (iii) the applicability of other provisions of the ABA principles and guidelines, and (iv) the impact of public policy issues;

B. Common Opinions. Opinions commonly requested for outbound opinions include: (i) enforceability of foreign judgments, (ii) validity of choice of non-U.S. law, (iii) enforceability of forum selection clauses, (iv) hypothetical enforceability opinions as if the documents were governed by the law of the relevant U.S. state, (iv) security interest issues, (v) entity status and no dissolution or bankruptcy filing opinions;

C. Inappropriate opinion requests and how best to handle these;

D. Limitations on Liability. Should limitations on liability be included in outgoing opinions where that is customary in a jurisdiction with major contacts with the deal? Choice of non-U.S. law to govern opinion liability issues – e.g. reliance? Choice of forum outside the U.S.?

To help the subcommittee, please send by email to Noel Para (Noel.Para@alston.com) examples of requests to U.S. counsel from non-U.S. recipients and of outbound opinions given in cross-border transactions. The committee also would value comments you have about materials you submit, or about the project, sent either via the list serve or as part of your submission.

The committee is particularly interested in requests and opinions that are (a) customary in cross-border transactions but not in U.S. domestic transactions, (b) unusual, or (c) otherwise problematic. However, we also would like to see examples that are similar to requests that are customary in U.S. domestic transactions. We especially wish to collect examples of opinions that include assumptions, qualifications, limitations and exceptions that are not normally found in domestic U.S. opinions.

Larry Safran
Latham & Watkins LLP
**Joint Taskforce on Deposit Account Control Agreements**

*R. Marshall Grodner, Marvin D. Heilesen, Oliver I. Ireland, John D. Pickering and Edwin E. Smith, Co-Chairs*

After the Joint Task Force on Deposit Account Control Agreements unveiled its new form of deposit account control agreement at the Section’s 2006 Spring meeting in Tampa, Florida, and the initial report of the task force was published in 61 *The Business Lawyer* 745 (2006), the task force began to develop a series of inserts designed to accommodate transactions other than the paradigm transaction originally contemplated by the deposit account control agreement (the “DACA”) developed by the task force. These transactions include those involving a standing disposition instruction, lock box arrangements, a security interest in a time deposit or other deposit account not payable on demand, the blocking of the debtor’s access to the deposit account without a standing disposition instruction, a deposit account from which funds are automatically swept into an omnibus investment account, and first and second lien arrangements over the same deposit account.

All of these inserts have now been promulgated by the task force and are available, together with the task force’s initial report and the DACA, on the [task force’s web site](https://www.sectionlaw.org). Each insert contains footnotes and, in one case, a prefatory note to assist the parties in selecting the proper insert for their transaction and in guiding them through possible choices contained in the insert where the task force recognized that different solutions may be present in the market place.

The task force plans to publish an additional report that will summarize and further explain the operation of these inserts. In addition, the task force will make a telephone presentation to the Section relating to the inserts on March 11, 2008, from 1:00 to 2:30 p.m. Eastern time, and will also conduct a program at the Section’s 2008 annual meeting in New York in August.

Two projects remain for the task force. The first project is to develop, with the assistance of the Section’s Commercial Finance Committee’s Subcommittee on Securitizations and Derivatives, a DACA specifically designed for securitizations.

The second project is to develop an agreement relating to security interests in health-care receivables. Under applicable federal law relating to Medicare and Medicaid receivables, with certain exceptions, the secured party may not have a right to collect health-care receivables directly from the account debtor and may not be able to have a control agreement with the depositary bank for a deposit account to which the proceeds of the receivables are credited. The task force is developing a form of agreement among the debtor, the secured party and the depositary bank that falls short of a control agreement but which contains certain safeguards to protect the secured party from the proceeds being diverted by the debtor.

The co-chairs of the task force are Marshall Grodner, Marvin D. Heilesen, Oliver I. Ireland, John D. Pickering and Edwin E. Smith. Edwin E. Smith serves generally as the reporter. Eric Marcus serves as the reporter for the securitization DACA. Leslie Polt serves as the reporter for the health-care receivables agreement.
The Task Force on Filing Office Operations and Search Logic has been formed to address issues relating to filing and searching under Article 9 of the Uniform Commercial Code. The Task Force will cooperate closely with the International Association of Commercial Administrators (“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. In addition to the development of a cooperative and joint approach between the ABA through the Task Force and IACA, the Task Force will also work with the Internal Revenue Service and the appropriate Committees of the Congress with regard to the pending legislation to establish a central filing system for federal tax liens.

As outlined in our Mission Statement, our goals are to:

- Develop, with IACA, a recommended national Search Logic and administrative rules to foster consistent State administration of the UCC search and filing process.

- Coordinate the UCC search and filing process with other stakeholders, such as the Internal Revenue Service.

- Coordinate the State UCC search and filing process with other related State databases.

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 Corporation Service Company, and Kelly Kopyt, the UCC Administrator of the Commonwealth of Massachusetts.

Scheduled for the Spring Meeting of the ABA Section of Business Law is a one-hour panel discussion focusing on debtor name issues left unresolved by Article 9, including the 2007 Texas debtor name legislation and the filing officers’ perspective on the impact of indexing rules and search logic. The panel will also address special concerns with registered organization, individual and trust debtor names. A half-hour organizational meeting will follow the panel discussion.

Ahead, the Task Force will join a roundtable discussion on filing office issues at the May meeting of IACA, will hold a meeting of the Task Force with related presentations at the Annual meeting 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 has also begun holding monthly telephonic meetings, on the second Monday of each month, to which all members are invited. The first conference was held on Monday, February 11th. The purpose of the meeting was primarily to identify topics for assignment to subcommittees. It began with a lively discussion of search logic issues surrounding the hypotheticals posted to the UCC listserv the previous week. However, the discussion indicated that a subcommittee would not be productive on the topic. Members expressed interest in having subcommittees to address two topics. The first was to explore the pros and cons of a national central UCC filing system. Further discussion on this suggestion was put on hold until after the IACA conference in May. The second topic was to have a subcommittee create a state status report and evaluation (report card) of state filing offices. This status report would expand beyond the current information collected by IACA on various filing offices. The subcommittee still needs a chair.

Additional topics submitted for consideration by subcommittees that were not discussed on the call:

- Review of IACA suggested changes to A9
- Use of SSNs for Individual Debtors
- IRS Central Filing Legislation

The next telephonic meeting of the Task Force is set for March 17, 2008 at 11:00 am EST (10:00 CST and 8:00 PST). To join the meeting, call 866-469-3239 and enter access code 44876231#. If it asks for your attendee ID number, simply press #.
## UNIFORM STATE LAWS SCORECARD

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

**As of February 1, 2008**

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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 February 1, 2008.

1. In addition to enactments noted below, all states and the District of Columbia have adopted (i) the 1995 Official Text of Article 5 of the UCC, (ii) the 1994 Official Text of Article 8 of the UCC and (iii) the 1998 Official Text of Article 9 of the UCC.

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

3. New York and South Carolina are the only states that still have the 1951 version of Articles 3 and 4.

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COMMERCIAL FINANCE COMMITTEE

Section of Business Law
American Bar Association

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Term Expires: Indefinite

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DEPOSIT ACCOUNT CONTROL AGREEMENTS

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ABA Section of Business Law
Practical Resources for the Business Lawyer

Commercial Finance Committee
http://www.abanet.org/dch/committee.cfm?com=CL190000
<table>
<thead>
<tr>
<th>Group</th>
<th>Chair(s) &amp; Vice-Chair(s)</th>
<th>Term Expires*</th>
</tr>
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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>
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<td>International Commercial Law</td>
<td>Larry I. Safran (c) Kate Sawyer (vc)</td>
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<td>Meredith S. Jackson (co-c) Howard Darmstadter</td>
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<td>Leasing</td>
<td>Barry Graynor (c) Teresa Davidson (vc)</td>
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<td>Letters of Credit</td>
<td>George A. Hisert (c)</td>
<td>2009</td>
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<td>Payments</td>
<td>Sarah H. Jenkins (c) Greg Cavanagh (vc)</td>
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<td>Secured Transactions</td>
<td>Leianne S. Crittenden (c) Pauline Stevens (vc)</td>
<td>2008 2008</td>
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<td>Russell A. Hakes Robyn Meadows Stephen L. Sepinuck</td>
<td>n/a</td>
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<td>William H. Towle</td>
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<td>Commercial Law Newsletter</td>
<td>Maria Milano</td>
<td>2008</td>
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<td>Membership</td>
<td>Terri A. Motosue</td>
<td>2008</td>
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<td>Consumer Involvement</td>
<td>Michael Ferry (co-c) William Woodward, Jr. (co-c)</td>
<td>expired</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>Cindy J. Chenuchin</td>
<td>2010</td>
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<td>State Certificate of Title Laws</td>
<td>Alvin C. Harrell (c) Lee Anne Leathers-Lutz (vc)</td>
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<td>UCC Litigation</td>
<td>Mary Binder (c) Stephen C. Veltri (vc)</td>
<td>2008</td>
</tr>
<tr>
<td>Group</td>
<td>Chair(s) &amp; Vice-Chair(s)</td>
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<td>Transferability of Elec. Assets</td>
<td>Mattias Hallendorf (c-Cyberspace) Richard M. Newman (c-UCC)</td>
<td>2009</td>
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<td>Liaisons</td>
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<td>Committee on Institutes + Seminars</td>
<td>James J. Murphy</td>
<td>2007</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>
<td>2010</td>
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</tbody>
</table>

* All terms expire at the end of the ABA Annual Meeting in the year indicated.