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

Commercial Law Newsletter

Messages from the Chairs

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

Upcoming Programming

The UCC Committee is pleased to be offering three CLE programs at the upcoming annual meeting in New York, each of which is co-sponsored by the Committee on Commercial Finance:

- "Getting Blood from a Stone: Commercially Reasonable Foreclosure on Collateral and the Availability of a Market", Saturday, August 9, 2008 at 8:00 - 10:00 a.m.
- "Do Worlds Collide - When Operational Systems Meet the Law", Sunday, August 10, 2008 at 8:00 - 10:00 a.m.
- "Bluebloods and Newbloods - Financing Wealthy Individuals", Sunday, August 10, 2008 at 2:30 - 4:30 p.m.

A complete schedule of the Committee's activities, including the meetings of all its subcommittees and task forces, is attached to this newsletter. In addition, the UCC is co-sponsoring CLE programming offered by other committees.

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

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Mark Your Calendars

2008 ABA Annual Meeting Schedule

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Subcommittee on Payments
Task Force on State Certificate of Title Laws

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Subcommittee on Aircraft Financing
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Subcommittee on Cross-Border and Trade Financing
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Subcommittee on Lender Liability
Subcommittee on Loan Workouts
Subcommittee on Real Estate Financing
Subcommittee on Syndications and Lender Relations
Model Intercreditor Agreement Task Force
Task Force on Surveys of State Commercial Laws

Joint Subcommittee Report
Subcommittees on Secured Lending (ComFin) and Secured Transactions (UCC)

Joint Task Force Reports
Joint Task Force on Commercial Finance Terms
Joint Task Force on Deposit Account Control Agreements
Joint Task Force on Filing Office Operations and Search Logic

UCC Scorecard
Committee Leadership Rosters

Just Published!
Practice Under Article 9 of the UCC
an update of the book formerly titled The New Article 9
By the Uniform Commercial Code Committee of the Business Law Section
Editor: Stephen L. Sepinuck

Editorial Board:
Maria Milano
Co-Editor (UCC)
Riddell Williams P.S.
206-389-1752

Christine Gould Hamm

8/7/08 - Donald Rapson Memorial Dinner
On August 7, 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 accessed here.

8/8/08 - Aircraft Financing Subcommittee Dinner
The Aircraft Financing Subcommittee will hold its traditional dinner at the Annual Meeting on Friday, August 8 from 7:00 - 10:00 p.m. Reservation information can be accessed here.

8/8-11/08 - ABA Annual Meeting, New York, NY
The Annual Meeting will feature CLE programs on commercially reasonable foreclosure, commercial finance in global markets, lenders and credit providers in financial trouble, model deposit account control agreements, financing wealthy individuals, operational systems, and cross-border legal opinions, among others, as well as a full schedule of subcommittee and task force meetings. We have a full schedule of events, from Friday afternoon until Monday afternoon. The ComFin and UCC schedule can be accessed here and additional information about the meeting is available at the meeting's webpage.

11/12/08 - Fall ComFin Meeting, San Francisco, CA
The Fall ComFin Meeting, held in conjunction with the CFA convention, will provide three CLE programs and a networking lunch. Additional information is available at the meeting's webpage. More details will follow before the meeting.

Attending Your First Meeting

If you'll be attending your first ABA meeting in New York, attending the UCC Committee or ComFin Committee forums and programs is a good way to meet people and get an overview of what the committees are doing:

- UCC Committee Program "Getting Blood from a Stone: Commercially Reasonable Foreclosure on Collateral and the Availability of a Market" will be held Saturday, August 9, at 8:00 a.m. - 10:00 a.m.
- ComFin Committee Program "It's a Small World After All - Commercial Finance in Global Markets" will be held Saturday, August 9, at 10:30 a.m. - 12:30 p.m.
- ComFin Committee Forum "Topsy Turvy Markets? When Lenders and Credit Providers are in Financial Trouble" will be held Saturday, August 9, at 2:30 p.m. - 4:30 p.m.
- UCC Committee Program "Do Worlds Collide - When Operational Systems Meet the Law" will be held Sunday, August 10, at 8:00 a.m. - 10:00 a.m.
- ComFin Committee Program "It's a Wrap! The Model Deposit Account Control Agreement Final Report" will be held Sunday, August 10, at 10:30 a.m. - 12:30 p.m.
- UCC Committee Forum "Bluebloods and Newbloods - Financing Wealthy Individuals" will be held Sunday, August 10, at 2:30 p.m. - 4:30 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 (styrer@mcglinchey.com), Norman M. Powell (npowell@ycst.com) or Sherman G. Helenese (sherman.helenese@yahoo.com), 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.

Business Law Section Creates New Committee on Securitization and Structured Finance

In April, the Business Law Section created a new Committee on Securitization and Structured Finance, chaired by Vicki O. Tucker and with Martin Fingerhut as vice-chair. Members of the Securitization and Derivatives Subcommittee of ComFin, the Securitization of Assets Subcommittee of Business Financing and the Structured Finance Subcommittee of FedRegS automatically became members of the new SSF Committee. SSF’s mission is to provide a forum for discussion of legal issues and market trends related to securitization and other structured finance transactions and the role of derivatives in those transactions. SSF welcomes you to join them at the Annual Meeting in New York on August 10, 2008 for their inaugural business meeting and two informative CLE programs.

More...

Ernest Williams III Remembrance

Recently we lost another icon in the world of commercial finance and our profession. Ernest Williams III died on April 20, 2008. Ernest was one of the handful of commercial lawyers who, over a drink at a Commercial Finance Association meeting, suggested the idea of the Business Law Section forming what is now the Commercial Finance Committee (CFA meeting Fall, 1982; first Commercial Financial Services Committee meeting April, 1983). Ernest had a booming voice and an equally expansive heart. He was bigger than life. When he entered the room, he filled the room with his warmth and exuberance. He was a person of extraordinary intellect, intellectual curiosity and practical judgment. Attached is his obituary. For those of us who had the pleasure of knowing Ernest, he will never be forgotten.

- Maury B. Poscover

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.

Nationwide Transport Finance v. Cass Information Systems, Inc., 523 F.3d 1051 (9th Cir. 2008)

This case presents a very narrow and troubling view of the
obligations of an account debtor's payment agent.

More...

**Featured Articles**

**Commitment Letters in Turbulent Times: Market MAC Clauses and the Solution Litigation**
George A. Zimmerman and Seth E. Jacobson, Skadden, Arps, Slate, Meagher & Flom LLP

When credit markets deteriorated and volatility increased, banks and other financial institutions that had committed to provide financing found themselves funding loans on below market terms and either holding the loans on their books or selling the loans at substantial losses. In order to protect against this scenario, lenders began seeking to allocate market risk to borrowers. The result was the re-introduction of so-called "Market MAC" clauses into commitment letters. A Market MAC clause essentially excuses lenders that have issued a commitment from funding the loans in the event of an adverse change in the capital markets that impairs the ability to syndicate the loan. Given the unprecedented turmoil in the capital markets over the past year, Market MACs are once again prominent features in commitment letters.

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**The Forthright Negotiator Principle and the Legitimate Role of Ambiguity in Contracts**
Norman M. Powell and Evangelos Kostoulas, Young Conaway Stargatt & Taylor, LLP

When drafting a contract, it's always best to minimize ambiguity, right? As with so much in the law, the answer, it turns out, is a clear "it depends." There has been much recent discussion of the so-called forthright negotiator principle. Some of it seems to misapprehend the principle, suggesting it gives rise to an affirmative duty to eliminate ambiguity. It does not. It is simply one of a number of principles of contract interpretation used by, among others, the Delaware courts. An economic analysis of the forthright negotiator principle shows that it aids social efficiency.

More...

**Transferred Rights Under LSTA Purchase and Sale Agreement After M. Fabrikant & Sons, Inc.**
Amy G. Pasacreta and John J. Voorhees, Mayer Brown LLP

In exchange for allowing the Debtors to use their collateral, the Court granted the Debtors' lenders adequate protection, which included an administrative priority claim for the reimbursement of a lender's reasonable expenses relating to all proceedings in connection with the enforcement and validity of the prepetition agreements (the "Reimbursement Rights"). After the Order was entered, the original lenders sold their loans on the secondary market to the current lenders under standard LSTA documents. The Court considered the transferred rights under the LSTA documents to determine whether the Reimbursement Rights could be avoided for the benefit of the Debtors' estate.
More...

**Book Review: Cross-Border Security over Tangibles**
*Edwin E. Smith, Bingham McCutchen LLP*

Those of you who have been wondering what happened to Harry Sigman now have an answer. Harry was active for years in the work of the Commercial Finance and Uniform Commercial Code Committees but has been noticeably absent recently. We now know why. Having made his mark on domestic commercial law in the United States, Harry has turned his attention to the rest of the world. In addition to his serving as a member of the US delegations with respect to the Hague Securities Convention, the UN Receivables Convention and the UNCITRAL Legislative Guide on Secured Transactions, his global concerns are well-evidenced by this new book that he and Professor Eva-Maria Kieninger have co-edited on cross-border security over tangibles.

More...

**Tennessee Begins Another UCC Article 9 Transition Period**
*Paul Hodnefield, Corporation Service Company*

Two bills enacted in Tennessee this year may require secured parties to take action if they recently filed financing statements on individual debtors. The first was Senate Bill 3732, which created a broad safe harbor for individual debtor names if the financing statement provides the name shown on one of five different identification documents. The second, Senate Bill 372, scaled back the list of documents that can serve as a safe harbor source of individual names.

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**UNCITRAL Secured Transactions Guide Intellectual Property Issues**
*Neil Cohen and Steve Weise*

Neil Cohen and Steve Weise, familiar to many members of the ComFin and UCC Committees, have been active in the 6-year project of the United Nations Commission on International Trade Law (UNCITRAL) to develop a Secured Transactions Guide. The Secured Transactions Guide was completed last year and approved by UNCITRAL in December. At that time, UNCITRAL asked the Working Group that had worked on the Secured Transactions Guide to examine in greater detail how the Secured Transactions Guide addresses security rights in intellectual property and related assets. Neil and Steve have continued their work on this project and have attended Working Groups and Experts meetings with intellectual property experts to review the issues. Neil and Steve prepared an outline of some of the principal issues, which is available here. Neil and Steve welcome comments and questions.

Dictionary of Commercial Finance Terms

The Joint Task Force on Commercial Finance Terms has compiled a list of over 2000 terms that they consider useful, interesting or at least amusing to commercial lawyers. While they are continuing to solicit new terms, they would also like members of the task force to identify
their practice areas, so that they can assign terms for definition to those members who might actually know what they mean. At the task force meeting (as part of the Annual Meeting in NY), the task force plans to get the "definitive" phase of the project underway. Please consider joining and/or assisting in the task force's efforts.

Useful Links and Websites

Maria Ann Milano, UCC Committee Editor

In our last edition of the Commercial Law Newsletter, we added a column on useful links and websites. We hope to continue to build this list based on input from our members. Please find below a list of electronic links that are not ABA-affiliated sites, but are resources our members find useful:

1. The UCCLAW-L listserv, which is sponsored by West Group, publisher of the "UCC Reporting Service." To subscribe to the UCCLAW-L listserv, go to http://lists.washlaw.edu/mailman/listinfo/ucclaw-
   
2. U. Penn's archive of NCCUSL final acts and drafts can be accessed at http://www.law.upenn.edu/bl/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.

In addition, the Commercial Finance Committee's Task Force on Surveys of State Commercial Laws website links to surveys of the law of all 50 states (except Connecticut), DC and Puerto Rico.

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: Subcommittee and Task Force Reports

Subcommittee on Article 2A

Barry Graynor, Chair

Several decisions arising from the Norvergence fraud have prevented an assignee of a lessor from enforcing the "hell & high water" provision of a finance lease. In January 2008 the Tennessee Court of Appeals rejected a lessor's argument that a lease was unenforceable due to the hell and high water clause in Wells Fargo Financial Leasing v. Mountain Rentals, 2008 WL 199855 (Tenn Ct. App.), 64 UCC Rep.Serv.2d 1004, in a straight forward application of Article 2A.

Mountain Rentals entered into a finance lease in June 2000 for the rental of telecom equipment. The original lessor assigned its rights and Wells Fargo acquired the lease in the transferee's bankruptcy. The lease contained the standard finance lease provisions: the parties agreed that the lease was a "finance lease" governed by Article 2A; the lessor made no warranties regarding the equipment; the lessee waived all rights and remedies; and the lessee could assign the lease to an assignee who had all of the rights and benefits, but none of the obligations of the lessor. The lessee also signed an acceptance
Subcommittee on General Provisions and Relation to Other Law
Kristen Adams, Chair

At the ABA Business Law Section Meeting in April, the General Provisions and Relation to Other Law Subcommittee presented a program entitled, "Are We Giving Good Faith a Bad Name?" The program, which featured Fred Miller and Ed Smith, focused on the 2001 changes to the Article 1 definition of "good faith" as found in 1-201 (b) (20), addressing the purpose and meaning of the changes and how the states have responded. At the meeting, a brief, selected bibliography on the topic of good faith was circulated. If you are interested in receiving a copy of the bibliography, which has been updated since the meeting, please contact Kristen Adams, Chair of the General Provisions and Relation to Other Law Subcommittee, at adams@law.stetson.edu.

Subcommittee on Investment Securities
Howard Darmstadter and Meredith Jackson, Co-Chairs

HIGHLAND CAPITAL V. SCHNEIDER: THE FINAL (ALMOST) FURY

In Highland Capital Management LP v. Schneider, a case that played a starring role in The Business Lawyer's 2006 Article 8 survey, the New York Court of Appeals held that eight promissory notes issued in connection with the purchase of a business were securities. As a result, an alleged oral contract to sell the notes was not subject to the statute of frauds. The case was remanded to the US District Court for the Southern District of New York.

At this point, interest in the case for Article 8 connoisseurs would be thought to end. However, just as in a novel or movie there is often a coda explaining just what happened to its (fictional) characters, I thought followers of the story might be interested in hearing what has happened to their old friends.

Subcommittee on Leasing
Barry Graynor, Chair

The committee held a joint meeting with the Business Development's Subcommittee on Lease Financings and Secured Transactions at the spring meeting in Dallas. During the meeting, Patricia E. Rademacher, a partner with Coston & Rademacher in Chicago, provided an update on recent cases for attorneys representing equipment lessors, including the efforts of a trustee in bankruptcy seeking to recharacterize a lease as a secured transaction after the lease's acceptance by the debtor had been approved by the court earlier in the bankruptcy.

Contributors for upcoming newsletters and speakers on leasing developments are needed. If you'd like to provide a case discussion or speak at a subcommittee meeting, please contact Teresa Davidson at teresa.davidson@vfSCO.com.
News of the Subcommittee's activities is set forth at the end of this article. The main focus of the article is on two recent cases dealing with certain practical issues of which letter of credit practitioners and their clients need to be constantly mindful.

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Subcommittee on Payments
Sarah Howard Jenkins, Chair, Greg Cavanagh, Vice-Chair

At the spring meeting in Dallas in April, the Payments Subcommittee of the UCC Committee met jointly with the Deposit Products and Payment Systems Subcommittee of the Consumer Financial Services Committee to discuss NACHA's proposed deposited check truncation (DCT) pilot. As proposed, DCT would permit certain low-value checks, consumer checks for $25 or less, to be truncated and collected through the automated clearing house (ACH) network. Paying banks could request copies of checks presented to them on an exception basis. Unlike ACH applications such as Point of Purchase (POP), Accounts Receivable Conversion (ARC), and Back Office Conversion (BOC), which use checks as source documents to create ACH entries, checks truncated in the DCT pilot would be collected as checks and principally governed by traditional check law.

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

Culminating an effort that began with the creation of an American Bar Association UCC Committee Task Force on State Certificate of Title Laws in the early 1990s, and continued with the participation of the Task Force in the UCC Article 9 revision process throughout that decade, the Section of Business Law is preparing to publish the final edition of the Task Force Compendium of State Certificate of Title Laws.

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Committee on Commercial Finance: Subcommittee and Task Force Reports

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

The Aircraft Financing Subcommittee has an exciting program of speakers for this summer's meetings. One of the world's foremost experts on Islamic finance will be discussing aircraft financing and Shari'ah compliant structures. Kerry Long, the FAA Chief Counsel will be joining us again to provide his unique perspectives on the airline industry and FAA regulatory initiatives in this turbulent time for the US airline industry. We also have an FAA briefing on the technology that is expected to constitute the future of air traffic control in the US air transportation system. We have an update on recent bankruptcy cases relevant to competing claims in leveraged lease structures, as well as cross-default provisions. A leading business aviation practitioner will discuss evolving market practices and strategies for enforcing lenders' rights in fractional share programs.

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 Cape Town registration of lease assignments and the expanding and developing area of aircraft pre-delivery payment financings.

Traditionally, our Subcommittee dinners have provided a relaxed venue for camaraderie generally - and we expect this summer's dinner to hew to that tradition. We currently are finalizing plans for the Subcommittee dinner for Friday evening, August 8, at a restaurant within easy walking distance of the Grand Hyatt. We encourage all members and friends of the Subcommittee to "save the date" for what should be a very delightful evening.

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

Our subcommittee meeting at the Annual Meeting in New York will focus on new developments in Delaware law on breach of fiduciary duty by officers and directors and related damage claims for deepening insolvency. We will meet on Saturday, August 9, 2008, from 1:00 - 2:30 p.m. Come join our panelists and committee members to learn about best practices to insulate clients from damage claims related to breach of loyalty and deepening insolvency in workout scenarios. Our discussion will be led by Glenn Siegel, a partner at Dechert LLP in New York, and his colleague at Dechert, Iva Uroic. Glenn has written about the recent Brown Schools decision and we look forward to hearing his advice.

This program will outline the current status of Delaware law following the decision of Judge Mary Walrath on April 24, 2008 in In re Brown Schools (Miller v. McCown De Leeuw & Co.), 2008 Bankr. LEXIS 1226, Adv. No. 06-50861 (Bankr. D. Del. 2008), wherein the court refused to dismiss a Chapter 7 trustee's breach of fiduciary duty claims against the former directors of a debtor corporation in which some of the damages claimed were for the "deepening insolvency" of the debtor allegedly caused by the defendants' breaches of their duties of loyalty to the corporation and its creditors. This decision distinguished Trenwick Am. Litig. Trust v. Billett, 2007 Del. LEXIS 357 (Del. 2007), where the Delaware Supreme Court held that Delaware does not recognize a cause of action for deepening insolvency. This program is relevant to every workout lawyer who needs to advise clients on their duties as officers and directors of corporations that are insolvent or approaching insolvency. The discussion will focus not only on the Brown Schools decision, but will provide an overview of the current standards under Delaware law for breach of fiduciary duty.

Our program at the Spring Meeting in Dallas last April focused on 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 also explored 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 was also discussed. Our speakers were 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...
Subcommittee on Cross-Border and Trade Financing  
Daryl Clark, Chair

In May of this year, our subcommittee organized and sponsored a program at the ABA's first ever Global Business conference in Frankfurt, Germany. The program topic was Recent Changes to Tax Laws in Canada and The Netherlands and Their Effect on Cross Border Finance and Mergers and Acquisitions. Also, at the ABA's Spring Meeting in Dallas, our subcommittee agreed that it, together with the International Subcommittee of the UCC Committee, would organize and sponsor a program at the Spring Meeting next April in Vancouver. If you have any program ideas you would like to share for next year's Spring Meeting, please do not hesitate to contact me. The planning for this meeting will begin in the next few months.

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

The IP Financing Subcommittee convened at the Dallas ABA Spring Meeting. Professor Tom Ward (University of Maine School of Law) reported on the status of a lien filing project involving the US Patent and Trademark Office and certain state filing offices. Neil Cohen and Kirakoula Hatzikiakos updated the group on the UNICITRAL Guide to Secured Financing and IP Security Interests. Matt Kavanaugh gave a presentation on internet domain names as collateral. The materials from the meeting can be downloaded from the Subcommittee's ABA webpage.

The Subcommittee will meet on August 10, 1:00 - 2:30 p.m. at the NYC ABA Section of Business Law Annual Meeting to discuss licensing issues in IP financing and any other developments of interest.

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

The Lender Liability Subcommittee conducted a well-attended session on Recent Updates: Lender Liability Theories, Trends and Defenses during the Spring 2008 meeting in Dallas. The subcommittee will not be meeting at the Annual Meeting in NY. Our next meeting will be held at the Spring 2009 Meeting in Vancouver. The program for that meeting is under development and comments or suggestions are welcome.

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

The Loan Workout Subcommittee of the Commercial Finance Committee presented a panel at the Section of Business Law Spring Meeting in Dallas, Texas entitled: Current Issues and Developments in Dealing with Distressed Real Estate. The panel was moderated by Steven B. Soll, a Member of the Firm of Otterbourg, Steindler, Houston & Rosen, P.C. and included presentations by Cathy L. Reece, a Member of the Firm of Fennemore Craig, P.C., William K. Snyder, Managing Partner of CRG Partners and Daren Wayne Perkins, Vice
President/Assistant General Counsel, JPMorgan Chase & Co. The panel discussed the changing state of the real estate markets, both commercial and residential, and explored major issues, concerns and alternative strategies which arise in the workout of defaulted real estate loans in a diverse range of real estate transactions including home builders, developers, shopping centers, apartments, condos, hotels and retailers with a large number of leases. The panel presented a PowerPoint presentation and distributed written materials which contained both factual and statistical information regarding distressed real estate and legal authorities regarding issues which have arisen in recent bankruptcy cases involving real estate assets. An active question and answer session followed the panel presentation.

Steve and Cathy desire to organize panel presentations by the Subcommittee on a regular basis. Active participation by Subcommittee members is sought and Steve and Cathy welcome suggestions for future programs, as well as volunteers for future panels. Please contact Steve at (212) 905-3650/ssoll@oshr.com or Cathy at (602) 916-5343/creece@fclaw.com with your thoughts, comments and suggestions.

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

Here is our recap of the 2007-2008 bar year, and a call (already!) for ideas for our Spring 2009 meeting in Vancouver, B.C. First, thanks to all our subcommittee members and others who attended the April 2008 meeting and participated in the lively panel discussion on bad things that can happen when dirt is your collateral. The materials from the meeting are posted on our website: the meeting was entitled "Avoiding Jail, Disbarment and Other Bad Consequences: What You Need to Know About Real Estate Collateral." Thanks in particular to our meeting moderator Ed Lester and to our panel members: Ray Carpenter, Wilhelmina Kightlinger, Mark Rankin and Norm Powell.

For next year, we are considering a bit of a different type of meeting. Even though we always seem to start our meetings with a specific premise, they usually evolve into great discussions on state specific topics and their impacts on our practice. Accordingly, we are considering conducting the 2009 meeting as a structured discussion on hot or interesting state specific topics, with the meeting attendees speaking up as our "panelists." To make this work, however, we will need to get some idea of topics and who might be willing to take ownership and lead a discussion on different topics. Accordingly, while you bask in the summer sun, please think about topics, and send us a quick e-mail with the topic ideas and whether you would consider taking the lead on a discussion (no firm commitment required at this time). Kathleen's e-mail is khopkins@rp-lawgroup.com and Ed's is elester@carltonfields.com. Have a great summer and we hope to see you at the annual meeting in NYC.

**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 the Law Committee jointly presented their second annual "Syndicated
Loans Market Update " at the 2008 Spring Meeting of the Business Law Section in Dallas. Bridget Marsh of the Loan Syndications and Trading Association was the moderator for this informative and topical program, which featured panelists such as Eliot Ganz, General Counsel of the LSTA, Peter Wasserman of JPMorgan Chase Bank, N.A. and Alex Spiro of Bank of America, N.A. A complimentary copy of the PowerPoint slides for this presentation may be obtained by contacting Anthony Callobre, Chair of the Syndications and Lender Relations Subcommittee.

The two task forces created under the auspices of the Syndications and Lender Relations Subcommittee have been quite active. The Model Intercreditor Task Force, Chaired by Gary Chamblee, continues to make substantial progress toward its goal of creating a balanced, market-based form of intercreditor agreement for use in second-lien financing transactions. The Syndications Chapter Task Force, chaired by Michele Suarez, is preparing a chapter on syndicated loans for inclusion in Howard Rud's treatise on asset-based lending. Anyone interested in contributing to the work of these task forces is encouraged to contact Gary Chamblee or Michele Suarez or to attend the next meeting of these task forces to be held at the 2008 ABA Annual Meeting in New York City.

The Syndications and Lender Relations Subcommittee will meet at the 2008 ABA Annual Meeting in New York City. This meeting will include reports on the status of the work of the Model Intercreditor Agreement Task Force and the Syndications Chapter Task Force, the introduction of the newly installed chairs and vice-chairs of the Subcommittee, and an open forum to discuss prospective future programs and task forces.

**Model Intercreditor Agreement Task Force**
Gary D. Chamblee, Chair, Alyson Allen, Christian Brose, Richard K. Brown, Robert L. Cunningham, Jr. and Jane Summers, Vice Chairs

The Model Intercreditor Agreement Task Force is holding a series of dial-in monthly meetings prior to the Annual Meeting to discuss proposed revisions and additions to the Model Intercreditor Agreement, including alternative provisions for first and second lien lenders. At the meeting on June 18th, Bob Cunningham of Gibson, Dunn & Crutcher LLP, who is a Vice-Chair of the Task Force, lead a discussion of the provisions dealing with common collateral and lien priority, including issues raised by first and second lien caps. At the next dial-in meeting, which is scheduled for July 16, Vice-Chair Christian Brose of the McGuire Woods firm will lead a discussion on the modification and amendment provisions. At the Annual Meeting, we will discuss the proposed revisions to the Model Intercreditor Agreement, including those arising out of the monthly meetings of the Task Force.

**Task Force on Surveys of State Commercial Laws**
Brian D. Hulse, Chair, James H. Prior and Jeremy S. Friedberg, Co-Chairs

**COMING SOON TO THE ABA BOOKSTORE: SURVEYS OF STATE COMMERCIAL LENDING LAWS TO BE PUBLISHED IN BOOK FORM**

Over the past several years, the Task Force on Surveys of State Commercial Laws has completed a project to prepare a comprehensive summary of the commercial lending and real estate finance laws of all 50 states, the District of Columbia and
Puerto Rico. A volunteer from each jurisdiction has prepared a summary of its laws in a substantially uniform format. The summaries are available now on the Commercial Finance Committee's webpage. They provide a tremendous resource on local lending laws of a type that is not available anywhere else.

The ABA has announced that it will publish the surveys in book form, and the survey authors are in the process of updating their surveys for publication. The ABA intends to have the book available in late 2008 or early 2009. While the current surveys will continue to be available on the web page, the updated surveys will be available only in book form.

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)

At the 2008 ABA Annual Meeting in New York, the Secured Lending Subcommittee of the Commercial Finance Committee and the Secured Transactions Subcommittee of the UCC Committee will hold a joint meeting on Saturday, August 9 from 12:30 to 2:30 p.m. As you may have heard, the American Law Institute and Uniform Law Commission (formerly NCCUSL) have appointed a Joint Review Committee for UCC Article 9. This joint ALI/ULC Committee is preparing a report that will likely recommend to the sponsoring organizations that a drafting committee be appointed and consider revisions to "fine tune" certain provisions of UCC Article 9 to address some issues, particularly in the filing area, that have arisen in practice. Steven Weise, Edwin Smith and others working on this project will discuss their work, its status and prospects. Please join us!

If airline cancellations or other considerations made you miss the joint meeting of the ComFin Secured Lending Subcommittee and the UCC Secured Transactions Subcommittee at the Spring Meeting in Dallas, you missed an energetic, entertaining and interactive discussion of "The ABC's of Assignments for the Benefit of Creditors." Apparently this historical remedy is alive and well in many states. The presentation included both technical expertise from the panel and in-the-trenches experience from the audience. We thank the panel of experts: James C. Chadwick (moderator) and Brent R. McIlwain of Patton Boggs LLP, Michael W. Hilliard (moderator) and Jennifer D. Knapke of Winstead PC and Brian Cejka of Alvarez & Marsal.

As always, we welcome your ideas and suggestions.

Joint Task Force Reports

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

The Joint Task Force on Commercial Finance Terms is working to compile and publish a dictionary of terms used in every aspect of commercial finance law and practice, including asset based lending, syndicated credits, securitization, structured finance, project finance, derivatives, real estate finance, lease finance,
We are currently working through Stage 1 of our project, developing our list of terms to be defined. These may be terms that are unique to commercial finance, or simply terms that may arise from time to time in the practice. We are seeking terms from the basic to the esoteric (extra points if they're funny!). The terms may be terms of art, statutory terms, acronyms, commonly-used expressions - if you can add to our list with terms that are reasonably related (or even ancillary) to commercial finance practice, send us your terms!

We would like to thank Jonathan Lipson, Stephen Sepinuck, Lynn Soukup, Stuart Ames, George Hisert, Pamela Martinson, Tony Callobre, Tom Patterson, Peter Gregura, Joel Rabinowitz and Rob Zeitinger for their contributions to this project. Special thanks to Arthur Cohen for a complete dictionary of project finance terms. What we really want now is an opportunity to thank many, many more of you, so please contact Meredith Jackson with suggestions of additional terms, or contact Carl Bjerre with any information you may have regarding other dictionaries or sources of definitions for commercial finance terms. You may access the current list of terms here and on the task force website. We will be meeting in New York and hope to see you there!

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

Task Force Program at the ABA Annual Meeting: August 10, 2008 from 10:30 a.m. to 12:30 a.m. in the Empire State Ballroom D, Ballroom Level, Grand Hyatt Hotel Topic: "It's a Wrap! The Model Deposit Account Control Agreement Final Report"

As many of you know, the Task Force was formed in 2004 to develop a form Deposit Account Control Agreement that was fair to all parties, represented market practice, could be widely accepted by market players and could be concluded with no or minimal negotiation. The form of deposit account control agreement developed by the Task Force was released at the American Bar Association's 2006 Spring Meeting in Orlando, Florida, and was published in 61 The Business Lawyer 745 (Feb. 2006) together with an initial report of the Task Force. The form addresses the common situation in which a secured party seeks to enter into a control agreement with its debtor and the debtor's depositary bank relating to a transactional deposit account to which the debtor initially has access. Subsequently, the Task Force finalized several inserts to the initial form, including, the Standing Disposition Instruction Insert, the Lock Box Insert, the Initial Block without Standing Disposition Instruction Insert, the Non-Demand Deposit Account Insert, the Time Deposit Insert, the First Lien Insert and the Second Lien Insert. We have also finalized the Securitization Deposit Account Control Agreement, including General Terms and Specific Terms, for use in securitization transactions. The Initial Report, the General Terms, the Specific Terms, the finalized inserts and the Securitization DACA are available on the Task Force's website. The website also has been updated to include in .pdf format annotated versions of the inserts and in .doc format unannotated versions of the inserts for use by the public. The Task Force, additionally, is continuing to work on a Medicare/Medicaid Directive for use in transactions involving government health-care insurance receivables. We are working on additional reports regarding the inserts and the Securitization DACA, as well. Drafts of a Medicare/Medicaid Directive and the additional report are available on the website. Last, we are developing a web-based
product for assembling a DACA. It is a menu-driven product, where the user merely inputs information such as names, account numbers, inserts requested and the like, and the product creates a DACA that is downloaded to your computer.

For those of you attending the ABA Annual Meeting, we are presenting a program on August 10, 2008 from 10:30 a.m. to 12:30 a.m. in the Empire State Ballroom D, Ballroom Level of Grand Hyatt Hotel. The topic will be "It's a Wrap! The Model Deposit Account Control Agreement Final Report." It is sponsored by the Commercial Finance Committee and co-sponsored by the UCC Committee, the American College of Commercial Finance Lawyers and the Association of Commercial Finance Attorneys. The program will include a demonstration of the web-based DACA assembly product, a brief overview of the final inserts, an introduction to the Securitization DACA and a discussion of the current draft of the Medicare/Medicaid Directive.

The email list serve for the Task Force is quite active. Anyone interested in joining the Task Force, and in particular working on the Medicare/Medicaid Directive, should contact Marshall Grodner or Ed Smith or sign up on the website of the Task Force.

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

*James D. Prendergast and Paul Hodnefield, Co-Chairs*

The ComFin and UCC Committees’ Joint Task Force on Filing Office Operations and Search Logic met at the Spring Meeting of the Business Law Section in Dallas. The meeting began with a recap by Jim Prendergast, co-chair, on the resolution of the Task Force, currently pending approval by the Section at the Annual Meeting, requesting that State legislatures refrain from enacting non-uniform amendments to Article 9 affecting filing office organization or search logic matters until the Article 9 Review Committee recently appointed by the Uniform Commercial Code's sponsors (the American Law Institute and the National Conference of Commissioners on Uniform State Laws) reports on suggested uniform amendments to Article 9 for passage by the States. Paul Hodnefield, co-chair, then provided an introduction of the range of topics that are also within the FOOSL mission and turned the meeting over to Kelly Kopyt, Director, Registries of Deeds, and Assistant Director, Corporations Division, of the Commonwealth of Massachusetts.

Kelly Kopyt provided an overview of IACA, the organization's goals, current projects and resources available through the IACA website. She made it clear that IACA is committed to promoting uniformity, as evidenced by the influence it has had on some states (Alabama was specifically cited) and the various projects intended to disclose non-uniform jurisdictional practices, such as the jurisdictional guidelines. After some questions from the audience on IACA’s role, Sue Collins, JPMorganChase, proceeded to explain what motivated Texas to amend 9-503, the process used to draft the amendment and what defined the final draft. Following a spirited discussion on the merits of using a driver's license safe harbor, the meeting moved into FOOSL business.

Since the Annual Meeting, the Task Force has continued with its monthly conference calls and is in the process of forming substantive area subcommittees to address specific matters, such as responding to suggested amendments to Article 9 by IACA and the response to those suggestions by the UCC Committee of the State Bar of California, and on the issue of safe
harbors for individual debtor names. Further, the Task Force met with IACA in Salt Lake in mid-May. The Task Force participated in a joint meeting to discuss the mission statement of the Task Force and how we saw the utility of the Task Force as representative of the Business Law Section to IACA. Finally, the Task Force is preparing for the Annual Meeting. Currently planned is an hour debate between Steve Weise and Sue Collins on the benefit or detriment of State non-uniformity. See you in New York.

UCC Scorecard

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

Committee Leadership Rosters

- **Committee on Commercial Finance**
  (effective August 2008)
- **Committee on Uniform Commercial Code**
  (effective August 12, 2008)
Chair’s Column

Upcoming Programming

The UCC Committee is pleased to be offering three CLE programs at the upcoming annual meeting in New York, each of which is co-sponsored by the Committee on Commercial Finance:

Getting Blood from a Stone: Commercially Reasonable Foreclosure on Collateral and the Availability of a Market  
Saturday, August 9, 2008 at 8:00–10:00am

Do Worlds Collide? When Operational Systems Meet the Law  
Sunday, August 10, 2008 at 8:00–10:00am

Bluebloods and Newbloods – Financing Wealthy Individuals  
Sunday, August 10, 2008 at 2:30–4:30pm

A complete schedule of the Committee’s activities, including the meetings of all its subcommittees and task forces, is attached to this newsletter. In addition, the UCC is co-sponsoring the following CLE programming offered by other committees:

It’s a Small World After All – Commercial Finance in Global Markets  
(offerred by the Committee on Commercial Finance)  
Saturday, August 9, 2008 at 10:30–12:30

Topsy Turvy Markets? When Lenders and Credit Providers are in Financial Trouble  
(offerred by the Committee on Commercial Finance)  
Saturday, August 9, 2008 at 2:30–4:30pm

It’s a Wrap! The Model Deposit Account Control Agreements Final Report  
(offerred by the Committee on Commercial Finance)  
Sunday, August 10, 2008 at 10:30–12:30pm

Monetizing Intellectual Property Assets  
(offerred by the Committee on Intellectual Property Transactions)  
Sunday, August 10, 2008 at 10:30–12:30pm

Back to the Future – Revisiting the Basics of Securitization and Looking at What Lies Ahead  
(offerred by the Securitization and Structured Finance Committee)  
Sunday, August 10, 2008 at 10:30–12:30pm

It’s All About the Cash – Cash Management and Control Arrangements in Securitization Transactions (offerred by the Securitization and Structured Finance Committee)  
Sunday, August 10, 2008 at 4:00–5:30pm
**Legislative Developments**

Revised Article 1 has now been enacted in the following 33 states and territories:

- Alabama
- Arizona
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- Florida
- Hawaii
- Idaho
- Indiana
- Iowa
- Kansas
- Kentucky
- Louisiana
- Minnesota
- Montana
- Nebraska
- Nevada
- New Hampshire
- New Mexico
- New York
- North Carolina
- North Dakota
- Oklahoma
- Pennsylvania
- Rhode Island
- South Dakota
- Texas
- Utah
- Vermont
- Virginia
- West Virginia
- Virgin Islands

All of these jurisdictions except the Virgin Islands omitted the most controversial change: the new choice-of-law rules in § 1-301. In response to that, this summer the ALI agreed to replace revised § 1-301 with the choice-of-law rules in pre-revision § 1-105. NCCUSL had previously approved the change. Thus, with the exception of the Virgin Islands, all jurisdictions – whether or not they have enacted revised Article 1 – now have the same choice-of-law rules and these rules are reflected in the official text.

The other big legislative news deals with Article 9. The Code’s sponsors – the ALI and NCCUSL – have established an Article 9 Review Committee and charged it with issuing a report to the Permanent Editorial Board outlining any problems that have developed and recommending whether a new drafting Committee should be appointed. The Review Committee consists of the people listed below and is expected to complete its work by the end of the summer. So, stay tuned folks, we could be working on amendments to revised Article 9 in the very near future.

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<tr>
<th><strong>NCCUSL Representatives</strong></th>
<th><strong>ALI Representatives</strong></th>
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<td>William Henning</td>
<td>E. Carolan Berkley</td>
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<td>John McGarvey</td>
<td>Steven Harris</td>
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<td>Edwin Smith (chair)</td>
<td>Ronald Mann</td>
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ABA Business Law Section Advisor: Steven Weise

While on the subject of Article 9, several states have recently enacted non-uniform amendments to deal with the uncertainty attendant to the correct name of an individual. Texas made the name on the debtor’s driver’s license a safe harbor. Thus, while filing against one or more other variations of the debtor’s name may be effective, filing against the name as indicated on the debtor’s license will suffice. 2007 Tex. Sess. Law Ch. 565. Tennessee did initially something similar, but created multiple alternative safe harbors: (i) a state-issued driver’s license or identification card; (ii) birth certificate; (iii) passport; (iv) social security card; or (v) military identification card. 2008 Tenn. Pub. Ch. No. 648. However, due to concerns about the burden this would place on the searcher, the new law was amended a few weeks later to track the Texas legislation, so that only the debtor’s driver’s license is a safe harbor. Nebraska took a different approach. It amended its version
of § 9-506(c) to provide that an error in the debtor’s name is not seriously misleading if a search under the debtor’s correct last name reveals the filing. 2008 Neb. Laws Leg. Bill. 851, § 28. However, subsequent legislation delayed the effective date of this new rule to give the Code’s sponsoring organizations more time to craft a uniform solution to the problems surrounding uncertainty about an individual debtor’s name. 2008 Neb. Laws Leg. Bill 308A.

In response to the legislation in Texas, Tennessee and Nebraska, the Joint Task Force on Filing Office Operations and Search Logic has passed a resolution asking the Business Law Section to request that state legislatures refrain from making any more non-uniform amendments regarding the debtor’s name until the new Article 9 Review Committee, or a successor drafting committee, has a chance to propose a uniform solution to the problem that these states were attempting to solve. The UCC Committee and the Commercial Finance Committee are in the process of seeking the necessary ABA authorization to issue such a statement.

Committee Developments

Pursuant to ABA policy, almost all leadership positions are subject to a three-year term limit. Because of that, Keith Rowley, Larry Safran, Barry Graynor, Leianne Crittenden, and Maria Milano will be stepping down as chairs of their respective subcommittees at the conclusion of the ABA annual meeting in August. I thank each of them for their three years of service and their sage advice. Although it is doubtful that any of them can be replaced, I am excited to have found successors for them. Professor Candace Zierdt will take over Keith’s position as co-chair of the Sales Subcommittee. Kate A. Sawyer will follow Larry as chair of the International Law Subcommittee. Teresa Davidson will assume Barry’s position as chair of the Leasing Subcommittee. Pauline Stevens will succeed Leianne as chair of the Secured Transactions Subcommittee. And Carol Nulty will take over as editor of this newsletter.

Other recent additions to the leadership ranks include Ruthanne C. Hammett, who has agreed to serve both as vice-chair of the Leasing Subcommittee and as Regional Coordinator for the South Central Region, and Professor Thomas E. Plank, who has agreed to become vice-chair of the Secured Transactions Subcommittee. Also, Professor Keith Rowley is becoming the Committee’s first Developments Reporter. His duties in that new position will consist of: (i) authoring a column for the newsletter on non-uniform amendments; (ii) reporting on all state amendments to and adoptions of the UCC; and (iii) preparing a substantive index for the entire Uniform Commercial Code.

Two leadership positions remain available. The Committee needs a liaison to the Diversity Committee and a Regional Coordinator for the Northeast Region. Please contact me if you are interested in either of these positions or wish to suggest who might be interested.

Stephen L. Sepinuck
Professor, Gonzaga University School of Law
ssepinuck@lawschool.gonzaga.edu
ComFin Chair’s Letter Summer 2008

We were recently asked to develop a “tag line” for a marketing campaign for the ComFin Committee. “Current market and legal developments for finance lawyers” is what we came up with (so I should probably keep my job as a finance lawyer and not think about a career change to the advertising world). The message is correct (if not scintillating) – we want to be a source of information and discussion for ComFin members as legal issues and markets arise and develop. We’ll do this via meetings and programs, email on current developments, the newsletter, listservs and our webpages. With that in mind, I encourage participation by all ComFin members – whether by attending meetings, suggesting topics, writing for the newsletter or other publications, suggesting a project or model agreement or other resource we can provide – to increase the benefits that ComFin can provide.

Before an update on events and activities for ComFin for the rest of 2008, I once again have sad news to pass along. One of our earliest committee members, Ernest Williams, III, passed away on Sunday, April 20, in Memphis. Ernest chaired the Interest and Usury Subcommittee of ComFin and was the first president of the American College of Commercial Finance Lawyers. As others before me have remarked, we are losing some of the truly great ones – Don Rapson and Earl Glick last year, and now Ernest Williams. Please take a moment to read the remembrance of Ernest in this issue of the Commercial Law Newsletter.

New York, New York – 2008 Annual Meeting

The Annual Meeting will take place in New York, with the ComFin Committee meeting from Friday, August 8, through Monday, August 12. A schedule of programs, subcommittee and taskforce meetings for ComFin is attached. There is a full line-up of CLE programs of interest to finance lawyers, including:

- Getting Blood from a Stone: Commerially Reasonable Foreclosure on Collateral and the Availability of a Market
- It’s a Small World After All - Commercial Finance in Global Markets
- Topsy Turvy Markets? When Lenders and Credit Providers are in Financial Trouble
- Do Worlds Collide - When Operational Systems Meet the Law
- Toward One World - Customary U.S. Practice for Outbound Cross-Border Opinions
- It’s A Wrap! The Model Deposit Account Control Agreement Final Report
- Bluebloods and Newbloods - Financing Wealthy Individuals.

I’d also like to highlight three new Committees that will kick off their activities this year that cover areas of interest to ComFin members: Governmental Corporations; Project Finance; and Securitization and Structured Finance. The meetings and programs for Project Finance and Securitization and Structured Finance are included on the attached schedule. Please visit the webpages for these new committees on the Section website for more information and to join.
There won’t be a formal dinner gathering for ComFin at this year’s annual meeting – many committee members plan to attend the memorial dinner in honor of Don Rapson on Thursday (see the item below for more information) and the other ABA and Section-wide social events, and the Aircraft Financing Subcommittee plans to hold its traditional dinner on Friday evening. For those who would like to put an informal group together for dinner on Friday, Saturday or Sunday evening please contact my assistant Linda Loomis, and we will coordinate putting folks in touch and locating restaurants.

If you’ll be a “first time” attendee at the meeting please let me know by email if you have any questions or have time to catch up at the meeting.

**Don Rapson Memorial Dinner (August 7, 2008, New York, NY)**
A reception and dinner in honor of the memory of Donald J. Rapson will be held on Thursday, August 7, at the Yale Club of New York City. The dinner will take place on the eve of the Annual Meeting, and the venue is a few short blocks from our meeting hotel. The deadline to RSVP is July 15. Checks should be payable to Carlton Fields, P.A. (with a notation that it is for the Donald J. Rapson Dinner) and then sent to Thomas A. Snow, Carlton Fields, P.A., PO Box 3239, Tampa, Florida 33601-3239, Attention: Nancy Golightly. Tickets for the event are $160 per person. Additional information is 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 contact Neal Kling or Norm Powell, the planning chairs for the meeting. Hotel reservations can be made through the meeting website and registration information and details about the programs will be circulated in late August.

**Resources for Commercial Finance Lawyers**

*Cross-Border Security over Tangibles* is a resource for the commercial finance lawyer. Harry Sigman, a long-time member of ComFin, is co-editor of this new book on security interests in tangible property in a number of European countries, as well as a comparison of those laws with Revised Article 9. Read Ed Smith’s review of this new resource in this issue of the Commercial Law Newsletter.

*Words, Words, Words.* Our new Task Force on Commercial Finance Terms is gathering and grouping words in preparation for publishing a dictionary of terms used in finance transactions. Visit the Task Force website, take a look at the current list and email Meredith Jackson or Carl Bjerre, the Taskforce co-chairs, with suggestions for additional terms, definitions and market usages. “*Words are only postage stamps delivering the object for you to unwrap*” said George Bernard Shaw – we need stamps and letters!

*Surveys of State Commercial Laws.* A comprehensive summary of state commercial lending and real estate finance laws is available on the ComFin website. The summary provides a tremendous resource on local lending laws of a type that is not available anywhere else. Our
Task Force is in the process of updating and republishing these materials, as described in the Task Force report included in this issue of the Commercial Law Newsletter.

**ComFin Website.** Please visit the ComFin [website](#) for updates about the UNCITRAL Secured Transactions Guide and the current project on how the Guide should be applied to intellectual property, and on our taskforces on the Model Deposit Account Control Agreement, Model Intercreditor Agreement, UCC Filing Office Operations and Search Logic, Syndications Chapter for the Ruda ABL Treatise and more activities.

If you have other suggestions for making ComFin a resource for members, please let me know.

*Lynn*

[lynn.soukup@pillsburylaw.com](mailto:lynn.soukup@pillsburylaw.com)
Business Law Section Creates
New Committee on Securitization and Structured Finance

In April, the Business Law Section created a new Committee on Securitization and Structured Finance, chaired by Vicki O. Tucker and with Martin Fingerhut as vice-chair. Members of the Securitization and Derivatives Subcommittee of ComFin, the Securitization of Assets Subcommittee of Business Financing and the Structured Finance Subcommittee of FedRegs automatically became members of the new SSF Committee.

SSF’s mission is to provide a forum for discussion of legal issues and market trends related to securitization and other structured finance transactions and the role of derivatives in those transactions. We expect to cover structuring, legal, regulatory, accounting and market aspects of these transactions, from the planning stages to issues relating to distressed transactions and markets. Our over 400 members include attorneys representing a broad array of market participants and experience levels and will serve as a source of information about securitization, structured finance and derivatives for attorneys in the field as well as those who primarily practice in other areas.

We welcome you to join us at the Annual Meeting in New York on August 10, 2008 for our inaugural business meeting and two informative CLE programs.

The Committee’s business meeting will be from 1:00 p.m. to 2:00 p.m. on Sunday, August 10th (Grand Hyatt New York, Booth, Conference Level). We will be discussing the Committee’s mission and structure (including what types of subcommittees to create) and planning for two programs at the 2009 Spring Meeting in Vancouver. We welcome all to attend and hope that many of you will want to become active in the Committee’s work, particularly those who are interested in leadership positions.

If you don’t know what “securitization” is or know what it is but are wondering if it still is a viable financing vehicle, then you need to attend the SSF’s CLE program entitled “Back to the Future: Revisiting the Basics of Securitization and What Lies Ahead,” which will be held from 10:30 a.m. to 12:30 p.m. on Sunday, August 10th (Grand Hyatt New York, Empire State Ballroom E, Ballroom Level). Moderated by Martin Fingerhut of Blake, Cassels & Graydon LLP, some of the securitization industries’ leading practitioners (Petrina R. Dawson of Standard & Poor’s, Jason H.P. Kravitt of Mayer Brown LLP, Lorraine S. McGowen of Orrick, Herrington & Sutcliffe LLP, Steven L. Schwarcz of Duke University School of Law and Brian K. Victor of McKee Nelson LLP) will provide a primer on asset securitization and its importance, discuss what went wrong with securitization in recent years, identify what needs to be fixed and explore the possible changes that will be made to securitization programs and documents for future transactions. This program is co-sponsored by the Uniform Commercial Code Committee.
Management of cash flows, from collections on the assets to payments to investors, is of critical importance in securitization transactions. The SSF’s second CLE program, “It’s All About the Cash: Cash Management and Control Arrangements in Securitization Transactions,” will be held from 4:00 p.m. to 5:30 p.m. on Sunday, August 10th (Grand Hyatt New York, Morosco, Conference Level). Join panelists Brian P. Boland of Wachovia Corporation, Eric P. Marcus of Kaye Scholer LLP and Monica Puri of Hunton & Williams LLP, and moderator Vicki O. Tucker of Hunton & Williams LLP, to learn about typical cash managements structures in various types of securitization programs, the types of accounts that are used and the operational requirements and legal limitations of the banks that hold the accounts. We will also discuss how to perfect a security interest in these accounts, including tips and tricks for using the securitization deposit account control agreement developed by the Section’s Joint Task Force on Deposit Account Control Agreements. This program is co-sponsored by the UCC Committee and the Commercial Finance Committee.

If you are not a member of the Committee and want to join, please go to the Securitization and Structured Finance page on the Business Law Section’s website and sign up, or contact Vicki Tucker at vtucker@hunton.com or Martin Fingerhut at martin.fingerhut@blakes.com.
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.

**Nationwide Transport Finance v. Cass Information Systems, Inc.,**

*523 F.3d 1051 (9th Cir. 2008)*

This case presents a very narrow and troubling view of the obligations of an account debtor’s payment agent.

The case involved Nationwide Transport Finance, which purchases freight invoices from a variety of carriers. In essence, Nationwide was a factor of accounts. Cass Information Systems operates a freight invoice payment system. Merchants who need their goods shipped hire Cass to handle the processing and payment of the freight invoices. Typically, a shipper agrees to pay Cass all of the shipper’s verified freight invoices, and Cass forwards those funds to the carrier or its assignee. If Nationwide buys invoices, it notifies Cass to pay it directly. The parties’ relationships can be depicted as follows:

![Diagram](image)

Over the years, Cass occasionally made a mistake, such as by paying the carrier after being instructed to pay Nationwide. In each instance, Cass worked with Nationwide to obtain payment. After one such error in 2003, Cass asserted its rights under a hold harmless agreement signed by Nationwide in 1986. Thereafter, Nationwide terminated that agreement and refused to sign another. Cass then refused to pay any further Nationwide invoices.

Nationwide responded by suing for intentional interference with contract and intentional interference with prospective economic advantage, on the theory that Cass was really trying to steal Nationwide’s business. Nationwide alleged that Cass was motivated by a desire to get the carriers to use Cass’s own factoring service. Both of these torts require a showing that the defendant’s conduct lacks privilege or justification, which in turn rests on whether the actions are “improper.” *See* Restatement (Second) of Torts § 767. Nationwide claimed that Cass’s actions were improper because they violated § 9-406(a). That provision requires account debtors to pay the assignee of an account after the account debtor receives an instruction to do so.
The trial court excluded testimony about § 9-406 and refused to instruct the jury about it. On appeal, the Ninth Circuit concurred. It ruled that because Cass was not the account debtor – the shippers were – Cass’s actions could not have violated § 9-406. The court then ruled that neither principles of agency law nor industry practices made § 9-406 applicable to Cass. This is the most disconcerting aspect of the decision.

In reaching its conclusion, the court relied on two main points. First, that the Code imposes a principal’s duties on its agent in only one place, § 8-407, and references agents in several others, e.g., §§ 2-201(1), 3-311(d), but that § 9-406 makes no reference to agents. That may be true, but such silence is irrelevant. Article 1 makes it clear that the law of principal and agent supplements the Code. See § 1-103(b). While the common law of agency cannot supplant Code rules, see § 1-103 comment 2, extending the rules of § 9-406 to the account debtor’s agent presents no risk of that. If anything, such an extension would give greater effect to § 9-406.

Second, the court noted that the Restatement (Third) of Agency lacks reference to the proposition that the agent is liable if it acts in a way that violates a statutory duty of the principal. That is not entirely accurate. The agent can incur tort liability by breaching a duty to the principal if the conduct involved also breaches an express or implied promise of the agent and the plaintiff is a third party beneficiary of that promise. See Restatement (Third) of the Law of Agency § 7.02 cmt. d & ill. 9. That is quite arguably the situation Cass was in. As the dissent pointed out, Cass promised to make the invoiced payments by accepting the agency. It should therefore have been bound. In other words, the shippers had an absolute duty to pay under § 9-406, Cass accepted that duty by accepting the agency, therefore Cass had an absolute duty to pay. As a result, Cass’s decision to hold up payment to obtain a benefit for itself was improper.

Unfortunately, the court’s decision leaves us with the asymmetry that shippers may be bound by Cass’s actions, but Cass is not necessarily bound by the shippers’ duties. As the court explained near the end of its opinion, Nationwide has a claim against the shippers, and the shippers may have a clam against Cass, but there’s no direct action by Nationwide against Cass. That seems unnecessarily circuitous and likely to promote unnecessary litigation. More to the point, Cass not only avoided tort liability, but under the court’s analysis, it is entitled to demand a hold harmless agreement from the account buyers that its principals – the shippers – could not insist upon.

**DLJ Mortgage Capital, Inc. v. Homeloan Mortgage Corp.**


Last year this column highlighted a case involving a “double booking” of home mortgage loans, Provident Bank v. Community Home Mortgage Corp., 498 F. Supp. 2d 558 (E.D.N.Y.). This case presents similar facts, but a different error of law. Like Provident Bank, this case involves a fraudulent mortgage-loan scheme. The fraudfeasor, Euro-Funding Corporation, required four borrowers, for whom it originated a total of eight residential mortgage loans, to execute duplicate original promissory notes. It indorsed and delivered the first set of notes to Homeloan Mortgage Corporation, which funded the mortgages through its warehouse lender, First Collateral. Homeloan’s interest in the notes was later assigned to Windvest Corporation. At a later date, the second, identical set of notes was delivered to DLJ Mortgage Capital in return for valuable consideration. The following diagram illustrates the essential facts:
The borrowers paid the notes in full to Windvest, and DLJ, which had not received payment, brought suit to recover the payments, which it claimed should have been made to it. As is so frequently the case, the fraudfeasors were nowhere to be found, leaving innocent parties to litigate the dispute against one another. Both sides moved for summary judgment, and the trial court held that only the first set of notes, which had been delivered to Homeloan, was enforceable.

In analyzing the parties’ rights, the California Court of Appeal correctly rejected DLJ’s contention that the Homeloan notes were never legally issued within the meaning of § 3-105(a) – and thus not legally enforceable – because Homeloan received the notes prior to the close of escrow and the funding of the loans. DLJ’s argument was flawed because it is premised on the incorrect assumption that negotiable instruments are enforceable only when supported by consideration. While holder-in-due-course status does require that the holder have given value for the instrument, see §§ 3-302(a)(2)(i), 3-303, consideration is not a requirement for an instrument to be negotiable. See § 3-104(a). Even if it were, a lack of consideration would not necessarily render an instrument unenforceable. The terms “non-negotiable” and “unenforceable” are not synonyms. Negotiability affects the competing rights of third parties, or, alternatively, of a third party against an original party to the instrument. Enforceability, on the other hand, is essentially a matter of contract law and addresses the rights of the instrument’s original parties against one another.

The court also correctly held that, even if the instrument had not been properly issued, nonissuance might not have barred Homeloan from recovery. Nonissuance is a personal defense that would not be effective as against a holder in due course. See § 3-105 comment 2. Thus, whether Homeloan would have been successful on this point would depend on whether it was found to be a holder in due course, a matter that the court did not address.

Despite this sound beginning, the court went on to make a serious error. Without any analysis and without citation to any authority, the court blithely stated that the second set of original promissory notes – the ones delivered to DLJ – were not negotiable instruments because the borrowers intended to be obligated only on a single note for each loan. This statement wholly misconstrues the nature of negotiability. The test for negotiability, which is found in § 3-104(a), depends entirely on the form of the instrument; the issuer’s intent is irrelevant. The court’s suggestion to the contrary is both wrong and disturbing. If applied in other contexts, it could seriously undermine the holder-in-due-course doctrine.

Nevertheless, the result in this case may be correct. Arguably, the defrauded borrowers should pay only once, even at the expense of an innocent party. They were defrauded into executing the duplicate original, and such fraud may well qualify as a defense against enforcement, even as against a holder in due course such as DLJ. See § 3-305(a)(1)(iii).
Burley v. Gelco Corp.,
976 So. 2d 97 (Fla. Ct. App. 2008)

This case presents an odd circumstance in which two courts (and ostensibly also the parties) continually referred to the transaction in question as a lease, but went on to apply Article 9 rather than Article 2A.

The case involved a vehicle lease agreement between Gelco Corporation as the lessor, Mr. Rooter of Central Florida, Inc., as the lessee, and its president, John Burley, as guarantor. After Rooter and Burley defaulted, the court ordered that the vehicles be surrendered to Gelco, which then sold them at auction. The auction yielded $44,180, leaving a balance due of about $56,000. When Gelco sued Rooter and Burley for the deficiency, Burley defended on two Article 9 grounds: (1) Gelco’s failure to provide him with pre-disposition notice pursuant to § 9-611; and (2) Gelco’s failure to conduct a commercially reasonable sale pursuant to § 9-610. The lower court granted summary judgment in favor of Gelco, and Burley appealed. In reversing, the District Court of Appeal ruled that factual questions as to the reasonableness of both the notice and the sale precluded summary judgment. Throughout its holding, the court applied Article 9, rather than Article 2A, without explaining why it had done so. Presumably, the lower court did the same.

However, Article 9 does not apply to a true lease. Instead, Article 2A governs such a transaction. White & Summers put it simply: “A lessor’s rights to leased personal property is not an Article 9 security interest.” JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 30-3 (4th Practr. ed. 2002). Although some transactions structured as leases are in reality a sale with a retained security interest – in which case Articles 2 and 9 govern – neither the court nor the parties suggested that was the case here. The court’s only discussion of the applicability of Article 9 appears in a footnote in which the court stated that “Burley could properly seek the protections afforded by the U.C.C. because a guarantor is a debtor for Article 9 purposes.” Of course, this hardly proves the point. Burley could avail himself of the protections in Article 9 only if the transaction itself falls within Article 9. Even then, the court’s assertion is not technically accurate. A guarantor is not a debtor under revised Article 9 because the debtor is someone with an ownership interest in the collateral. See § 9-102(a)(28). Instead, Article 9 refers to guarantors as secondary obligors. See § 9-102(a)(59), (71). However, to the extent that the court was suggesting that, as a guarantor, Burley would be entitled to notification of a disposition and damages for conducting a commercially unreasonable sale, the court was correct, see §§ 9-611(c)(2), 9-625(c)(1), but only if Article 9 provided the governing law.

Because the transaction in this case apparently involved an ordinary Article 2A lease, the parties’ rights should have been analyzed under Article 2A. Pursuant to § 2A-527, Gelco had the right to dispose of the goods without sending advance notification to Rooter and Burley, and pursuant to § 2A-528, Gelco is entitled to recover damages from Rooter and Burley regardless of whether its sale of the goods was commercially reasonable.

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1 This case does not fall within the narrow confines of §9-110, which brings a security interest created under §2A-508(5) within the purview of Article 9. Notably, such a security interest would exist under these facts only if the lessor had defaulted – not the lessee.
Commitment Letters in Turbulent Times: Market MAC Clauses and the Solutia Litigation

By George A. Zimmerman and Seth E. Jacobson

As equity sponsors and robust economic conditions drove merger and acquisition activities to new heights through the first half of 2007, the competition to finance those acquisitions and other corporate transactions intensified. Banks and other financial institutions competed fiercely to act as lead arranger for these transactions and, in addition to committing to structure and arrange credit facilities, committed to provide the financing regardless of whether the loans could be syndicated. As the competition increased, the conditional nature of commitment letters decreased. Banks and other financial institutions issued long term commitments with committed pricing to finance acquisitions and other corporate transactions that would occur months or even a year in the future. Notwithstanding the commitment to provide the entire financing, the banks and other financial institutions issuing commitment letters frequently intended to sell all or a substantial portion of the loan contemporaneously with closing the transaction. The problem with this model is that, unlike a bond offering which is typically priced within days of closing, lenders were forced to price a loan months or even a year in advance. In spite of the fact that no bank or financial institution could predict with certainty the market clearing price of a loan so far in advance, the model worked well in relatively

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1 George Zimmerman is a litigation partner and Seth Jacobson is a banking and institutional finance partner with Skadden, Arps, Slate, Meagher & Flom LLP. Mr. Jacobson represented the lenders who executed a commitment letter to provide exit financing to Solutia Inc. in October 2007, and Mr. Zimmerman represented the lenders in the adversary proceeding that Solutia filed in February 2008. The opinions expressed in this article are the authors’ views, not those of the Firm. The authors gratefully acknowledge the invaluable contributions to this article of Wallis Hampton, counsel at Skadden, Arps, Slate, Meagher & Flom LLP.
stable credit markets and loans were routinely syndicated at or shortly after closing. However, when credit markets deteriorated and volatility increased, banks and other financial institutions that had committed to provide financing found themselves funding loans on below market terms and either holding the loans on their books or selling the loans at substantial losses. In order to protect against this scenario, lenders began seeking to allocate market risk to borrowers. The result was the re-introduction of so-called “Market MAC” clauses into commitment letters. A Market MAC clause essentially excuses lenders that have issued a commitment from funding the loans in the event of an adverse change in the capital markets that impairs the ability to syndicate the loan.

Given the unprecedented turmoil in the capital markets over the past year, Market MACs are once again prominent features in commitment letters. This article explores Market MACs generally, and discusses what practitioners should expect when negotiating and dealing with disputes over Market MACs, particularly in light of the recent Solutia litigation.²

1. The Role of Market MACs in Financing Transactions

Unlike a Company MAC, which is tied to material adverse changes in a company’s business, a Market MAC is linked to changes in the loan syndication, financial and capital markets generally. While the parties to a commitment letter often intensely negotiate the particular language of a Market MAC, a typical Market MAC provides, as a condition precedent to closing, that no change in the relevant financial markets has occurred between the signing of the commitment and the closing of the

² Solutia Inc. v. Citigroup Global Markets Inc., et al., Case No. 08-01057 (Bankr. S.D.N.Y.).
transaction that adversely affects syndication of the loan. For instance, one common version of a Market MAC conditions the lenders’ funding commitment on “there not having occurred a material disruption of or material adverse change in conditions in the financial, banking or capital markets that, in our judgment, could reasonably be expected to materially impair the syndication of the Facility.”

Historically, the use of Market MACs has depended on credit market conditions. When credit markets are strong, borrowers typically parlay their negotiating leverage to resist Market MACs. Conversely, in a tight credit market, lenders have more leverage to insist on Market MACs. During the Russian ruble crisis of the late 1990s, for instance, many lenders insisted on Market MACs. In the strong credit markets of the five years prior to mid 2007, Market MACs had fallen out of favor and were rarely included in commitment letters in the acquisition context or in other contexts where a borrower had significant negotiating leverage. Market MACs reemerged in the aftermath of the subprime credit crisis.3

The primary battleground during negotiations over the Market MAC is the scope of the Market MAC. Lenders want broad language that provides them with maximum discretion to determine whether an adverse change is sufficient to trigger the Market MAC. Conversely, borrowers seek to circumscribe the lenders’ discretion by negotiating as narrow provisions as possible to define the requisite adverse change that will trigger the Market MAC. These competing agendas often result in Market MACs that contain subjective standards such as “material” and “reasonable judgment.” While this is fairly

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standard language in commercial contracts, there is precious little caselaw interpreting what this language means in the Market MAC context. Indeed, the *Wall Street Journal* described MACs as “maddeningly vague” last fall,⁴ and Vice Chancellor Leo Strine, Jr. of the Delaware Court of Chancery wrote in 2001 that evaluating whether a Company MAC had occurred was “dauntingly complex.”⁵ Faced with this largely blank slate, one participant at the 2008 Tulane University Corporate Law Institute equated the Market MAC test to Justice Potter Stewart’s obscenity test: “You know it when you see it.”⁶

While Market MACs enable lenders to avoid funding if properly invoked, their primary utility is to provide lenders with leverage to reopen negotiations with a borrower to restructure a financing that then can be successfully syndicated in the then current market. Sometimes, however, efforts to renegotiate will fail. In that situation, someone—typically the borrower—might consider filing a lawsuit to challenge the other side’s position. Even here, though, the litigation usually is only a means to an end. To reframe Clausewitz’s famous dictum, the litigation is merely a continuation of negotiations by other means. Litigation intensifies the pressure for both sides to reach a settlement. A borrower will not want to risk losing the financing in its entirety, while the lenders will be concerned about creating bad precedent, damage to their reputation, and the balance sheet consequences of funding a transaction on below market terms.

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Thus, the inherent uncertainties of litigation, particularly given the dearth of case law interpreting Market MACs, provides a powerful incentive for all parties to settle their dispute by renegotiating the terms of the loan. This is particularly true because any victory in court may prove pyrrhic. Market MAC litigation can be extremely expensive and distracting. It diverts valuable organizational and management resources and creates reputational risks—particularly for lenders. Likewise, a borrower who wins faces the risk of a reversal on appeal, and may have to account for that contingency on its balance sheets and with its other constituents.

2. The Lessons of Solutia

The recent litigation between Solutia and its lenders highlights the dynamics of Market MAC provisions in today’s environment. After spending several years in Chapter 11 bankruptcy, Solutia began soliciting exit financing proposals in June 2007. Solutia received twelve proposals that month, none of which included Market MACs. Before Solutia could enter into a commitment letter, however, the subprime mortgage crisis erupted. Solutia then suspended its solicitation efforts, renewing them in September 2007 when the credit markets appeared to be rebounding. And, indeed, there was a mini-recovery in September and October 2007, as significant amounts of leveraged loans were syndicated, and market commentators noted that “most participants expect[ed] the [Leveraged Loan] index to rally further as the broad cross section of the mid-tier and small-cap loans catch up with the larger, more liquid names”.

Solutia secured a commitment for its exit financing during this mini-recovery. On October 25, 2007, Solutia signed a commitment letter with Citigroup Global Markets Inc., Goldman Sachs Credit Partners L.P., Deutsche Bank Trust Company Americas, and Deutsche Bank Securities Inc. (collectively, the lenders) in which the lenders agreed to provide Solutia with $2 billion of exit financing subject to specified terms and conditions. In light of the volatility in the leveraged financial markets and the fact that there was likely to be a three month time frame between the execution of the commitment letter and the funding of the transaction, all three lenders insisted on a Market MAC in order to shift the risk of another market downturn to Solutia. After extensive negotiations, the parties agreed to include a Market MAC clause providing that the lenders’ obligation to fund was subject to the absence of any adverse change in the financial markets since the date of the agreement that, in the reasonable judgment of the lenders, materially impaired the ability to syndicate the Solutia exit financing. The commitment letter was scheduled to expire on February 29, 2008.

Shortly after the commitment letter was executed, the credit markets began to deteriorate once again, and took a precipitous nosedive in January. In January 2008, Solutia demanded that the lenders fund the $2 billion commitment on January 25. With the leveraged financial markets in the midst of one of the worst deteriorations in history, and after the lenders had attempted unsuccessfully to syndicate the loan facility, each of the lenders independently concluded that the Market MAC condition precedent had not been met and so advised Solutia.
Rather than agree to renegotiate the terms of the loan to facilitate syndication, Solutia filed a lawsuit in the U.S. Bankruptcy Court for the Southern District of New York on February 8, 2008 seeking, among other things, an order of specific performance forcing the lenders to fund the $2 billion commitment by the February 29 termination date. Solutia contended that the lenders’ failure to fund by February 29 would cause its confirmation plan to unravel. In view of the February 29 deadline, the bankruptcy court ordered expedited discovery and scheduled a trial to begin on February 21, only 13 days after the complaint was filed. During this 13-day period, approximately three million pages of documents were exchanged and more than 20 depositions were taken. Opening arguments began on Thursday, February 21, and the lenders rested their case-in-chief late Saturday night, after the court heard testimony from eight fact witnesses, two expert witnesses, and videotaped deposition testimony from additional witnesses. The court scheduled closing argument for Monday afternoon. On the eve of closing arguments, Solutia and the lenders settled the lawsuit by renegotiating the terms of the loan to bring the terms in line with current market conditions and facilitate syndication. The bankruptcy court approved the revised terms on February 26, and the exit financing closed as scheduled on February 28. Based on the renegotiated loan terms, the lenders were able to successfully syndicate the facility.

The Solutia litigation puts a spotlight on the types of arguments one can expect to face in a Market MAC dispute. As summarized below, even contract language that is viewed by institutional lenders as completely clear and unambiguous nevertheless can be challenged; and a judge is far more likely to want to hear extensive trial testimony rather than interpret a Market MAC provision as a matter of law based solely on the pleadings.
As a result, the potential enormous costs and diversions of management time engendered by such complex litigation, coupled with the inherent uncertainties of the litigation process, serve as powerful incentives for the parties to renegotiate the terms of the loans to achieve certainty of outcome.

Avenues of Attack

Was the Market MAC Inconsistent with an Underwritten Commitment? Solutia first argued that the commitment letter was ambiguous because it contained a Market MAC that was tied to an impairment of syndication and a separate condition that stated syndication was not a condition to the commitment. It contended that there was a conflict between the Market MAC provision and the agreement’s “firm commitment” language, which provided that the completion of syndication was not a condition to the lenders’ funding obligation; and subject to the satisfaction of all other conditions, the lenders would fund prior to the completion of the syndication of the facility. Therefore, according to Solutia, the lenders’ inability to syndicate the facility was not a basis for refusing to fund.

The lenders countered that the two provisions did not conflict. Their evidence demonstrated that it is not uncommon for commitment letters to contain both types of provisions and that, far from being inconsistent, they reflect a clear allocation of risk between borrowers and lenders. The lenders bore the risk of nonmarket, transaction specific factors that could impair syndication (for instance, mispricing the transaction, overleveraging the borrower, misallocating the debt among tranches), while Solutia bore the risk of financial market downturn that adversely impacted syndication.
This debate proved critical. Prior to hearing testimony, the bankruptcy court initially expressed skepticism about the lenders’ position, indicating its view that these two provisions were in conflict and therefore rendered the commitment agreement ambiguous. The court also suggested that the lenders were seeking to ignore the “firm commitment” language and trumpet the Market MAC as a superior provision. Once the lenders’ case-in-chief was presented, however, the court appeared to have altered its view. Each of the lenders testified as to the meaning of the two provisions, and how they are completely harmonious with each other. The testimony also confirmed that institutional lenders in the leveraged finance markets uniformly viewed these two provisions the same way – i.e., as a specific allocation of syndication risk between an inability to complete syndication as a result of transaction-specific factors (a risk borne by the lenders) and an inability to complete syndication as a result of market factors (a risk borne by the borrower), and that participants in the leveraged finance market do not view these provisions as ambiguous or in conflict in any way. Importantly, Solutia offered no rebuttal testimony. Although the case settled before the court reached a definitive conclusion on this issue, the unrebutted evidence harmonizing these two provisions appeared to have impacted the Court’s perception of the case.

Had there been adverse changes in the credit markets since October 2007? The evidence on this point was overwhelming. By any reasonable quantitative or qualitative measure, the credit markets had declined dramatically between October 2007 and January 2008. For instance, liquid loan bids had fallen sharply during that three month window:
Similarly, debt issued in September and October 2007 was trading at a substantial discount to par by late January 2008:

Other metrics, such as syndication volume and the LCDX index, had experienced similar declines during that period.

Solutia apparently recognized its problems on this front, and did not even attempt to dispute this issue. Instead, it argued that any decline in the credit markets after October 2007 was not due to a “change” in the markets, but rather to the preexisting sub-prime mortgage meltdown that began in July 2007. Under this view, the critical inquiry
was the cause of market problems, not their effect. According to Solutia, no matter how precipitous the decline in the capital markets, there could be no “adverse change” if the underlying causal factors existed at the time the commitment was signed. Thus, Solutia contended, the Market MAC was only designed to address unforeseeable changes in market conditions caused by new conditions that arose only after the commitment was executed.

The lenders countered that this theory stood the entire concept of risk allocation on its head. After all, a basic tenet of contract law is that the parties can contractually allocate the risk of foreseeable contingencies. Indeed, as the lenders pointed out, nothing in the Market MAC itself limited its scope to unforeseeable or new events. Given the high level of sophistication of the parties, they surely would have included this limitation had that been their intent.

While this was one of the major issues at trial, the court did not preview its views on the issue before the case settled. Nonetheless, it underscores the key fact that no matter how strong the facts appear to be, a highly motivated borrower facing the prospect of losing its financing can develop theories that, if accepted, render undisputed objective facts proving a collapsed market completely irrelevant.

The lenders failed to exercise reasonable judgment in concluding the Market MAC condition had not been met. Solutia argued that the lenders failed to conduct a principled evaluation of the market conditions, but instead engaged in a perfunctory result-oriented analysis in concluding that the syndication was materially impaired. In turn, each of the lenders presented evidence concerning the meetings they held to discuss
the syndication market, the metrics they used to evaluate the issues, and the analysis they each relied on to reach their independently derived conclusion that the Market MAC condition had not been met.

This is a particularly salient point for practitioners. The Market MAC provision in Solutia required the lenders to conclude in their reasonable judgment that the syndication was materially impaired. Under New York law, the lenders had to make this decision in good faith. Accordingly, the lenders argued that as long as they acted in good faith, their decision could not be overturned even if the court might have reached a different conclusion. When negotiating the specific language of a Market MAC, practitioners should keep the implications of this discretionary standard in mind. In addition, if a lender has some measure of discretion to determine whether a Market MAC has occurred, it should make sure that it follows a careful, defensible process in reaching whatever decision it makes. It should prepare written materials, allow sufficient time for a full deliberation, and create a clear record that it exercised appropriate care and judgment.

3. **Remedies**

Market MAC clauses raise a number of remedies issues, and practitioners should carefully evaluate their potential claims (or liabilities) when dealing with Market MAC provisions. The classic measures of damages would give the borrower the benefit of the bargain as well as any consequential damages that flowed from a breach of a funding

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commitment. 9 Most commitment letters, however, require the borrower to waive consequential damages claims. Under New York law, these waivers are usually enforceable. 10 Compounding the problem for borrowers, New York law historically does not permit specific performance in failure to lend cases unless they involve the purchase of a specific parcel of real property. 11

The combined effect of New York’s law on consequential damages and specific performance can create enormous pressures for borrowers faced with a lender’s potential breach of a commitment letter. However, in the recent Clear Channel litigation, 12 a New York state court denied the lenders’ motion for summary judgment, and left for trial the issues of the availability of alternative financing, the uniqueness of the transaction at issue, and whether the borrower’s damages can be proven with reasonable certainty in order to determine whether to award specific performance of the financing commitment. Thus, lenders and borrowers should not automatically assume that the general rules surrounding specific performance in the context of loan agreements necessarily will

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9 See, e.g., Sager v. Friedman, 1 N.E.2d 971, 974 (N.Y. 1936) (“The measure of damages which flows from a breach of contract is the difference between the value of what has been received under the contract and the value of what would have been received if the contract had been performed according to its terms. Damages there are not limited to indemnity for loss suffered through the making of the contract. The injured party is entitled to the benefit of his bargain as written and is entitled to damages for the loss caused by failure to perform the stipulated bargain.”); accord Freund v. Washington Square Press, Inc., 314 N.E.2d 419, 420-21 (N.Y. 1974).

10 See, e.g., Metro. Life Ins. Co. v. Noble Lowndes Int’l, Inc., 84 N.Y.2d 430, 436 (1994) (“[A] limitation on liability provision in a contract represents the parties’ agreement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor.”).


apply to large commercial transactions, particularly if the money is intended to be used to fund a unique or extraordinary event such as an exit from bankruptcy or an LBO, and alternative financing is not readily available.

Finally, lenders need to consider the possibility of third-party claims. In the wake of the aborted merger between The Finish Line and Genesco earlier this year, a Genesco shareholder sued The Finish Line’s banks, alleging that they tortiously interfered with the Genesco shareholders’ expectancy in the merger when they announced that they would not proceed to fund under the commitment letter until they finished examining Genesco’s financial condition. While recognizing the claim was “somewhat novel,” a federal court held that the shareholder had stated a claim for tortious interference, at least for pleading purposes.  

Conclusion

The Solutia litigation reinforces the central truth of Market MAC provisions: They provide significant leverage to lenders to convince borrowers to renegotiate loan terms to bring them more in line with current market conditions. Practitioners should keep this in mind when negotiating Market MACs and advising clients on how to respond to market downturns.

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When drafting a contract, it’s always best to minimize ambiguity, right? As with so much in the law, the answer, it turns out, is a clear “it depends.” Common sense suggests that clarity should be a primary goal in drafting contracts. But as Judge Posner notes, ambiguity may play a valuable role in contract drafting.\(^1\) As he explains in *The Law and Economics of Contract Interpretation*, an economic analysis of contract interpretation reveals that the presence of intentional ambiguities in contracts is not only rational but, in many circumstances, desirable. There has been much recent discussion of the so-called forthright negotiator principle. Some of it seems to misapprehend the principle, suggesting it gives rise to an affirmative duty to eliminate ambiguity. It does not. It is simply one of a number of principles of contract interpretation used by, among others, the Delaware courts. An economic analysis of the forthright negotiator principle shows that it aids social efficiency. Posner places the principle in its proper context.

**The Law and Economics of Contract Interpretation**

Posner begins with the premise that the “object of judicial enforcement of contracts is to minimize”\(^2\) the social transaction costs associated with contracts.\(^2\) Such costs are a function of the parties’ expenditures in the contract-drafting stage, as well as the expected costs of litigation or other dispute resolution. Posner suggests that greater expenditures on the former typically correlate with lower probability, and cost, of litigation.\(^3\) Presumably, this correlation is at least to some extent a function of reduced ambiguity.\(^4\) When viewed from this cost-benefit perspective, it becomes apparent that it is *not* socially desirable to draft contracts free from any possible ambiguity (indeed, it may be impossible to draft contracts free from *any* possible ambiguity). Rather, parties should not expend more resources to negotiate and draft a contract than their expected savings from potential litigation costs in the future.

While courts cannot control many of the variables in Posner’s equation for social transaction costs, they have adopted rules of construction that help minimize social costs in three ways. First, courts can minimize costs by following a hierarchy of rules that limits judicial inquiry. Second, courts can minimize costs through consistent application of clear rules of

\(^1\) See Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 Tex. L. Rev. 1581, 1583 (2005) ("Deliberate ambiguity may be a necessary condition of making the contract; the parties may be unable to agree on certain points yet be content to take their chances on being able to resolve them, with or without judicial intervention, should the need arise.").

\(^2\) *Id.* at 1584.

\(^3\) *Id.* at 1608.

\(^4\) *See id.* at 1584.
construction, giving rise to expectations on which parties may rely. Third, courts can minimize costs by allocating burdens (e.g., of proof) to the “cheapest cost avoider.”

**Delaware Rules of Contract Construction**

One of the most well-known rules of contract construction is the “clear meaning rule” or the “four corners rule.” It provides that “where the parties have created an unambiguous integrated written statement of their contract, the language of that contract (not as subjectively understood by either party but) as understood by a hypothetical reasonable third party will control.” This rule encourages social efficiency in two ways. First, because the clear meaning of the contract dictates its interpretation, extrinsic evidence is not admissible to interpret it. By limiting the scope of judicial inquiry to the language of the document, the costs to the judiciary and the parties in litigation are reduced. Second, because contracting parties recognize that courts utilize the clear meaning rule, they need only expend resources clarifying their contractual intent to the extent they feel possible unforeseen circumstances are worth addressing.

Another well-known rule of contract construction is the parol evidence rule. It provides that extrinsic evidence contradicting or supplementing a completely integrated contract is not admissible. However, where the agreement is not integrated, and “there is uncertainty in the meaning and application of the terms of the contract, [courts] will consider testimony pertaining to antecedent agreements, communications and other factors which bear on the proper interpretation of the contract.” Thus, parties may make a conscious decision when drafting a contract to include an integration clause, thereby limiting the role of extrinsic evidence in any future disputes, as well as limiting the costs of such potential litigation.

The forthright negotiator principle is yet another principle of contract interpretation utilized by the Delaware courts. It comes into play where resort to the parol evidence rule leaves proper construction uncertain. “[W]here ambiguity in contract language is not easily resolvable by extrinsic evidence, it may be necessary for the court, in considering alternative reasonable interpretations of contract language, to resort to evidence of what one side in fact believed the obligation to be, coupled with evidence that the other party knew or should have known of such

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5 See id. at 1601 (discussing the allocation of transaction costs to the “cheapest cost avoider”).  
8 See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997) (“If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity.”).  
11 See Posner, supra note 1, at 1603 (“So just as the parties choose whether to have a written contract and whether to include an arbitration clause, they also choose whether to state that their contract is integrated and by so doing to limit further the role of the jury or judge as the trier of fact and the expense of litigating a suit should their contractual relationship break down.”).
Applying the forthright negotiator principle in such a case, the court would adopt the meaning as understood by one side, but known to both parties.\textsuperscript{13}

Application of the forthright negotiator principle furthers the goal of minimizing social transaction costs. If Party A knows that Party B believes a contract to mean one thing, but Party A believes it to mean another, Party A can resolve this ambiguity at the lowest cost \textit{ex ante}. Party A need only disclose the ambiguity, while Party B would need to invest resources to even learn that an ambiguity exists. By adopting the forthright negotiator principle, the courts have essentially placed a burden on the lowest cost avoider to disclose a known ambiguity \textit{ex ante} or, alternatively, be forced to accept the other party’s interpretation \textit{ex post} should the issue be litigated.

To some observers, it seems Party A has behaved poorly, even actionably so. From this view, it is but a short step to recast the forthright negotiator principle as an affirmative duty, owed by one negotiator to another. It is not. While there are any number of arguments concluding that Party A should (or shouldn’t) disabuse Party B of his blissfully clarion view of an ambiguous provision, the forthright negotiator principle is not one of them. Rather, it is simply a rule of construction.

\textsuperscript{12} U.S. West, 1996 Del. Ch. LEXIS 55, at *34-*35.
\textsuperscript{13} Id. at *63-*64.
Transferred Rights Under LSTA Purchase and Sale Agreement
After M. Fabrikant & Sons, Inc.

by

Amy G. Pasacreta and John J. Voorhees

The Situation

M. Fabrikant & Sons, et al. (the “Debtors”), commenced a chapter 11 bankruptcy case on November 17, 2006. In exchange for allowing the Debtors to use their collateral (which was pledged to several lenders under the terms of a credit agreement), the Court granted the Debtors’ lenders adequate protection, pursuant to the Final Order Authorizing Debtors’ Use of Cash Collateral and Granting Adequate Protection Claims and Lien (the “Order”), which included an administrative priority claim for the reimbursement of a lender’s reasonable expenses relating to all proceedings in connection with the enforcement and validity of the prepetition agreements (the “Reimbursement Rights”). After the Order was entered, the original lenders (the “Sellers”) sold their loans on the secondary market to the current lenders (the “Buyers”) under standard LSTA documents.

About one year later, the Official Committee of Unsecured Creditors sued the Sellers seeking to, among other things, avoid for the benefit of the Debtors’ estate, the security interests granted to the Sellers. The Sellers incurred substantial legal fees defending against this adversary proceeding and, as such, when the Debtors filed a plan that failed to provide for payment of the Sellers’ legal fees, the Sellers objected to the plan arguing that: (a) the legal fees constituted Reimbursement Rights which were Retained Interests under the LSTA standard documents and not transferred to the Buyers and (b) the failure to provide for their payment in full to the Sellers violated the Bankruptcy Code’s priority scheme.

Transferred Rights, Retained Interests and Adequate Protection Payments

On April 9, 2008, Chief Judge Stuart Bernstein overruled the Sellers’ objection to the Debtors’ plan. In doing so, Judge Bernstein focused on the standard LSTA purchase and sale agreement, finding that the Sellers had transferred their post-transfer reimbursement rights to the Buyers, and consequently, the Reimbursement Rights were not required to be paid in full under the plan.

Under the LSTA’s terms for the purchase and sale of distressed trades, “Transferred Rights” include, among other things:

any and all of Seller’s right, title, and interest in, to and under the [bank loans] and the [commitments (if any) and, to the extent related thereto, the following (excluding, however, the Retained Interest, if any): all claims (including “claims” as defined in Bankruptcy Code §101(5)), suits, causes of action, and any other right of Seller or any Prior Seller, whether known or unknown. . . .
Retained Interest is defined as follows:

if “Settled Without Accrued Interest” is specified in the Transaction Specific Terms, the right retained by Seller to receive, in accordance with the provisions of section 8.3, payments or other distributions, whether received by setoff or otherwise, of cash (including interest), notes, securities or other property (including Collateral) or proceeds paid or delivered in respect of the Pre-Settlement Date Accruals or the Adequate Protection Payments (if any); provided that Retained Interest shall not include PIK Interest.

Finally, Adequate Protection Payments (the narrowest of the three definitions) means, with respect to the “Transferred Rights,” amounts (other than “PIK Interest”) ordered to be paid by the Bankruptcy Court as adequate protection under an “Adequate Protection Order” for the loans and obligations owed under the “Credit Agreement” that accrue during the period before (but excluding) the earlier of (a) the Settlement Date and (b) T + 20. None of these definitions had been tested by the courts until this decision.

**The Analysis**

The Sellers asserted that the Reimbursement Rights were not transferable because they: (a) fell outside of the Bankruptcy Code’s definition of claim which excludes claims arising post-petition, such as the Reimbursement Rights; (b) were personal to the Sellers; (c) were counterclaims preserved by paragraph 22 of the Order and (d) were future rights unable to be assigned. The Court disagreed with each of these assertions declaring generally that the LSTA transfer agreements represent an “all-encompassing assignment of rights” (Decision at 18) and, more specifically, that the Reimbursement Rights fell squarely within the definition of Transferred Rights because they were contingent indemnification rights related to and arising in connection with the Credit Documents or the transactions related thereto or contemplated thereby (Decision at 15).

**Conclusion**

The decision makes clear that the rights assigned to a buyer under the standard LSTA documents are broad and include both contingent and postpetition claims unless specifically excluded. Thus, lenders that are, or may be, subject to lender liability or other litigation, should explicitly negotiate carve outs at the time of trade.
BOOK REVIEW

Harry C. Sigman and Eva-Maria Kieninger (Eds.), Cross-Border Security over Tangibles (published by Sellier, Munich, 2007)

Reviewed by
Edwin E. Smith
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Those of you who have been wondering what happened to Harry Sigman now have an answer. Harry was active for years in the work of the Commercial Finance and Uniform Commercial Code Committees but has been noticeably absent recently. We now know why. Having made his mark on domestic commercial law in the United States, Harry has turned his attention to the rest of the world. In addition to his serving as a member of the US delegations with respect to the Hague Securities Convention, the UN Receivables Convention and the UNCITRAL Legislative Guide on Secured Transactions, his global concerns are well-evidenced by this new book that he and Professor Eva-Maria Kieninger have co-edited on cross-border security over tangibles.

Those of us who have ventured beyond U.S. borders in negotiating and documenting secured transactions will appreciate what Harry and Professor Kieninger have done. Spoiled as we are by the highly developed Uniform Commercial Code, especially Article 9, the book reminds us that many other countries have radically different secured transactions regimes that, in the eye of a U.S. lawyer, may be viewed as uneconomic, incomplete or inconvenient and certainly challenging. In any event, they are different.

In this book the authors examine the laws of Germany, France, England and Wales, Italy, the Netherlands, Belgium and Spain with respect to security interests in tangibles (e.g., equipment and inventory). After an introduction that surveys the development of those laws and includes some comparative observations in relation to Article 9, the book presents several case studies under the laws of each of the countries in the context of creation of a security interest, treatment of after-acquired property, purchase-money priority (referred to as “acquisition financing” to take into account retention-of-title arrangements and lease transactions that create security interests), the rights of buyers of collateral, rights in proceeds, what constitutes a possessory security interest, the use of a notice or other filing or registration system to establish perfection or priority, and the effect of collateral being an attachment to or being commingled with other goods. The author of each case study is an expert in the laws of the relevant country.

The book will be of interest to those whose practices in personal property secured transactions touch on the countries whose laws are examined. The book will also indicate to the rest of us the variety of approaches taken in other countries with respect to personal property secured transactions. But the book’s usefulness may well go beyond its value to practitioners. The authors hope that the book will provide further guidance for national law reform and international harmonization for personal property secured transactions.

So, where in the world is Harry Sigman? Check with the publisher’s U.S. distributor, International Specialized Book Services, in Portland, Oregon; telephone (800) 944-6190; www.isbs.com to order a copy of the book. A companion volume is being planned to examine similar issues with respect to cross-border security over receivables.
Tennessee Begins Another UCC Article 9 Transition Period

by

Paul Hodnefield

Two bills enacted in Tennessee this year may require secured parties to take action if they recently filed financing statements on individual debtors. The first was Senate Bill 3732, which created a broad safe harbor for individual debtor names if the financing statement provides the name shown on one of five different identification documents. The second, Senate Bill 372, scaled back the list of documents that can serve as a safe harbor source of individual names.

A consequence of SB 372 is that some individual debtor names sufficient under SB 3732 may now make the financing statement seriously misleading. To protect secured parties that have financing statements at risk from the narrower safe harbor, SB 372 provides for a sixty-day transition period. During that time, secured parties may need to amend non-conforming debtor names to remain perfected.

The sufficiency of individual debtor names provided on financing statements has been an ongoing concern for UCC filers since UCC Revised Article 9 took effect in 2001. A debtor name is sufficient under Article 9 if the financing statement provides the name of the debtor in strict compliance with the requirements of UCC § 9-503(a). A financing statement that fails to sufficiently provide the name of the debtor in accordance with § 9-503(a) is seriously misleading under § 9-506(b). The only exception is found in § 9-506(c), where a financing statement that fails to sufficiently provide the name of the debtor is not seriously misleading if a search on the correct name of the debtor, using the jurisdiction’s standard search logic would disclose the record.

Unfortunately, even diligent UCC filers can have difficulty determining what individual name to provide on a financing statement. Article 9 offers no standards or guidance for a filer to identify a sufficient individual name with any certainty. The courts are left to decide the sufficiency of an individual debtor name on a case-by-case basis. The UCC filer has no option but to exercise its best judgment and hope the courts later agree.

Some lenders and legal counsel have found the level of uncertainty surrounding individual names unacceptable. Individual debtors include sole proprietors, farmers, guarantors and private banking customers that often enter into sizeable financial transactions. In many states individual names make up approximately half of all the debtor names in the UCC index. The sheer number and nature of transactions involving individual debtors means that secured parties have a lot at stake.

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With no resolution to the individual name concerns on the horizon, state bar and bankers associations began exploring options for bringing more certainty to the process. Texas was the first state to offer a legislative solution to the individual debtor name sufficiency issue through non-uniform amendments to Bus. & Com. Code § 9.503(a). Along with a clarification on the source of registered organization names, the amendments created a safe harbor if the financing statement provides the individual debtor’s name shown on the debtor’s driver’s license or state identification certificate. The Texas law took effect on June 16, 2007.

Following Texas’s lead, the Tennessee Bankers Association promoted similar legislation in 2008. Senate Bill 3732 contained non-uniform amendments to Tenn. Code Ann. § 47-9-503(a) that largely adopted the language enacted in Texas. However, the bill had one significant departure. Instead of limiting the safe harbor to the name shown on an individual’s driver’s license or state-issued identification, the Tennessee legislation added several other documents to the list, including the debtor’s passport, Social Security card, birth certificate or military identification.

The legislation quickly moved through the legislative process and received little comment. Both the senate and the house unanimously passed SB 3732 within six weeks of its introduction. It was promptly signed by the governor. The new law took effect on May 1, 2008.

While SB 3732 offered greater protection for secured parties, it had the unintended consequence of creating a substantial burden for parties that conduct due diligence on individuals. After the law took effect, searches became necessary on all names shown on any of the safe harbor documents.

The new Tennessee law immediately came under criticism from a variety of stakeholders. In response to these concerns, the Tennessee Bankers Association submitted legislation to narrow the safe harbor scope. Senate Bill 372 limited the safe harbor to just the name shown on the individual’s driver’s license or state-issued identification license authorized by Tenn. Code Ann. § 55-50-336 (a driver’s license identification equivalent for non-drivers issued by Tennessee and many other states).

However, there remained a problem with how to deal with financing statements filed after May 1, 2008 that provided a formerly sufficient name shown on one of the documents removed from the safe harbor. If that name differed from the name shown on the driver’s license or identification license, it might make the financing statement seriously misleading. To address this problem, SB 372 contains a sixty-day transition period. The governor’s signature on June 13th triggered the start of the transition. Secured parties that filed a non-conforming name under SB 372 must file a debtor name amendment by August 12th to ensure the name falls within the safe harbor.

The Tennessee legislation does not apply to every financing statement that lists an individual debtor name. The effect of the new laws and the required secured party actions, if any, depend on the file date.
Financing Statements filed before May 1, 2008. The Tennessee legislation has no effect on UCC records filed before SB 3732 took effect on May 1, 2008. Financing statements that sufficiently provided the name of an individual debtor under former law remain effective. However, if the name on the financing statement is different from the name shown on the driver’s license or identification license, the secured party should consider amending the financing statement to add the safe harbor name.

Financing Statements filed between May 1, 2008 and June 13, 2008. If the financing statement provides the name shown on the individual’s birth certificate, Social Security card, passport or military identification and it differs from the name shown on the individual’s driver’s license or identification license, it will only remain sufficient through August 12, 2008. The secured party must amend the financing statement to provide the name of the debtor shown on the individual’s driver’s license or identification license before August 12th to ensure it falls within the safe harbor after that date.

Financing Statements filed after June 13, 2008. The financing statement must provide the name shown on an individual’s driver’s license or identification license to fall within the safe harbor.

Secured parties should carefully review all financing statements filed in Tennessee since May 1st and take the appropriate actions. Failure to amend non-conforming individual debtor names could result in an unperfected security interest.
1. **Purpose of expert groups**
   1.1 Provide expert advice for Secretariat
   1.2 Experts do not make decisions
   1.3 Only Working Group can make decisions

2. **Status of Legislative Guide on Secured Transaction (the “Secured Transactions Guide”)**
   2.1 Approved by UNCITRAL Commission in December 2007

3. **Purpose of review of intellectual property issues [WP.33, ¶ 1 – 2]**
   3.1 Possible annex to Secured Transaction Guide to address IP-specific issues in the context of the framework established by the Secured Transactions Guide
      (a) Secretariat Working Paper 33 (WP 33) raises possible matters to consider for Annex
   3.2 WP 33 will be discussed at May 2008 Working Group meeting
   3.3 Possibly will be other meetings

4. **Terminology**

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This summary is not an official document. It is Neil’s and Steve’s personal “quick and dirty” summary of the discussions, often for “issue spotting” purposes. The summary often does not refer to matters in the same order as they were discussed; rather it attempts to summarize matters in a “logical” order. Because it is a summary, it does not refer to everything discussed over the three-day experts meeting. Moreover, because the discussions were wide ranging and did not always involve rigorous analysis of the Secured Transactions Guide, the summary should not be taken as our views as to the meaning of the Guide or of intellectual property law. The summary often states what someone said, so sentences that might appear to be declarative sentences are often only reporting. References to WP.33 and WP.33/Add.1 are to those documents dated 18 March 2008 and posted on the UNCITRAL web site.
4.1 Meaning of “intellectual property” [WP.33, ¶ 39 – 40]

(a) Secured Transaction Guide refers to State laws, treaties, international instruments and the like for purposes of definition

(1) If TRIPS or other law treats royalties to some or full extent as “intellectual property” then royalties are “intellectual property” to that extent

(b) Different rights – ownership of intellectual property is one and licensee’s rights are another

(1) Define infringement claim separately?

(2) Define “right to use” as a separate asset?

(c) Secured transactions law does not make secured creditor an “owner” of any IP that is collateral prior to enforcement of security right

(d) Secured creditor’s rights in IP that is collateral are no greater than those of the grantor

4.2 “Assignment” [WP.33, ¶ 43]

(a) Avoid confusing use with use of “assignment” in intellectual property law

(b) “Assignment” as used in Secured Transaction Guide refers to transfer of a receivable. Otherwise, not used to describe creation of security rights

(c) “Receivable” is only right to payment of money [WP.33, ¶ 40]

(1) “Receivable” does not include licensee’s rights to use intellectual property

4.3 License and license agreement [WP.33, ¶¶ 52 – 53]

(a) Distinguish “license” (package of rights) from the license agreement

(b) The encumbered asset is the “right” to use the intellectual property

4.4 Meaning of rights holder

(a) Is secured creditor a TRIPS “rights holder” solely by creation of the security right? [WP.33, ¶ 47]
(1) TRIPS, and not Secured Transaction Guide, would answer this question

(2) Expect that the answer is “no”

(b) Secured Transaction Guide does not define “right holder”, it just gives certain rights to secured creditor to do things

(c) Secured creditor needs to be right holder to license in a foreclosure disposition by a license

(1) Secured creditor not disposing of the property at foreclosure on its own, ownership goes from the grantor to the dispose

5. Scope of Secured Transaction Guide

5.1 Guide sometimes applies to outright sales of asset

5.2 Guide applies to outright sales only if a sale of a receivable – a right to payment of money

(a) Thus, e.g., licensee’s obligation to advertise etc is not a “receivable” (nor intellectual property) [WP.33, ¶ 40]

6. General meaning of deferral to treaties and laws relating to intellectual property

6.1 Recommendations of Secured Transactions Guide do not apply to intellectual property in so far as they are “inconsistent with … law … relating to intellectual property.” (Recommendation 4(b)) [WP.33, ¶ 77 – 78]

6.2 Evaluate inconsistency issue by issue

6.3 Not all laws that affect intellectual property are laws “relating to intellectual property.”

(a) How much broader than “intellectual property law” is “law relating to intellectual property”?

(b) Is a business practice validated by case law a “law” for 4(b) purposes?

(c) Law does not “relate” to intellectual property just because it applies a general rule to intellectual property. E.g., if a State’s law recognizes transfer of title for security purposes for all property (including IP), this doesn’t mean that that law is a law “relating to intellectual property.”

7. Secured creditor’s rights to “intellectual property” that is collateral

7.1 General approach: nemo dat (i.e., secured creditor steps into shoes of grantor)
7.2 Thus, e.g., security right subject to “enforceable” terms and conditions

(a) Distinguish priority rules (ranking of claims derived from grantor’s rights) from nemo dat

7.3 Secured transactions law does not interfere with intellectual property owner’s right to determine who can use the intellectual property

7.4 Analysis should clearly distinguish security right in intellectual property itself from security right in rights of licensee [WP.33. ¶ 86]

7.5 Example: Secured Creditor-1 has security right in intellectual property owner’s rights and Secured Creditor-2 has security right in licensee’s rights

(a) Each secured creditor has a security right in a different asset

(b) If intellectual property law says that licensee loses its rights if intellectual property owner loses the intellectual property, then secured transactions law does not give the licensee or its secured party any greater rights

8. Substantive matters

8.1 Anti-assignment clauses [WP.33, ¶¶ 120 – 122]

(a) Secured Transaction Guide anti-assignment override applies only:

(1) To agreement not to transfer receivable (right to payment (royalty))

(2) Agreement must be in agreement out of which receivable arises between the obligee and obligor. In other words, the override applies only to an anti-assignment term in an agreement between a licensor (or sublicensor) and a licensee (or sublicense) in which the licensor/sublicensor agrees not to transfer its right to collect royalties from the licensee/sublicense. Does not apply to other agreements not to transfer receivable.

(3) Does not apply to non-contractual, e.g. statutory, restrictions

(b) What if licensee agrees with licensor that licensee will not grant a security right in right to sub-royalties?

(1) Licensor can enforce licensee’s agreement not to assign right to sub-royalties (assuming agreement is enforceable under other law)
(i) Guide does not affect that prohibition (if enforceable under other law)

(2) What if licensee grants a security right anyway
   (i) If other law (e.g. intellectual property law) says the grant is ineffective, then it’s ineffective

(3) Even if grant of security right is effective, licensor retains rights it otherwise has to:
   (i) Terminate the license
   (ii) Set off any claims it has against the licensee for breach (or otherwise)

8.2 Creation of security right [WP.33, ¶¶ 95 – 99]

(a) Security right in infringement claim
   (1) Guide does not affect ability to obtain security right in infringement claim
   (2) Can secured creditor enforce against infringers?
      (i) Standing question?
      (ii) Intellectual property law answers that question

(b) Would referring to “intellectual property” in the granting language pick up the infringement claim? Yes?
   (1) Interpretation of grant language
   (2) Lawsuit pending w/ or w/o judgment?
   (3) Does not resolve question of standing under intellectual property law

(c) For description purposes, reference to “inventory” includes limited rights to use any intellectual property related to the goods for those goods only (don’t have to refer separately to “intellectual property” when, e.g., granting a security right in a microwave oven) [WP.33/Add.1, ¶ 44]

(d) Does secured creditor have right to protect grantor’s right in intellectual property (e.g. make filings)? [WP.33, ¶¶ 100 – 102]
   (1) No – leave to contract
   (2) Mention as a good practice
(3) Can the secured creditor take action as a default rule if nothing in the contract?
   (i) Even if agreement, under intellectual property law the contract provision might not be enforceable
   (ii) General Guide rule is that upon default secured creditor can take action

8.3 Intellectual property relating to goods (See also 8.8) [WP.33, ¶¶ 102 – 106, 132 -133]
   (a) “Intellectual property” not “embodied” in the goods
   (b) Example: goods sold with trademark on them pursuant to license from trademark owner
      (1) If mark exhausted, secured party can sell with mark
      (2) If mark not exhausted (license to bottler, but not sold to distributor), secured creditor can’t sell with trademark
   (c) Example: if manufacturer sells completed bottle (with trademark appropriately on the bottle) to distributor, then distributor is beneficiary of exhaustion and secured creditor can enforce
      (1) If manufacturer sells completed bottle and restricts places that can be sold, as a matter of contract law
   (d) “Exhaustion” does not apply to licensor when licensee has done the manufacturing
      (1) In the end other law (intellectual property or contract) determines the issue
   (e) If sell laptop with software on hard drive, and limitations on use of software, secured transactions law does not affect the result that would otherwise obtain under intellectual property law or contract law

8.4 Effectiveness between the parties
   (a) If there are intellectual property requirements for a transfer of ownership for security, effectiveness between the parties can occur both ways? [WP.33, ¶¶ 113 – 119]
      (1) If intellectual property law says must register or do something to create the security right, then that rule applies
(2) Guide’s rule kicks in where intellectual property law does not provide a mandatory, specific rule

8.5 Third-party effectiveness

(a) To promote transparency, Guide generally provides for registration of security rights for effectiveness against third parties

(1) Guide rule would be applicable unless affirmative rule in intellectual property that unregistered liens are favored

8.6 Priority

(a) As to priority, if there is an applicable intellectual property priority rule that differs from the priority rule in the Guide, the intellectual property rule governs to that extent

(b) Does not mean that Guide’s third-party effectiveness rule is ineffective for purposes of registration to defeat insolvency administrator

(1) Nor would Guide be displaced if no intellectual property priority rule

(2) So Guide’s registration system applicable unless clear that intellectual property system totally displaces the Guide’s effectiveness rules

8.7 Licensor retains ownership of intellectual property [WP.33/Add.1, ¶ 44]

(a) Licensor’s ownership of intellectual property is different concept for different purpose of “retention of title” transactions involving goods

(1) “Retention of title” transactions in the Guide refer to sales of goods in which seller retains title to sold goods until buyer finishes paying, at which time title transfers to buyer – in other words, a purchase money security interest retained by the seller

(2) In intellectual property, licensor of course retains title to intellectual property by nature of transaction

8.8 Intellectual property that relates to goods [WP.33, ¶¶ 102 – 106, 132 -133]

(a) “Intellectual property” not “embodied” in the goods

(b) Security right in the goods extends, if at all, to rights associated with the particular goods
(1) Does not create a right to manufacture other goods based on or relating to the intellectual property

(2) But can’t sell the intellectual property separately from the inventory

  (i) Note that even with implied license, there could be a separate security right in the intellectual property itself with a conflicting claim in the intellectual property

(c) Separate description/creation matters from enforcement (triggers intellectual property issues)

  (1) Security right in patent does not extend to the pump manufactured based on patent

  (2) Security right in the pump does include whatever right was involved in making that particular pump (with respect to that physical pump only)

(d) Enforcement

  (1) Generally secured creditor can enforce only if:

     (i) Owner’s intellectual property rights are “exhausted”, or

     (ii) Owner has consented

  (2) Where grantor of the security right in goods is also the owner of the intellectual property, discussion over whether there needs to be an express consent

  (3) Question of intellectual property law is can intellectual property owner prevent the grantor from selling – if yes, then can stop secured creditor

8.9 Third-party effectiveness of security right [WP.33, ¶¶ 134 – 161]

(a) Priority between buyer that registers in intellectual property registry and secured creditor that registers in secured transactions registry with no registration in intellectual property registry

  (1) If intellectual property buyer that plans to register purchase in intellectual property registry had to search secured transaction registries and there are many prior owners, does buyer have to search all secured transaction registries?
(2) Where intellectual property registry provides ability to search chain of title (including security rights), buyer should not have to search secured transactions registry [WP.33, ¶ 136]

(b) Guide would not change any intellectual property rule that does not require registration in intellectual property registry for effectiveness against third parties

(c) Competing claimant does not include an infringer [WP.33/Add.1, ¶ 4 – 5]

8.10 Priority [WP.33/Add.1, ¶¶ 1 – 10]

(a) What if no intellectual property registration system and under general property law, first in time wins, and there is registration in the secured transactions registry – who wins

(1) Be sure that ability to check with chain of title in intellectual property registry is not disrupted

(2) OK to apply Guide priority rule if there’s no priority rule under intellectual property law (e.g. no registration in intellectual property registry available)?

(3) Think of the creation of the security right as the first “transfer” (a suspended transfer?)

(4) If state has a priority rule in under other law relating to intellectual property, can still use the Guide where it does not interfere

(5) If under intellectual property rules no specific priority rule exists, probably general priority of transfer rules apply

(i) If no specific intellectual property rule, then 4(b) does not apply

8.11 Licensee’s rights

(a) Licensee in ordinary course? [WP.33/Add.1, ¶¶ 16 – 25]

(b) As matter of intellectual property law, secured creditor gives implied authorization to allow licenses?

(c) Were licenses authorized by the secured creditor?

(1) If not prohibited by the secured creditor, would intellectual property law say OK?
(2) In many cases the intellectual property rule will get to the same result as the Guide rule?

(d) If security agreement does not have a prohibition on licensing, implied consent to licensing?

8.12 Enforcement [WP.33/Add.1, ¶¶ 33 – 44]

(a) A few countries may have a fair-value hearing in its intellectual property law

(1) 4(b) would cover it where there is a rule in a law relating to intellectual property

(2) Commercial reasonableness test in Secured Transaction Guide

(i) No requirement of fair value

(b) License created as part of foreclosure on intellectual property itself comes from the grantor via the secured creditor

8.13 Acquisition financing [WP.33/Add.1, ¶¶ 48 – 50]

(a) Guide provides for special priorities for acquisition financing of goods

(1) Should not be necessary for licensor

(b) Licensor can prohibit grant of security right in subroyalties

(c) Licensor can terminate license if licensee in bankruptcy (subject to insolvency law)

(d) Licensor can terminate license if other breaches

(e) Personal license does not go to insolvency administrator

8.14 Choice of law

(a) Freedom of contract for contractual elements

(b) Property aspects – state of origination [WP.33/Add.1, ¶¶ 53 – 56]
Commercial Finance Terms – Alphabetical Listing

1031 exchange
33 Act
34 Act
40 Act
45-day priority rule
360.6 (FDIC rule on safe harbor for securitizations and participation in receivership)
AAA (American Arbitration Association)
ABC (assignment for the benefit of creditors)
ABL (asset based lending)
ABR (alternate base rate)
ABS (asset backed securities)
Absolute priority rule
Accelerated cost recovery system (ACRS)
Acceleration
Acceleration forbearance period
Acceptance credit
Acceptance draft
Acceptance of collateral in full or partial satisfaction
Access easement
Accession
Accommodation party
Accord and satisfaction
Accordion
Account
Account debtor
Account party
Accounting
Accounting charge
Accounting controls
Accounting Principles Board (APB)
Accounting research bulletins (ARB)
Accounts agreement
Accounts payable
Accounts receivable
ACH (automated clearing house)
Acid test ratio
Acquired debt
Acquisition finance
Acquisition of security
Action
Accredited investor (AI)
Accreted value
ACRS (accelerated cost recovery system)
Actual knowledge
Actual notice
Ad hoc committee
Add-on acquisition
Additional insured
Additional market disruption event (AMDE)
Additional termination event
Adequate protection
Adequately capitalized
Adhesion contract
Adjusted EBITDA
Administrative agent
Administrative fee
ADR (alternative dispute resolution)
Advance
Advance rate
Adverse claim
Advising bank
Affected party
Affected transaction
Affiliate
Affiliate transaction
Affirmative covenant
AFR (applicable federal rate)
After-acquired collateral
After-tax basis
Agency agreement
Agent bank
Aggrieved party
Agricultural lien
AHYDO (applicable high yield discount obligation)
AI (accredited investor)
Air permit
Airbag swap
Airball
A/k/a (also known as)
Allocation
Allocation of risk
Allonge
Also known as (a/k/a)
Alt-A
Alternate base rate (ABR)
Alternative dispute resolution (ADR)
Alternative medium
AMDE (additional market disruption event)
American Arbitration Association (AAA)
American style option
Amortization
Annual credit sales
Anti-assignment override
Anti-layering
Anti-money-laundering laws
Anti-terrorism laws
APB (Accounting Principles Board)
Applicable federal rate (AFR)
Applicable high yield discount obligation (AHYDO)
Applicable law
Applicable margin
Applicable nonbankruptcy law
Applicable rate
Applicable procedures
Applicant
Appraised value
Appraisal
Appropriate person
ARB (Accounting research bulletins)
Arbitrage
Arranger
ARS (auction rate securities)
Articles of incorporation
Artisan’s lien
As-extracted collateral
Asset backed commercial paper (ABCP)
Asset backed securities (ABS)
Asset based lending (ABL)
Asset disposition
Asset sale
Assigned rights
Assignee
Assignment
Assignment and acceptance
Assignment for benefit of creditors (ABC)
Assignment for collection
Assignment in blank
Assignment of Claims Act
Assignment of partnership interests
Assignment separate from certificate
Assignor
Assumed obligations
Assumption
ATOP (automated tender offer procedures)
Attachment
Attorney-in-fact
Attributable indebtedness
Attribution rules
Auction rate securities (ARS)
Audit
Audited financials
Auditor’s letter
Audit rep
Audit respond letter
Authenticate
Authenticated record
Authentication order
Authoritative copy
Authorized account
Authorizing entry point
Automated clearing house (ACH)
Automated tender offer procedures (ATOP)
Automatic acceleration
Automatic early termination
Automatic stay
Auxiliary load
Availability
Availability period
Average collection period
Average inventory
Average life
Average total assets
Avoidance
Backstop
Back-to-back L/Cs
Back-up servicer
Backup withholding
BACT (best available control technology)
Bad boy guarantee
Bad faith
Bailee
Bailee acknowledgment/letter
Bailment
Bailor
Balance sheet date
Balance sheet test
Balloon payment
Bank
Bank guarantee (ICC Uniform Rules for Demand Guarantees (Pub No. 485))
Bank holding company
Banker's acceptance
Bankruptcy (BK)
Bankruptcy remote
Bar date
Bargain purchase option
Base case projections
Base rate
Base term
Baseload
Baseload capacity
Baseload plant
Basel
Basel II
Basic rent
Basis point/bp/bip
Basket
Bearer form
Beneficial interest
Beneficiary
Best case projections
Best available control technology (BACT)
Best efforts commitment
BFP (bona fide purchaser)
Bid rate
Big boy letter
Bill and hold
Bill of exchange
Bill of lading
Binding arbitration
BIOCOB (buyer in the ordinary course of business)
Biofuels
BK (bankruptcy)
Black-Scholes formula
Blanket lien
Blackout period
Blocked account
Blockage notice
Blockage period
Blue sky
Bogus filing
Boiler
Bomb thrower
Bona fide purchaser (BFP)
Bond option
Bonded warehouse
Book
Book entry
Book value
Bookrunner
Borrowed money
Borrower agent
Borrowing base
Branch
Breakage costs
Breakfunding
Break-up fee
Bridge bank
Bridge loan
Bring down
British thermal unit (BTU)
Broken funding
Broker
Broker-dealer
BTU (British thermal unit)
Budget
Bulk sale
Bullet payment
Bundled lease
Burden of establishing
Burdened party
Business day
Business day convention
Business judgment rule
Business profits
Business trust
Buyer
Buyer in the ordinary course of business (BIOCOB)
Buyout option
C corp
Call
Call protection
Cancellation amount
Cancellation cost schedule
Cancellation costs
Cancellation notice
Cancellation of debt (COD)
Cap
Cap/floor transaction
Capability
Capacity
Capacity charge
Capacity payment
Cape Town
Capex
Capex carryover
Capital
Capital call
Capital contribution
Capital expenditure
Capital gain
Capital lease
Capital stock
Capital structure
Capitalization
Capitalization of interest
Capitalization rate
Capitalization ratio
Capitalized lease obligations
Carve-out
Carryover
Cash
Cash available for debt service
Cash collateral
Cash conversion cycle
Cash equivalents
Cash flow
Cash flow coverage ratio
Cash flow loan
Cash flow recapture
Cash management account
Cash proceeds
Cash sweep
Casualty event
Casualty loss
Casualty value
Cautiously optimistic letter
CDO (collateralized debt obligation)
CDO cubed
CDO of CDOs
CDO squared
CDS (credit default swap)
Cede & Co
Certificate of acceptance
Certificate of incorporation
Certificate of payment
Certificate of title
Certificated security
Certified copy
CFC (controlled foreign corporation)
Chain of title
Change in law
Change in tax law
Change of control
Change of control put
Change order
Chapter
Chapter 7
Chapter 11
Chapter 13
Chapter 15
Chapter 18
Chapter 22
Chapter 747
Charge-back
Charter documents
Chattel mortgage
Chattel paper
Check
CEO (chief executive officer)
CFO (chief financial officer)
Chief executive officer (CEO)
Chief financial officer (CFO)
Chief information officer (CIO)
Chief operating officer (COO)
Chief restructuring officer (CRO)
CIO (chief information officer)
Choate lien
CIM (confidential information memorandum)
Circle
Claim
Class of securities
Clawback
Clean draft
Clean opinion
Clean-up period
Clearing agency
Clearstream
CLN (credit-linked notes)
CLO (collateralized loan obligation)
Close-out amount
Closely held corporation
Closing agenda
Closing checklist
Closing date
Club deal
CMBS (collateralized mortgage-backed securities)
CMO (collateralized mortgage obligation)
COD (cancellation of debt)
COD income
Cogen
Cogeneration
Cogenerator
Cold comfort letter
Collapsible transaction
Collar
Collateral access agreement
Collateral agent
Collateral assignment
Collateralized debt obligation (CDO)
Collateralized loan obligation (CLO)
Collateralized mortgage-backed securities (CMBS)
Collateralized mortgage obligation (CMO)
Collecting bank
Collection account
Collection guaranty
Collection of items
Combined cycle
Combined cycle unit
Comfort letter
Commencement of commercial operations
Commercial bank
Commercial invoice
Commercial letter of credit
Commercial operations
Commercial paper conduit (CP conduit)
Commercial tort claim
Commercially reasonable
Commingle
Commingled goods
Commissioning tests
Commitment
Commitment fee
Commitment letter
Commitment percentage
Committed line
Committee on Uniform Security Identification Procedures (CUSIP)
Commodity account
Commodity broker
Commodity contract
Commodity customer
Commodity index agreement
Commodity intermediary
Commodity option
Commodity swap
Common agent
Common agreement
Common stock
Communicate
Compensating balances
Completion
Completion agreement
Completion date
Compound interest
Comptroller of the Currency
Conduit financing
Confidential information memorandum (CIM)
Concentration
Concentration account
Concentration limit
Condition precedent (CP)
Condition subsequent
Conditional sale contract
Conduit
Confidentiality agreement
Confirmation
Confirmation number
Conforming
Conforming owner’s direction
Consensual lien
Consent and agreement
Consignee
Consignment
Consignment agreement
Consignor
Consolidated
Consolidated return
Consolidating
Conspicuous
Constant currency payer
Constant maturity swap
Constant proportion debt obligation (CPDO)
Controlled foreign corporation (CFC)
Construction budget
Construction contract
Construction contract guarantee
Construction contractor
Construction contractor’s letter of credit
Construction draw schedule
Construction loan
Construction progress report
Construction schedule
Constructive exchange
Constructive knowledge
Constructive notice
Constructive ownership rules
Constructive receipt
Consumer goods
Consumer obligor
Consumer transaction
Consumer-goods transaction
Contingency amount
Contingency costs
Contingent obligations
Contingent sweep
Continuation statement
Continuing directors
Contra account
Contract
Contract of sale
Contract party
Contract rate
Contractual currency
Control
Control agreement
Control premium
Controlling party
Conversion
Conversion agent
Conversion date
Conversion price
Convertible
COO (chief operating officer)
Copyright assignment
Correspondent bank
Corporate acquisition indebtedness
Corporate veil
Cost of funds
Cost of goods sold
Cost overrun agreement
Cost overrun amount
Costs
Counterparty
Country risk
Coupon
Course of dealing
Course of performance
Covenant
Covenant defeasance
Covenant light
Covenant strip
Cover
Coverage ratio
CP conduit (commercial paper conduit)
CPDO (constant proportion debt obligation)
CPs (conditions precedent)
Cramdown
Cramup
Credit agreement
Credit crunch
Credit default swap (CDS)
Credit enhancement/credit enhancer
Credit event upon merger
Credit facility
Credit rating
Credit risk
Credit support annex
Credit support document
Credit support provider
Creditor
Creditor process
Creditors’ committee
Creeping tender offer
CRO (chief restructuring officer)
Cross acceleration
Cross aging
Cross collateralization
Cross currency rate swap
Cross default
Cross over collateral
Cross rate
Cross-stream guarantee
Currency option
Currency swap
Current assets
Current liabilities
Current ratio
Cushion
CUSIP (Committee on Uniform Security Identification Procedures)
Custodian
Customer
Customs house broker
Cutoff date
D&O (directors and officers)
D&O insurance
DACA (deposit account control agreement)
Date draft
Daylight overdraft
Days sales outstanding
DBA (doing business as)
DBRS (Dominion Bond Rating Service)
Dealer
Death-spiral preferred
Debenture
Debt
Debt for money borrowed
Debt for tax
Debt index agreement
Debt option agreement
Debt rate
Debt ratio
Debt service
Debt service coverage ratio
Debt service reserve account
Debt to cash flow ratio
Debt to EBITDA ratio
Debt to equity ratio
Debtor
Debtor in possession (DIP)
Debtor out of possession (DOPE)
Debtor’s correct name
Deductible basket
Deed
Deed in lieu
Deed of trust
Deemed dividend
Deems itself insecure
Deeping insolvency
Default
Default rate
Defaulting party
Defeasance
Defect
Deferral
Deferral threshold
Deficiency
Deficiency guaranty
Definitive note
Delay compensation
Delay liquidated damages
Delay period
Delayed publication or announcement
Delayed settlement date
Deliverables
Delivery
Delivery date
Delivery order
Demand deposit
Demand draft
Demand note
Demand loan agreement
Demurrage
Deposit account
Deposit account control agreement (DACA)
Deposit/withdrawal at custodian (DWAC)
Depository bank
Depository
Depository Trust Company, The (DTC)
Depreciation
Dequity
Derivatives
Description of notes (DON)
Design documentation
Designated senior debt
Destination bill
Determination date
Developer
Development fee
Dilution
Dilution reserve
DIP (debtor in possession)
DIP loan/financing/facility
Direct agreement
Direct pay letter of credit
Directors and officers (D&O)
Directly related assets
Dirt for debt
Dirty lease
Disappearance of commodity reference price
Disbursement
Disbursement account
Disbursement certificate
Disbursement schedule
Discount
Disgorge
Dishonor
Dispatch
Dispute
Dispute resolution
Disqualified capital stock
Disqualified interest
Disregarded entity
Disruption fallback
Distressed debt
Distribution
Dividend
Dividend payout ratio
Dividend received deduction
Dividend stopper
Dividend yield
Dividends per share
Dock receipt
Document
Document of title
Documentary credit
Documentary draft
Documentation schedule
Documents against acceptance
Documents against payment
Documentation agent
Dollar of debt test
Dollar-one basket
Domestic subsidiary
Dominion and control
Dominion Bond Rating Service (DBRS)
DON (description of notes)
DOPE (debtor out of possession)
Down round
Downstream guaranty
Draft
Dragnet clause
Draw certificate
Draw down
Draw schedule
Drawee
Drawer
Drop dead date
Dry closing
Dry lease
DTC (The Depository Trust Company)
DTC participant
Due diligence
Due diligence request
Dutch auction
Due-on-sale clause
DWAC (deposit/withdrawal at custodian)
E-sign
Early completion bonus period
Earn out
Earnings before interest and taxes (EBIT)
Earnings before interest, taxes, depreciation and amortization (EBITDA)
Earnings before interest, taxes, depreciation, amortization and management fees (EBITDAM)
Earnings before interest, taxes, depreciation, amortization and rents (EBITDAR)
Earnings per share (EPS)
Easement
EBIT (earnings before interest and taxes)
EBITDA (earnings before interest, taxes, depreciation and amortization)
EBITDA multiple
EBITDAM (earnings before interest, taxes, depreciation, amortization and management fees)
EBITDAR (earnings before interest, taxes, depreciation, amortization and rents)
ECA (export credit agency)
ECA finance agreement/funding agreement/guarantee/note
ECA reimbursement agreement
ECL (equity credit line)
Economic life
Economic interest
Effective date
Effective indorsement
Effective lease rate
Effective subordination
Effective tax rate
EFT (electronic funds transfer)
EIS (environmental impact statement)
Electric utility
Electronic chattel paper
Electronic document
Electronic funds transfer (EFT)
Electronic signature
Eligible assignee
Eligible inventory
Eligible receivable
ELN (equity-linked notes)
Embedded software
Employee Retirement Income Security Act (ERISA)
Encumbrance
End of term options
Endorsement
Endorsement in blank
Energy
Energy charge
Energy payment
Engineering, procurement and construction contract (EPC)
Enterprise value/EBITDA (EV/EBITDA)
Enteritlement
Enteritlement holder
Enteritlement order
Environmental assessment/report/statement
Environmental audit
Environmental claims
Environmental consultant
Environmental impact
Environmental impact statement (EIS)
Environmental indemnity agreement
Environmental law
Environmental liability
EPC (engineering, procurement and construction) contract
EPC contractor
EPS (earnings per share)
Equal and ratable
Equipment
Equipment lease
Equipment schedule
Equitable subordination
Equity
Equity contribution
Equity contribution agreement
Equity contribution guarantee
Equity credit line (ECL)
Equity cure right
Equity cushion
Equity documents
Equity forward
Equity index agreement
Equity interest
Equity kicker
Equity letters of credit
Equity-linked
Equity-linked account
Equity-linked notes (ELN)
Equity participant
Equity security
Equity sponsor
Equity subscription agreement
Equity subscription guarantee
Equity swap agreement
Equivalent amount
ERISA (Employee Retirement Income Security Act)
ERISA affiliate
ERISA event
ERISA reportable event
Errors and omissions coverage
Escrow
Escrow account
Escrow agent
Escrow agreement
Estoppel certificate
Euroclear
Eurocurrency liability
Eurocurrency reserve
Eurodollar
European style option
EV/EBITDA (enterprise value/EBITDA)
EV/EBITDA purchase price multiple
Event of default
Event of loss
Evergreen
EWG (exempt wholesale generator)
Excess cash flow
Exchange Act
Exchange controls
Exchange offer
Exchange period
Exchange rate
Exchange risk
Exchangeable
Excluded assets
Excluded taxes
Exculpatory agreement
Exercise price
Executory contract
Exempt wholesale generator (EWG)
Exim Bank
Exim Bank Environmental Guidelines
Exit financing
Exit strategy
Exit tender
Expiration date
Export credit agency (ECA)
Exposure
Extension
Extraordinary items
FAA (Federal Aviation Administration)
Face amount
Facility
Factor
Factoring
Factoring agreement
Fair market value (FMV)
Fair market value purchase option
Fairness opinion
Fallback reference dealer
Fallback reference price
Fallen angel
Farm products
Farming operation
FAS 140
FASB (Financial Accounting Standards Board)
FASIT
Fast automated securities transfer (FAST) program
FAST program (fast automated securities transfer)
FAT (fixed asset turnover)
Fault
FCC (Federal Communications Commission)
FCC license
FCPA (Federal Corrupt Practices Act)
FDAPI (fixed or determinable annual periodic income)
FDIC (Federal Deposit Insurance Corporation)
Fed funds rate
Federal Aviation Administration (FAA)
Federal Communications Commission (FCC)
Federal Corrupt Practices Act (FCPA)
Federal Deposit Insurance Corporation (FDIC)
Federal Energy Regulatory Commission (FERC)
Federal Reserve Bank
Federal Reserve Board
Federal Reserve System
Federal Trade Commission (FTC)
Fee
Fee letter
Fee simple
FERC (Federal Energy Regulatory Commission)
FF&E (furniture, fixtures & equipment)
Field warehousing
FIFO (first in, first out)
File number
Filing
Filing date
Filing office
Filing-office rule
Final certificate
Final completion
Final maturity date
Final payment
Final retention
Finance lease
Financeable
Financial Accounting Standards Board (FASB)
Financial asset
Financial buyer
Financial close
Financial condition
Financial covenant
Financial guaranty
Financial institution
Financial Institutions Reform, Recovery and Enforcement Act (FIRREA)
Financial milestones
Financial officer
Financial owner
Financial plan
Financial statements
Financials
Financing agreement/documents
Financing parties
Financing statement
Fire sale price
Firm commitment
Firm gas
Firm power
Firm transmission service
FIRREA (Financial Institutions Reform, Recovery and Enforcement Act)
First call
First in, first out (FIFO)
First in, last out (FOLO)
First in, still there (FIST)
First in time
First loss
Fiscal quarter
Fiscal year
FIST (first in, still there)
Fitch
Fixed asset turnover (FAT)
Fixed charge coverage ratio
Fixed charge/floating charge
Fixed charges
Fixed or determinable annual periodic income (FDAPI)
Fixed rate
Fixed rate day count
Fixed rate option
Fixed rate payer
Fixed rate payment date
Fixture filing
Fixtures
F/k/a (formerly known as)
Flash money
Flex pricing
Float
Floater
Floating lien
Floating rate
Floating rate day count
Floating rate option
Floating rate payer
Floating rate payment date
Floor
Flooring agreement
Flooring line
Flue gas desulphurization unit
FMV (fair market value)
F.O.B. (free on board)
FOLO (first in, last out)
For collection
For surrender
Forbearance
Forbearance agreement
Forbearance period
Forbearance termination date
Force majeure
Force majeure event
Foreclosure
Foreign Corrupt Practices Act (FCPA)
Foreign exchange (FX)
Foreign sales corporation (FSC)
Foreign subsidiary
Foreign utility company (FUCO)
Form W-8 BEN
Form W-8 ECI
Form W-8 IMY
Form W-9
Formerly known as (f/k/a)
Forward calendar
Forward contract
Forward rate
Forward transaction
Franchise agreement
Fraudulent conveyance
Fraudulent transfer
Free cash flow
Free cash flow/operating cash ratio
Free on board (F.O.B.)
Friendly foreclosure
Fronting fee
FSC (foreign sales corporation)
FTC (Federal Trade Commission)
FUCO (foreign utility company)
Fuel consultant
Fuel management agreement
Fuel manager
Fuel study
Fuel supply agreement
Fuel transportation agreement
Fully diluted basis
Functional specification
Fund of funds
Funded debt
Funding ratio
Funds flow statement
Funds transfer
Funds-transfer business day
Funds-transfer system
Fungible goods
Furniture, fixtures & equipment (FF&E)
Futures contract
FX (foreign exchange)
FX swap
FX trading office
GAAP (generally accepted accounting principles)
GAAS (generally accepted auditing standards)
Gap creditor
Gate
gatekeeper
General intangibles
General partner (GP)
General partnership
Generally accepted accounting principles (GAAP)
Generally accepted auditing standards (GAAS)
Generating unit
Genuine
Global note
Global note legend
GmbH
Go shop provision
Going concern qualification
Golden rule
Good faith
Good utility practice
Goods
Goodwill
Government securities
Governmental authority
Governmental unit
GP (general partner)
Grantor trust
Greenfield project
Greenshoe
Grid
Grid pricing
Gross generation
Gross profit margin
Gross-up provision
Ground lease
GT (gas turbine)
Guarantee/guaranty
Guaranteed completion date
Guaranteed pension plan
Guaranteed performance levels
Guaranteed obligations
Guarantor
Guarantor security agreement
Guidance line
Haircut
Hair trigger
Half-turn
Hard circle
Hazardous materials
Health care insurance receivable
Heat rate
Heat recovery steam generator (HRSG)
Heat recovery steam generator
Hedge
Hedge fund
Hedging obligations
Hell or high water clause
Held in custody (HIC repo)
HIC repo (held in custody)
Hidden liens
High dividend common stock
High yield bond
Highly leveraged transaction (HLT)
Historical volatility
HLT (highly leveraged transaction)
Holdback
Holder
Holder in due course
Holder of record
Holding company
Hold-up value
Holiday
Hot goods
HRSG (heat recovery steam generator)
HSR filing
Hypothetical lien creditor
IACA
IAI (institutional accredited investor)
ICA (International Court of Arbitration)
ICC (International Chamber of Commerce)
IDERA (Irrevocable deregistration and export request authorization)
IE (independent engineer)
Identification period
Illegality
Impairment
Impairment charge
Implementation contract
Implied yield
Implied volatility
Improvements
In the money
In-transit inventory
Inc.
Inchoate lien
INCO terms
Income trust security
Incumbency certificate
Incur
Incurrence test
Indebtedness
Indefeasible
Indemnifiable taxes
Indemnity
Indemnity agreement
Indenture
Indenture trustee
Independence principle
Independent accountants
Independent auditors
Independent director
Independent engineer (IE)
Independent financial advisor
Independent power producer (IPP)
Independent system operator (ISO)
Index
Index option
Indirect holding system
Indirect participant
Indorsement
Industrial and commercial profits
Industrial revenue bond (IRB)
Information reporting
Initial deposit
Initial disbursement
Initial financing statement
Initial public offering (IPO)
Initial purchaser
Insider preference period
Insolvency proceeding
Insolvent
Inspection certificate
Installment lease contract
Installment sales contract
Institutional accredited investor (IAI)
Instruction
Instrument
Insufficient funds (NSF)
Insurance broker
Insurance certificate
Insurance consultant
Insurance proceeds
Insured loss
Insurers
Intangible assets
Integration clause
Intellectual property (IP)
Intercompany loan
Interconnection
Interconnection study
Interconnection works
Intercreditor agreement
Interest
Interest charges
Interest coverage ratio
Interest expense
Interest payment date
Interest rate cap
Interest rate collar
Interest rate protection agreement
Interest rate swap
Interest re-set date
Interim certificate
Interim holding company
Intermediary bank
Internal financial statements
Internal rate of return (IRR)
International arbitration
International Chamber of Commerce (ICC)
International interest
International registry
International Securities Identification Number (ISIN)
International Swap Dealers Association (ISDA)
Interruptible gas
In-transit inventory
Interest only (IO)
Interest rate lock
Inventory
Inventory period
Inventory turnover
Investment
Investment bank
Investment company
Investment Company Act of 1940
Investment company security
Investment grade debt
Investment property
Investment unit
Investors rights agreement
Involuntary bankruptcy
Involuntary petition
IO (interest only)
IP (Intellectual property)
IPO (initial public offering)
IPP (independent power producer)
Ipso facto clause
IRB (industrial revenue bond)
IRR (internal rate of return)
Irrevocable deregistration and export request authorization (IDERA)
Irrevocable power of attorney
ISDA (International Swap Dealers Association)
ISDA Master, confirmation, schedule, credit support annex
ISIN (International Securities Identification Number)
ISO (independent system operator)
Issue date
Issuer
Issuer’s jurisdiction
Issuing bank
Item
Joinder agreement
Joint and several
Joint development agreement
Joint venture
Judgment default
Judgment lien
Judicial foreclosure
Judicial lien
Junior creditor
Junior debt
Junior subordinated
Junk bond
Jurisdiction of organization
Jury trial waiver
Keepwell
Key employees
Key man life insurance
Know your customer
Landing certificate
Landlord waiver
Landlord’s lien
Lapse
Last in, first out (LIFO)
Last quarter annualized (LQA)
LBO (leveraged buy-out)
LC or L/C (letter of credit)
Lead arranger
Leaking underground storage tank (LUST)
Lease agreement
Lease line of credit
Lease supplement
Leasehold mortgage
Legal defeasance
Legal isolation
Legal opinion
Lender liability
Lender of last resort
Lessee
Lessee in the ordinary course of business
Lessor
Lessor’s cost
Lessor’s residual interest
Letter of credit (LC or L/C)
Letter of credit application
Letter of credit issuer
Letter-of-credit right
Letter of instruction
Letter of intent (LOI)
Letter of transmittal (L/T)
Leverage ratio
Leveraged buy-out (LBO)
Leveraged finance
Leveraged lease
Leveraged recapitalization
LIBOR (London interbank offered rate)
Licensee
Licensee in the ordinary course of business
Licensor
Lien
Lien creditor
Lien search
Lien subordination
Lien subordination agreement
Lien waiver
LIFO (last in, first out)
Like-kind exchange
Limit order
Limited guaranty
Limited liability company (LLC)
Limited liability partnership (LLP)
Limited partner (LP)
Limited partnership (LP)
Limited recourse
Line
Liquid assets
Liquidation analysis
Liquidation preference
Liquidity
Liquidity event
Liquidity facility
Liquidity ratio
Liquified natural gas (LNG)
Liquor license
Limited (Ltd.)
LLC (limited liability company)
LLP (limited liability partnership)
LNG (liquified natural gas)
Load (electric)
Loan agreement
Loan and security agreement
Loan documents
Loan information memorandum
Loan participation
Loan Syndications and Trading Association (LSTA)
Loan to own
Loan to value (LTV)
Loans to one borrower
Local business day
Lock
Lockbox (hard and soft)
Lockbox agreement
LOI (letter of intent)
London interbank offered rate (LIBOR)
Long position
Long-term debt
Loss payee
Loss payee endorsement
LP (limited partnership or limited partner)
LQA (last quarter annualized)
LSTA (Loan Syndications and Trading Association)
LSTA Code of Conduct
LT or L/T (letter of transmittal)
Ltd. (Limited)
LTV (loan to value)
LUST (leaking underground storage tank)
M&M lien (mechanics & materialmen)
MAC (material adverse change)
MAE (material adverse effect)
Majority holders
Make-whole
Mandate
Mandate letter
Mandatory prepayment
Mandatory redemption
Mandatory redemption date
Management agreement
Management fees
Management incentive plan (MIP)
Management letter
Manufactured home
Manufactured home transaction
Margin
Margin call
Margin deposit
Margin payment
Margin regulations
Margin stock
Mark-to-market
Mark-to-market matrix (MTM)
Mark-to-model
Market disruption event (MDE)
Market maker
Market capitalization
Market out
Market rent
Market to book ratio
Marketable securities
Marshaling
Master lease agreement
Master netting agreement
Master trust
Material/materiality
Material adverse change (MAC)
Material adverse effect (MAE)
Material change in content
Material change in formula
Material non-public information (MNPI)
Material weakness
MDE (market disruption event)
Materialmen’s lien
Maturity date
MBS (mortgage backed securities)
Mechanical completion
Mechanics lien
Mechanics & materialmen (M&M)
Medallion guarantee
Medicare/Medicade receivables
Medium term note (MTN)
Meltdown
Melting ice cube
Memorandum of lease
Memorandum of understanding (MOU)
Merchant
Merchant bank
Merger
Mezzanine debt
Mezzanine endorsement
Mezzanine financing
Mezzanine lender
MFN (most favored nation) clause
Midnight deadline
Midquarter convention
Milestone
Milestone certificate
Milestone payment schedule
Milestone performance criteria
Minimum performance levels
MIP (management incentive plan)
Mirror note
Modification
Modified business day convention
Money
Money center bank
Money market account
Moody’s
Mortgage
Mortgage security
Mortgage backed securities (MBS)
Most favored nation clause (MFN)
MOU (memorandum of understanding)
MNPI (material non-public information)
MTM (mark-to-market) matrix
MTN (medium term note)
Multibranch party
Multilateral lender
Muni bond
Mutual fund
NAIC (National Association of Insurance Commissioners)
Naked contract
Naked sale procedure
Nameplate capacity
NASD (National Association of Securities Dealers)
NASDaq (National Association of Securities Dealers automated quotation system)
National Association of Insurance Commissioners (NAIC)
National Association of Securities Dealers (NASD)
National Association of Securities Dealers automated quotation system (NASDaq)
Nationally Recognized Statistical Rating Agency (NRSRO)
Natural gas
NDA (non-disclosure agreement)
Negative amortization
Negative arbitrage
Negative covenant
Negative negative pledge
Negative pledge
Negotiable document
Negotiable instrument
Negotiating bank
Nemo dat
Negotiation and transfer
NERC (North American Electric Reliability Council)
Net [#] days
Net cash proceeds
Net economic return
Net generation
Net income
Net operating income
Net operating loss (NOL)
Net proceeds
Net profit margin
Net tangible assets
Net working capital
Net worth
Net worth maintenance
Net worth ratio
Netting
New debtor
New value
New York closing
New York Stock Exchange (NYSE)
NewCo
NIMBY (not in my back yard)
Nitrogen oxide (NOx)
No-action letter
No fault termination
No-shop provision
NOL (net operating loss)
NOLV (net orderly liquidation value)
Nominal purchase option
Nominated person
Noncash proceeds
Non-appealable
Non-cash charge
Non-compete agreement
Non-defaulting party
Non-deliverable forwards
Non-disclosure agreement (NDA)
Non-firm power
Non-firm transmission service
Non-interference agreement
Non-recognition
Non-recourse debt
Non-recourse guaranty
Non-severable modification
Nonutility power producer
Non-warranty deed
NOPR (notice of proposed rulemaking)
North American Electric Reliability Council (NERC)
Note
Note purchase agreement
Note register
Note registrar
Notation of guarantee
Notice of adverse claim
Notice of assignment
Notice of borrowing
Notice of conversion/continuation
Notice of proposed rulemaking (NOPR)
Notification date
Notice to proceed (NTP)
Not in my back yard (NIMBY)
Notional amount
NO\textsubscript{x} (nitrogen oxide)
NRSRO (Nationally Recognized Statistical Rating Agency)
NSF (insufficient funds)
NTP (notice to proceed)
NYSE (New York Stock Exchange)
O&M agreement (operations & maintenance)
Obligations
Obligee
Obligor
Obligor on the securities
OBS (off balance sheet)
OCC (official creditors’ committee)
OCF (operating cash flow)
Off balance sheet (OBS)
Offering circular
Officers certificate
Official creditors’ committee (OCC)
Official filing
Offset
Offshore lending office
OID (original issue discount)
Oklahoma City
Old and cold creditors
One-stop shop
On-lend
Open account
Open position
Open-ended indenture
Operator
Operating account
Operating and efficiency standards
Operating and maintenance costs
Operating and maintenance guarantee
Operating cash flow (OCF)
Operating cash flow/sales ratio
Operating cycle
Operating lease
Operating profit margin
Operations and maintenance (O&M) agreement
Operative documents
Opinion documents
Opinion of counsel
Opt-in
Option
Option contract
Option line
Optional modification
Optional redemption
Order
Ordinary care
Ordinary course of business
Ordinary income
Organization
Organizational documents
Original debtor
Original issue discount (OID)
OTC (over the counter)
Outage
Out-of-court restructuring
Out of the money
Over-allotment option
Over the counter (OTC)
Overdraft
Overissue
Overnight overdraft
Owner’s representative
Owner participant
Ownership letters
Owner trust
PACA
Par
Par value
Parasitic loan
Pari passu
Participant
Participation
Partnership
Party
Pass-through entity
Patent assignment
Patriot Act
Payable
Payable to order
Payee
Paying agent
Payment blockage notice
Payment blockage period
Payment date
Payment default
Payment in kind (PIK)
Payment intangible
Payment order
Payment subordination
Payoff letter
Payor
Payor bank
PBGC (Pension Benefit Guaranty Corporation)
PCAOB
PE ratio (price/earnings)
PE to growth ratio
Peaking
Pension Benefit Guaranty Corporation (PBGC)
Pension plan
Per diem
Per pop
Perfection
Performance guaranty
Performance liquidated damages
Performance pricing
Performance tests
Performance tests protocol
Permit
Permitted encumbrance
Permitted indebtedness
Permitted investments
Permitted junior securities
Permitted liens
Permitted refinancing indebtedness
Permitted transfer
Permitted transferee
Person
Person entitled under document
Person related to
Petition
Petition date
Pickle lease
Pier
PIK (payment in kind)
Pink sheets
PIPES (private investment in public equity)
Placement agent
Plan
Plant and equipment
Platform acquisition
Pledge
Pledge agreement
PO (principal only)
POM (private offering memorandum)
Portfolio interest
Portfolio sale
PORTAL (private offerings, resale and trading through automated linkages)
Position listing
Possession
Possessory lien
Postponement
Potential event of default
Power
Power coupled with interest
Power marketers
Power of attorney
Power of sale
Power purchase agreement (PPA)
Power station
PPA (power purchase agreement)
PPM (private placement memorandum)
PPP (public/private partnership)
PPS (price per share)
PPV (public/private venture)
Preference
Preference period
Preferred ship mortgage
Preferred stock
Preliminary acceptance date
Premium
Pre-negotiated bankruptcy
Pre-pack or pre-packaged bankruptcy
Prepaid forward
Prepayment penalty/premium
Present value
Presentation time
Presenting bank
Presumption
Price/earnings (PE ratio)
Price per share (PPS)
Price talk
Pricing grid
Prime
Prime broker
Prime rate
Priming lien
Principal
Principal amount at maturity
Principal only (PO)
Principal place of business (PPB)
Priority
Priority search certificate
Private company
Private equity
Private investment in public equity (PIPEC)
Private offering memorandum (POM)
Private offerings, resale and trading through automated linkages (PORTAL)
Private placement
Private placement memorandum (PPM)
Pro forma
Pro forma schedule
Proceeds
Proceeds of a letter of credit
Process agent
Productive assets
Prohibited transaction
Prohibited transaction class exemption (PTE)
Project
Project agreements
Project budget
Project company
Project completion
Project completion agreement
Project completion date
Project costs
Project documents
Project site
Projections
Promissory note
Proof of assignment
Proof of claim
Property of the estate
Proposal
Proration
Prospectus
Prospectus summary
Protected purchaser
Protest
Protocol
Prove
Provisional settlement
PSA (purchase and sale agreement)
PTE (prohibited transaction class exemption)
PTO (United States Patent and Trademark Office)
Public company
Public filing
Public finance transaction
Public/private partnership (PPP)
Public/private venture (PPV)
Public Utilities Regulatory Policies Act (PURPA)
Public Utility Holding Company Act of 1935 (PUHCA)
PUHCA (Public Utility Holding Company Act of 1935)
Punch list
Purchase
Purchase and sale agreement (PSA)
Purchase contract
Purchase money collateral
Purchase money obligation
Purchase option
Purchase order
Purchase money security interest
Purchaser
Purchaser for value
PURPA (Public Utilities Regulatory Policies Act)
Purpose credit
Pursuant to commitment
Put
Put option
QF (qualifying facility)
QIB (qualified institutional buyer)
QIU (qualified independent underwriter)
QFC (qualified financial contract)
QP (qualified purchasers)
QPSE (Qualified special purpose entity)
Qualified financial contract (QFC)
Qualified independent underwriter (QIU)
Qualified institutional buyer (QIB)
Qualified intermediary
Qualified IPO
Qualified opinion
Qualified purchaser (QP)
Qualified special purpose entity (QPSE)
Qualifying facility (QF)
Quick assets
Quick ratio
Quitclaim deed
Ranking
Ratchet
Rating
Rating agency
Ratio debt
Reach-back
Real estate investment trust (REIT)
Real estate mortgage investment conduit (REMIC)
Reasonable and prudent operator
Reasonably equivalent value
Reasoned opinion
Recapitalization
Receivables
Receivables turnover ratio
Receiver
Recharacterization
Reclamation
Reclassification
Reclassification as current
Reconsignment
Record
Record date
Record holder
Recoupment
Recourse
Red herring
Redacted document
Redeemable
Redemption
Redemption date
Redemption notice
Reference bank
Reference market-maker
Refinancing
Registered form
Registered organization
Registered owner
Registration rights agreement
Registration statement
Regulation 14E
Regulation AB
Regulation D
Regulation FD
Regulation S
Regulation T
Regulation U
Regulation X
Reimbursement obligations
Reinstatement
REIT (real estate investment trust)
Related party
Relation back
Release and reconveyance
Release price
Relevant jurisdiction
Reliability test
Remedy
REMIC (real estate mortgage investment conduit)
Remitter
Renewal notice
Renewal rent
Renewal term
Rent period
Reorganization
Replacement property
Repledge
Repo
Repo participant
Reporting requirements
Representative
Repudiation
Repurchase
Repurchase agreement
Repurchase date
Repurchase price
Required lenders
Required modification
Resale exemption
Rescission
Reserve accounts
Reserve percentage
Reserve requirements
Residual mortgage backed security (RMBS)
Residual value
Resolution Trust Company (RTC)
Responsible officer
Restatement
Restatement (of financials)
Restricted cash
Restricted investment
Restricted payment (RP)
Restricted payment formula
Restricted securities
Restricted subsidiary
Restriction on transfer
Restrictive covenant
Restrictive legend
Restructuring
Results of operations
Retail sales
Retained interest
Retention
Retention account
Retention of title
Return on assets (ROA)
Return on investment (ROI)
Return on common equity (ROCE)
Return on equity (ROE)
Returned item
Reuters screen
Reverse exchange
Reverse repo/reverse repurchase agreement
Reverse triangular merger
Reviewed financials
Revocation
Revolver
Revolving basket
Revolving credit agreement
Revolving credit and term loan agreement
Rights offering
Risk of loss
RMBS (residual mortgage backed security)
ROA (return on assets)
ROCE (return on common equity)
ROE (return on equity)
ROI (return on investment)
Roadshow
Rollover
RP (restricted payment)
RTC (Resolution Trust Company)
Rule 14e-1
Rule 144
Rule 144A
Rule 903
Rule 904
SACA (securities account control agreement)
S corp
S&P (Standard & Poor’s Ratings Group, a division of The McGraw-Hill Companies, Inc.)
Sale
Sale and servicing agreement (SSA)
Sale lease-back
Sale on approval
Sale or return
Sales for resale
Same-day funds
Sarbanes-Oxley Act (SOX)
SARE (single-asset real estate entity)
Seasonably
Seasoning facility
Scheduled maturity
Scheduled outage
Scheduled payment date
Scope of work
SCR (selective catalytic reduction)
SEC (Securities and Exchange Commission)
Second lien
Secondary obligor
Secret lien
Secretary’s certificate
Section 3(a)(9)
Section 4(2)
Section 23A
Section 314
Section 363 sale
Section 552
Section 1111(b) election
Secured party
Secured party in possession
Securities account
Securities account control agreement (SACA)
Securities Act
Securities and Exchange Commission (SEC)
Securities intermediary
Securities intermediary’s jurisdiction
Securities Investor Protection Corporation (SIPC)
Securities purchase agreement (SPA)
Security
Security agreement
Security certificate
Security entitlement
Security interest
Security procedure
Securitization
Selective catalytic reduction (SCR)
Send
Seller note
Seller’s stoppage of delivery
Senior credit facility
Senior debt
Senior lenders
Senior loan documents
Senior obligations
Senior second lien debt
Senior subordinated
Servicer
Servicing fees
Series
Setoff
Settlement
Settlement amount
Settlement date
Settlement payment
Settles without accrued interest
Severable modification
Several and not joint
Severability
SFAC (statements of financial accounting concepts)
Shared services agreement
Shareholders
Shareholders agreement
Shareholders equity
Shariah compliant finance
Shelf registration statement
Shipper’s weight, load and count
Short position
Side letter
Sidestream guarantee
Signature guarantee
Signed
Sight draft
Silent second
Simple/single cycle
Single-asset real estate entity (SARE)
Single investor tax lease
SIPC (Securities Investor Protection Corporation)
Site lease
SIV (structured investment vehicle)
Society for Worldwide Interbank Telecommunication (SWIFT)
Soft circle
Software
Solvency certificate
Solvency opinion
Source code escrow
Sovereign immunity
SO\(_x\) (sulfur oxide)
SOX (Sarbanes-Oxley Act)
SPA (securities purchase agreement)
Spare parts agreement
SPE (special purpose entity)
Special servicer
Specifications
Specified entity
Specified indebtedness
Specified treaty
Special endorsement
Special purpose entity (SPE)
Spinning reserve
Sponsor
Spot contracts
Spot exchange
Spot purchase
Spot rate
Spread
Spread account
Spinning guaranty
Spinning lien
SPV (special purpose vehicle)
SSA (sale and servicing agreement)
Stale check
Stale dated
Stalking horse
Stamp tax
Standard & Poor’s Ratings Group, a division of McGraw-Hill, Inc. (S&P)
Standback
Standby letter of credit
Standstill
Staple financing
Start-up
State
Stated maturity
Statements of financial accounting concepts (SFAC)
Station load
Statute of frauds
Statute of limitations
Statutory insider
Statutory lien
Statutory trust
Steam turbine generator (STG)
STG (steam turbine generator)
Stipulated loss
Stock-on-stock dividend
Stockbroker
Stop payment order
Strategic buyer
Stream of benefits
Street name
Stretch the trade
Strict foreclosure
Strike price
Strip
Strong arm powers
Structural subordination
Structured finance
Structured investment vehicle (SIV)
Sub debt
SubCo
Subcontract
Subcontractor
Sub-division
Sublease
Sublimit
Subline
Subordinated debt
Subordinating creditor
Subordination agreement
Subprime
Subrogation
Subscription agreement
Subsidiary
Substantial completion
Substantial compliance
Substantive consolidation/non-consolidation opinion
Success fee
Successor
Successor guarantor
Sulfur oxide (SOₓ)
Sun Gard provisions
Sunset
Super holding company
Superpriority
Supplemental indenture
Supplemental rent
Supplier
Supply contract
Supporting obligation
Surety
Surety bond
Suretyship defenses
Surplus
Survey
Survival period
Suspends payment
Swap
Swap agreement
Swaption straddle
Sweat equity
Sweep
Sweetheart deal
SWIFT (Society for Worldwide Interbank Telecommunication)
Swing line
Syndicated loan
Syndication agent
Synthetic CDO
Synthetic lease
Synthetic letter of credit
Synthetic revolver
T-bill
T+3 (trade date + 3 business days)
T&C (terms and conditions)
T&R (timetable & responsibilities)
Take-or-pay
Take-out financing
Take-over date
Taking-over
Tangible chattel paper
Tangible net worth
Target
Tax assumption
Tax disruption
Tax event
Tax event upon merger
Tax-free reorganization
Tax gross-up
Tax lease
Tax lien
Tax sharing agreement
Tender offer
Tenor
Term
Term loan
Term out
Term securitization
Terms and conditions (T&C)
Term sheet
Terminal rental adjustment clause lease (TRAC)
Terminated transactions
Termination currency
Termination currency equivalent
Termination event
Termination fee
Termination rate
Termination statement
Termination value
Testing
The Depository Trust Company (DTC)
Thermal
Threshold amount
TIA (Trust Indenture Act)
TIBOR (Tokyo interbank offered rate)
Time draft
Time table & responsibilities (T&R)
Title
Title insurance
Title insurance endorsements
Title policy
Title report
Title search
Toggle PIK
Tokyo interbank offered rate (TIBOR)
Tolling
TOPrS (trust originated preferred securities)
Top-up provision
Total asset turnover
Total assets
Total debt
Total funded debt
Total funded debt to cash flow ratio
Total liabilities
Total liabilities to cash flow ratio
Total return swap (TRS)
Toxic preferred
TRAC (terminal rental adjustment clause) lease
Trade confirmation
Trade creditor
Trade date
Trade date + 3 business days (T+3)
Trade name
Trade payables
Trade ticket
Trades flat
Trademark assignment
Trading disruption
Trailing twelve month
Train leaving the station
Tranche
TRS (total return swap)
Transaction documents
Transfer
Transfer agent
Transfer point
Transfer statement
Transfer warranties
Transferee
Transferor
Transmission
Transmitting utility
Treasuries
Treasury benchmark
Treasury rate
Treaty rate
Trigger event
Triple-net lease
True sale
Truncated social security number
Trust agreement
Trust and retention agreement
Trust assets
Trust estate
Trustee
Trust Indenture Act (TIA)
Trust-originated preferred securities (TOPrS)
Trust receipt
Turbine
Turnkey contractor
Turnover
UBTI (unrelated business income tax)
UCC (Uniform Commercial Code)
UCCC
UCC insurance
UCITA
UCP (Uniform Customs and Practice)
UETA
UFCA (Uniform Fraudulent Conveyance Act)
UFTA (Uniform Fraudulent Transfer Act)
Unauthorized signature
Uncertificated security
UNCITRAL
Uncommitted line
Underground storage tank (UST)
Undersecured
Under trust deed dated (u/t/d)
Underwater
Underwriter
Unfunded liability
Uniform Commercial Code (UCC)
Uniform Customs and Practice (UCP)
Uniform Fraudulent Conveyance Act (UFCA)
Uniform Fraudulent Transfer Act (UFTA)
Unilateral change
United States Patent and Trademark Office (PTO)
Unitranche
Units offering
Unlimited guaranty
Unpaid amounts
Unrelated debt financed income
Unrelated business income tax (UBTI)
Unrestricted subsidiary
Unsecured
Unsecured creditors committee
Unsubordinated debt
Unwind
Upfront fee
Upstream guaranty
Usage of trade
Use it and lose it basket
Useful thermal output
UST (underground storage tank)
U/T/D (under trust deed dated)
Utility
Validity guaranty
Value
Variable currency payer
Variable delivery date contract
Variable interest entities
Variable rate
Vendor leasing
Void ab ignitio
Voidable
Volatility
Voluntary bankruptcy
Voluntary petition
Voluntary prepayment
Voting stock
Vulture fund
W-8
W-9
WAC (weighted average coupon)
Waiting period
Waiver
Waiver of jury trial
Warehouse facility
Warehouse lender
Warehouse receipt
Warehouseman’s lien
WARN (Worker Adjustment and Retraining Notification) Act
Warrant
Warrant coverage
Warranty
Warranty deed
Warranty period
Waterfall
Weighted average
Weighted average coupon (WAC)
Weighted average default rate
Weighted average life to maturity
Wheeling service
White knight
Whole business securitization
Whole loan mortgage
Wholesale sales
Wholly owned subsidiary
Willful default
Window dressing facility
Window forward
WIP (work in progress)
Work
Worker Adjustment and Retraining Notification Act (WARN)
Work in progress (WIP)
Work out
Working capital
Working capital ratio
World Bank, The
World Bank Environmental Guidelines
Worst case projections
Wrap insurance
Writing
Wrongful dishonor
Yank a bank
Year to date (YTD)
Yield
Yield to maturity
YTD (year to date)
Zero balance account
Zero coupon bond
Zone of insolvency
Zoning ordinance
Wells Fargo Financial Leasing, Inc. v. Mountain Rentals of Gatlinburg, Inc.
Slip Copy, 2008 WL 199855
January 24, 2008 (Approx. 4 pages)
Slip Copy, 2008 WL 199855 (Tenn.Ct.App.), 64 UCC Rep.Serv.2d 1004

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
WELLS FARGO FINANCIAL LEASING, INC.
v.
MOUNTAIN RENTALS OF Gatlinburg, INC.
No. E2007-00480-COA-R3-CV.
Oct. 29, 2007 Session.

Appeal from the Chancery Court for Sevier County, No. 04-2-047; Telford E. Forgety, Jr., Chancellor.
Douglas E. Taylor, Sevierville, Tennessee, for the appellant, Mountain Rentals of Gatlinburg, Inc.

Kenny L. Saffles, Knoxville, Tennessee, for the appellee, Wells Fargo Financial Leasing, Inc.

SHARON G. LEE, J., delivered the opinion of the court, in which CHARLES D. SUSANO JR. and D. MICHAEL SWINEY, JJ., joined.

OPINION

SHARON G. LEE, J.

*I Wells Fargo Financial Leasing, Inc., brought this action against Mountain Rentals of Gatlinburg, Inc., to collect rent under an equipment lease. The trial court granted summary judgment to Wells Fargo, and Mountain Rentals appealed. After careful review, we hold that the rental agreement is an enforceable finance lease and that Mountain Rentals's obligation to pay rent was irrevocable and independent. The judgment of the trial court is affirmed.

I. Background

In June of 2000, Mountain Rentals, Inc. ("Mountain Rentals") entered into a finance lease agreement with Telimage, Inc., ("Telimage") for the rental of telecommunications equipment. The agreement provided for Mountain Rentals to pay 60 monthly payments of $457 each for rental of certain specified equipment and was amended three times to include additional equipment. As of July 15, 2002, the parties had increased the monthly payment amount to $1,704. The agreement was termed a "finance lease" governed under Article 2A of the Uniform Commercial Code ("UCC") and included, inter alia, provisions that the system was rented "as is" with no warranties; that Mountain Rentals waived all rights and remedies; that Telimage could assign the agreement and give the new lessor the same rights and benefits Telimage had at the time of the contract, but none of Telimage's obligations; and that Mountain Rentals acknowledged that Telimage had no responsibilities or obligations regarding the service or maintenance of the system. In addition, Mountain Rentals signed a certificate acknowledging its acceptance of the system and agreeing that payment of rent was due Telimage without deduction, setoff, or abatement.

Telimage later assigned its rights under the agreement to Conseco Finance Vendor Services, Inc., and Wells Fargo Financial Leasing, Inc., became the successor in interest following Conseco's bankruptcy. Mountain Rentals subsequently became dissatisfied with service and maintenance of the equipment and ceased making rental payments to Wells Fargo. Wells Fargo sued Mountain Rentals alleging that Mountain Rentals had defaulted on the agreement and seeking the remaining balance of all rental payments, discounted to present value, and attorney's fees and costs pursuant to the agreement. Mountain Rentals joined Sprint Communications Company, L.P., and Telimage in the suit, but they were later dismissed as parties. The trial court entered an order granting Wells Fargo's motion for summary judgment and awarded judgment in its favor in the amount of $75,748.93.
II. Issues

Mountain Rentals argues in this appeal that the trial court erred in finding the finance lease agreement to be valid, as a matter of law, because the lease is ambiguous, unconscionable, contrary to public policy, a contract of adhesion, and not the result of a meeting of the minds between the parties. Wells Fargo contends that the trial court did not err and that it is entitled to an award for its attorney's fees and costs on appeal pursuant to the parties' agreement.

III. Analysis

A. Standard of Review

*2 Summary judgment is appropriate only when the moving party demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. When reviewing a motion for summary judgment, this Court is required to view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. See Robinson v. Omer, 952 S.W.2d 423, 426 (Tenn.1997); Byrd v. Hall, 847 S.W.2d 208, 210-11 (Tenn.1993). Because a trial court's decision to grant a motion for summary judgment is solely a matter of law, it is not entitled to a presumption of correctness. See Staples v. CBL & Associates, Inc., 15 S.W.3d 83, 88 (Tenn.2000); Carvell v. Bottoms, 900 S.W.2d 23, 26 (Tenn.1995). Consequently, our task is to review the record to determine if the requirements of Rule 56.04 of the Tennessee Rules of Civil Procedure have been met. Staples, 15 S.W.3d at 88.

B. Validity of the Finance Lease

Mountain Rentals does not dispute that it ceased making rental payments to Wells Fargo, but argues that it should not be required to comply with the agreement because Tellimagine failed to service and maintain the equipment. Mountain Rentals contends that since it is precluded from asserting its breach of warranty claims and defenses against Wells Fargo, the agreement is unconscionable, ambiguous, contrary to public policy, a contract of adhesion, and not the result of a meeting of the minds between the parties and is therefore unenforceable.

Mountain Rental's arguments are without merit because the lease agreement is not an ordinary lease, but a finance lease which makes Mountain Rental's obligation to pay rent irrevocable and independent upon its acceptance of the goods. It is undisputed that the lease was for non-consumer goods and the goods were accepted by Mountain Rentals. Therefore, the obligation of Mountain Rentals to pay rent is absolute even if, after acceptance, it becomes dissatisfied with the goods or with its lessor's performance under the agreement. Our conclusion is supported by statutory and case law, as well as the terms of the agreement.

We are guided by Florida law because the parties agreed to be bound by the law of the state of Florida. However, the result we reach would be the same if Tennessee law applied because the law in Florida and Tennessee law is virtually identical and both are based on Article 2 of the UCC. Florida law defines a finance lease as follows:

(1)(g) "Finance lease" means a lease with respect to which:

1. The lessor does not select, manufacture, or supply the goods;
2. The lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and
3. One of the following occurs:
   (a) The lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;
   *3 (b) The lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;
   (c) The lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or

the right to possession and use of the goods; or

(d) If the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing:

(I) Of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person.

(II) That the lessee is entitled under this chapter to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessee acquired the goods or the right to possession and use of the goods.

(III) That the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

Fla. Stat. § 680.1031(1)(g). FN1


The parties' agreement contained specific language wherein the parties agreed that their lease was a finance lease:

You agree that this Agreement is a "Finance Lease" under Article 2A of the Uniform Commercial Code, that is you acknowledge that: (a) we did not select, manufacture or supply the System, but we did purchase the System for rent to you; and (b) we have given you the name of the supplier of the System you are renting from us and therefore, the supplier is set forth in this Agreement or on the attached schedule. We hereby notify you that you may have rights under the supply contracts and that you may contact the supplier for a description of those rights or any warranties. To the extent permitted by applicable law, you waive any and all rights and remedies conferred upon you under UCC Section 2A-303 and 2A-508 through 522.

The determination that the lease is a finance lease is important because the hallmark of a finance lease is the aptly described "hell or high water" provision that is made applicable by Fla. Stat. § 680.407 FN2 which provides:


(1) In the case of a finance lease that is not a consumer lease, the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods.

(2) A promise that has become irrevocable and independent under subsection (1):

*4 (a) Is effective and enforceable between the parties, and by or against third parties including assignees of the parties.

(b) Is not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to whom the promise runs.

(3) This section shall not affect the validity under any other law of a covenant in any lease contract making the lessee's promises irrevocable and independent upon the lessee's acceptance of the goods.

The effect of this provision is to require the lessee to pay the finance lessor "come hell or high water" or in more legal terms—-even if the lessor's performance after the lessee's acceptance of the goods is not in accordance with the lease contract. Numerous courts have enforced the "hell or high water" provision of the statute and awarded recovery to the finance lessor. See Leasetec Corp. v. Orient Sys., Inc., 85 F.Supp.2d 1310 (S.D.Fla.1999) (providing that "hell or high water" clauses requiring lessees to continue making payments to equipment lease finance company regardless of condition of equipment were enforceable, despite lessor's default), De Lage Landen Financial Servs., Inc., v. Cricket's Termite Control, Inc., 942 So.2d 1001 (Fla Dist. Ct.App.2006) (stating that "the Uniform Commercial Code makes covenants in a finance lease irrevocable and independent, due to the function of the finance lessor in a three-party relationship" upon the lessee's acceptance of the goods); see also Wells Fargo Bank, N.A. v. Brooks America Mortgage Corp., 419 F.3d 107 (2d Cir.2005) (holding that assignee was entitled to enforce
equipment lease containing “hell or high water” clause notwithstanding lessor’s default on its obligations),

*Siemens Credit Corp. v. Newlands, 905 F.Supp. 757 (N.D.Cal.1994) (holding that lessee was liable to lessor under a commercial finance lease which was found to be valid and not unconscionable), Wells Fargo Bank Minn., Nat’l Ass’n v. B.C.B.U., 49 Cal.Rptr.3d 324 (Cal.Ct.App.2006) (providing that assignee of finance lease could enforce wavier of defenses clause against lessee of business equipment, even though lessee claims there was no meeting of the minds, that a material alteration voided the lease, and that the lease was cancelled), C and J Leasing Corp. v. Hendren Golf Mgmt., 728 N.W.2d 852 (Iowa Ct.App.2007) (holding that the finance lease for commercial goods was not unconscionable), Great America Leasing Corp. v. Star Photo Lab, Inc., 672 N.W.2d 502 (Iowa Ct.App.2003) (holding that hell or high water provision in lease and Uniform Commercial Code precluded lessee from ceasing payments under lease, even though lessee may have encountered problems with leased software and equipment, where lease was a finance lease and software and equipment were accepted by lessee), Canon Fin. Servs., Inc. v. Medco Stationery Servs., Inc., 300 A.D.2d 66 (N.Y.App.Div.2002) (holding that lessor was entitled to summary judgment under finance lease despite lessee’s complaints about the leased copier), D & D RV and Auto, LLC, v. Rainmaker Software, Inc., No. CA2006-02-006, 2007 WL 1121298 (Ohio Ct.App.2007) (holding that the lessee “had no right to cease payments under the lease agreement despite its dissatisfaction with the performance of the software”).

*5 The statutory provision supplements the specific language of the agreement, which requires Mountain Rentals to pay rental payments without deduction, setoff or abatement, that the equipment is sold “as is” with no warranties from the lessor, and that all rights and remedies are waived.

The result we reach is not inequitable. A finance lease is a method to finance the acquisition of goods. Normally, a lender who enables a buyer to acquire the goods is not subject to a refusal by the buyer to repay the loan if the goods are not what the buyer expected. Similarly, a finance lessee cannot refuse to pay a lessor an agreed payment. William D. Hawkland, 3 Hawkland UCC Series, § 2A-209:01 (Frederick K. Miller ed., 2006). The parties entered into a financial transaction in which the lessor is lending money and dealing largely in paper, not goods. 2 White & Summers, Uniform Commercial Code § 13-3 (4th ed.2006). The statutory scheme of finance leases benefits both parties. The lessor gains certainty and security for its extension of credit. The lessee forgoes its warranty claims against the lessor but becomes a statutory third party beneficiary of the supply contract between the manufacturer or other supplier and the lessee. Thus, the lessee has a right of action against the supplier and the manufacturer and so is not without a remedy. Fla. Stat. § 680.209; see also id. The remedy is simply not a warranty remedy against the lessor. It is important to note that only commercial financial leases, not consumer leases, qualify for the imposition and protection of the “hell or high water” obligation of the lessee under section 2A-407 of the Uniform Commercial Code. Edwin E. Huddleston, III, Old Wine in New Bottles: UCC Article 2A -Leases, 39 ALA. L.REV. 615, 665 (1988).

Mountain Rentals argues the agreement cannot be enforced because it is ambiguous. A cardinal rule of contract interpretation is to ascertain and give effect to the intent of the parties. Christenberry v. Tipton, 160 S.W.3d 487, 494 (Tenn.2005). In interpreting contractual language, courts look to the plain meaning of the words in the document to ascertain the parties’ intent. Planters Gin Co. v. Fed. Compress & Warehouse Co., 78 S.W.3d 885, 889-90 (Tenn.2002). This Court’s initial task in construing the agreement at issue is to determine whether the language is ambiguous. Id. at 890. There is nothing unclear about the terms of the parties’ agreement. It is a finance lease and Mountain Rentals’s promise to pay rent is irrevocable and independent upon its acceptance of the goods.

Mountain Rentals argues that the provision stating that the agreement may be assigned giving the new lessor “the same rights and benefits” that Telimage had at the time of the contract but none of Telimage’s obligations is unenforceable because the agreement is a contract of adhesion, unconscionable, and contrary to public policy. We do not agree. As a finance lease, the agreement is sanctioned by statutory authority in Florida, Tennessee, and numerous other jurisdictions. Mountain Rentals is not left without a remedy for faulty goods. It just cannot maintain a cause of action against the financial lessor, but must go against the supplier and manufacturer of the goods. In Buraczynski v. Eyring, 919 S.W.2d 314 (Tenn.1996), the Supreme Court ruled that a provision of an agreement will not be enforced if it constitutes a contract of adhesion and “contain[s] such unconscionable or oppressive terms as to render [it] unenforceable.” Id. at 320. We find nothing about this agreement to be oppressive or beyond the reasonable expectations of an ordinary person.

*6 Mountain Rentals also argues that there was no mutual assent because Mountain Rentals did not understand the effect, force, and consequence of provisions of the agreement. We disagree. The terms of the contract were clear. A party is presumed to know the contents of a contract he or she has signed and, in the absence of fraud, is then bound by that contract. Giles v. Allstate Ins. Co., 871 S.W.2d 154, 157 (Tenn.Ct.App.1993).

Mountain Rentals cannot, after receiving the benefit of the financing, seek to avoid the lease agreement. Mountain Rentals’ assertions that the leased goods were not satisfactory and that Telimage defaulted on the

contract do not raise issues of fact which are material because even assuming the goods or services were
defective or faulty, Wells Fargo still has a right to recover its rental payments under the agreement. Therefore, the
trial court did not err in granting summary judgment to Wells Fargo.

C. Attorney's Fees

Wells Fargo requests its attorney's fees associated with the costs of this appeal. The parties' agreement requires
Mountain Rentals to pay all of costs and expenses, including reasonable attorney's fees of at least twenty percent of
the remaining balance of all rental payments and collection fees incurred in enforcing the agreement. In Robinette v.
Johnson, we held that a contract that generally allowed for “attorney fees and costs of collection” in the event of
*3 (Tenn. Ct.App. M.S., filed June 21, 2001). Accordingly, Wells Fargo is entitled to its attorney's fees and costs
incurred on appeal, and we remand this case to the trial court for a determination of this amount.

IV. Conclusion

For the reasons stated herein, the judgment of the trial court is affirmed. Costs of appeal are assessed to
Mountain Rentals of Gatlinburg, Inc.

Wells Fargo Financial Leasing, Inc. v. Mountain Rentals of Gatlinburg, Inc.
Slip Copy, 2008 WL 199855 (Tenn.Ct.App.), 64 UCC Rep.Serv.2d 1004

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**Table of Authorities**
The High & High Water Clause of a Finance Lease – Enforced in a Non-Fraud Case.

Several decisions arising from the Norvergence fraud have prevented an assignee of a lessor from enforcing the “hell & high water” provision of a finance lease. In January 2008 the Tennessee Court of Appeals rejected a lessee’s argument that a lease was unenforceable due to the hell and high water clause in *Wells Fargo Financial Leasing v. Mountain Rentals*, 2008 WL 199855 (Tenn Ct. App.), 64 UCC Rep.Serv.2d 1004, in a straightforward application of Article 2A.

Mountain Rentals entered into a finance lease in June 2000 for the rental of telecom equipment. The original lessor assigned its rights and Wells Fargo acquired the lease in the transferee’s bankruptcy. The lease contained the standard finance lease provisions: the parties agreed that the lease was a “finance lease” governed by Article 2A; the lessor made no warranties regarding the equipment; the lessee waived all rights and remedies; and the lessor could assign the lease to an assignee who had all of the rights and benefits, but none of the obligations of the lessor. The lessee also signed an acceptance certificate.

Mountain Rentals became unhappy with the service and maintenance of the equipment. Mountain Rentals stopped making payments in Wells Fargo’s collection action against Mountain Rentals, the trial court granted summary judgment to Wells Fargo. The lessee’s arguments on appeal were similar to those asserted in the Norvergence cases – the lease was “ambiguous, unconscionable, contrary to public policy, a contract of adhesion, and not the result of a meeting of the minds between the parties.”

In rejecting the lessee’s appeal as “without merit” the Court made a detailed application of Article 2A to the lease and facts – stating that the lease was not an “ordinary lease” but instead a “finance lease” which made the lessee’s obligations “irrevocable and independent” upon acceptance of the equipment; the parties did not dispute that the equipment was “non-consumer goods”; and the equipment was accepted by the lessee.

The Court’s reasoning should be especially heartening for finance lessors in commercial transactions. After citing a number of cases discussing hell and high water provisions the court found:

The result we reach is not inequitable. A finance lease is a method to finance the acquisition of goods. Normally a lender who enables a buyer to acquire the goods is not subject to a refusal by the buyer to repay the loan if goods are not what the buyer expected. Similarly a finance lessee cannot refuse to pay a lessor an agreed upon payment. [cites omitted] . . . .The statutory scheme of finance leases benefits both parties. The lessor gains certainty and security for its extension of credit. The lessee forgoes its warranty claims against the lessor but becomes a statutory third party beneficiary of the supply contract between the manufacturer or other supplier and the lessor. Thus, the lessee has a right of action against the supplier and the manufacturer and is not without remedy. [cites omitted] The remedy is simply not a warranty remedy against the lessor. It is important to note that only commercial financial leases, not consumer leases, qualify for the imposition and protection of the “hell or high water” obligation . . . .[cites omitted]

The Court also reject the argument that that the lease was “ambiguous” finding that “[t]here is nothing unclear about the terms . . . . It is a finance lease and the [lessee’s] promise to pay is irrevocable and independent upon its acceptance . . . .” The argument that the
assignment clause providing that the lessor’s assignee obtained all of the rights but none of the obligations made the lease a “contract of adherence, unconscionable, and contrary to public policy” was also rejected. The Court stated that “[a]s a finance lease, the agreement is sanctioned by statutory authority” and “nothing about this agreement is oppressive or beyond the reasonable expectations of an ordinary person.”

The lessee’s argument that it did not understand the “effect, force, and consequence” of the lease terms was summarily rejected. The Court held that “[t]he terms of the contract were clear. A party is presumed to know the contents of a contract he or she signed and, in the absence of fraud, is then bound by that contract” and that the lessee could not “after receiving the benefit of the financing, seek to avoid the lease agreement.” Wells Fargo was awarded the attorneys’ fees and costs incurred on appeal.

An increase in litigation and credit defaults is unfortunately a product of the current economy. Since there is not a wide body of Article 2A cases it becomes even more important that the best arguments are presented in any lease enforcement action. The decision by the Tennessee Court of Appeals in Mountain Rentals provides a succinct road path for a lessor’s response to a challenge of a hell and high water provision in a non-fraud case.

_____________________________________________________

Teresa Davidson
Vice President, Legal and General Counsel
Volvo Financial Services North America
As most readers will know, the 2001 revisions to Article 1 of the UCC have been very successful as a whole, with the Uniform Law Commission website tally\(^1\) showing as of June 20, 2008, that 34 jurisdictions have enacted it. Most readers will also know that the 2001 revision to Article 1’s choice-of-law rule, found in §1-105 prior to the revision and §1-301 after the revision, has been almost wholly unsuccessful. The new rule was intended to increase the autonomy of contracting parties by allowing them to select even a choice-of-law rule of a state that bears no relation to their contract. To protect consumers against over-reaching on the part of commercial parties, the new rule contained special provisions for transactions in which one of the parties was a consumer. Only the U.S. Virgin Islands has adopted the new rule; all of the other jurisdictions adopting revised Article 1 have retained former §1-105.

Responding to this situation, and endeavoring to ensure that the Uniform Commercial Code would continue to fulfill the purpose set forth in § 1-103 (a) (3), “to make uniform the law among the various jurisdictions,” the Uniform Commercial Code’s Permanent Editorial Board\(^2\) recommended at its November 3, 2007, meeting that the official text of §1-301 be amended by returning to the language of former §1-105. Responding to this recommendation, on January 12, 2008, the Executive Committee of the Uniform Law Commission voted to accept the language set forth below, which is identical in substance to former §1-105 but does reflect a few stylistic changes:

\section*{§ 1-301. Territorial Applicability; Parties’ Power to Choose Applicable Law}

(a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.

(b) In the absence of an agreement effective under subsection

\footnote{See \url{http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucc1.asp}.}

\footnote{The website for the American Law Institute describes the Permanent Editorial Board’s responsibilities as follows:

The PEB assists in attaining and maintaining uniformity in state statutes governing commercial transactions by discouraging non-uniform amendments to the Uniform Commercial Code (UCC) by the states, and by approving and promulgating amendments to the UCC when necessary. The PEB is a joint committee of ALI and the National Conference of Commissioners on Uniform State Laws (NCCUSL).}

\url{http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=4}. Thus, it makes sense that the Permanent Editorial Board would have originated this amendment, in an effort to respond to the states’ rejection of the new choice-of-law rule.
(a), and except as provided in subsection (c), [the Uniform Commercial Code] applies to transactions bearing an appropriate relation to this state.

(c) If one of the following provisions of [the Uniform Commercial Code] specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:

1. Section 2-402;
2. Sections 2A-105 and 2A-106;
3. Section 4-102;
4. Section 4A-507;
5. Section 5-116;
6. Section 6-103;
7. Section 8-110;

As a matter of ULC procedure, since no Commissioner filed an objection to the amendment within the requisite period for doing so, the amendment can be deemed to have been accepted by the ULC as a body. Notably, this amended version of §1-301 is almost identical to the version that the ULC has for some time been preparing and circulating to legislatures as a “hip pocket” amendment.

Since the Uniform Commercial Code is a collaborative effort between the American Law Institute and the ULC, what remained was for the ALI to consider the same amendment. The Institute’s Executive Committee approved the amendment on February 27, 2008; the Institute’s Council approved it at the Council meeting on May 19, 2008; and the membership of the Institute approved it after brief discussion during the Annual Meeting on May 21, 2008.

Thus, as of May 21, 2008, both bodies charged with drafting the Uniform Commercial Code have voted to revise the Official Text of §1-301 to reflect (with minor stylistic changes) the choice-of-law rule that is now in effect in 33 of the 34 jurisdictions that have adopted Revised Article 1.

Further information regarding pre-2001 §1-105, the version of §1-301 that was part of the 2001 Official Text of the Uniform Commercial Code, and the newly approved version of §1-301 that returns to the substantive rules of prior §1-105 can be found on the American Law Institute website, at http://www.ali.org/doc/uccamendment.pdf.
HIGHLAND CAPITAL v. SCHNEIDER: THE FINAL (ALMOST) FURY

In Highland Capital Management LP v. Schneider,¹ a case that played a starring role in The Business Lawyer’s 2006 Article 8 survey,² the New York Court of Appeals held that eight promissory notes issued in connection with the purchase of a business were securities. As a result, an alleged oral contract to sell the notes was not subject to the statute of frauds.³ The case was remanded to the US District Court for the Southern District of New York.

At this point, interest in the case for Article 8 connoisseurs would be thought to end. However, just as in a novel or movie there is often a coda explaining just what happened to its (fictional) characters, I thought followers of the story might be interested in hearing what has happened to their old friends.

To recapitulate: The Schneiders received eight notes with a total face value of $69 million as part payment for their business. They engaged Glen Rauch Securities to price the notes. Rauch entered into an agreement with RBC Capital Markets to act as a broker to market the notes to third parties. RBC would act as a “riskless principal” — that is, RBC would purchase the notes from the Schneiders (through Rauch), and immediately flip the notes to one or more third-party purchasers for a slightly higher price. Highland was one of the third-party purchasers RBC found. Highland and RBC alleged that Rauch orally agreed on behalf of the Schneiders to sell $45.4 million of the notes to RBC for 51 cents on the dollar (with RBC flipping the notes to Highland for 52.5 cents), but then reneged on learning that the notes would likely be redeemed at par.

In 2005, the District Court had held that as a riskless principal, RBC was not acting as an agent for the Schneiders, and that therefore there was no contractual privity between the Schneiders and Highland.⁴ Accordingly, Highland could only maintain a breach of contract action against the Schneiders as an intended third-party beneficiary of the Schneiders’ alleged oral contract with RBC.

On remand, the Schneiders moved for summary judgment to have all of Highland’s claims dismissed. The District Court held (correctly, in my view) that the recharacterization of the notes as Article 8 securities did not change the contractual issue: RBC was still a riskless principal, not an agent, and therefore did not have authority to bind the Schneiders to a contract with Highland. All that was left for the jury

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¹ 866 N.E.2d 1020 (N.Y. 2007).
³ U.C.C. § 8-113.
to decide was whether the Schneiders breached an oral contract to sell the notes to RBC, with Highland acting as an intended third-party beneficiary.\(^5\)

Despite their loss in the New York Court of Appeals (in a decision that was much criticized in the aforementioned *Business Lawyer* review), it appeared that the Schneiders were poised for success in the jury trial: In normal parlance, for Highland to be an intended beneficiary of the Schneiders' alleged oral agreement with RBC, the Schneiders would have had to intend that Highland benefit. I find it hard to believe that such was the case; if at the last minute Lowland Capital had been substituted for Highland as a purchaser, does anyone think the Schneiders would have shed a tear for their pals at Highland? (In fact, RBC did not reveal Highland's identity until after the alleged oral contract to sell the notes.)

But I'm not an expert in contract law, and third-party beneficiary theory seems more than a little mushy. So perhaps it should not surprise that on March 10, 2008 a jury brought in a verdict of $36 million for Highland ($13.6 million of which was interest), and tacked on $28.4 million more for RBC. All this in a breach of contract case for which Highland's and RBC's combined benefit-of-the-bargain would not seem to have exceeded $23 million (plus interest).

The Schneiders have filed motions for judgment as a matter of law and, alternatively, for a new trial. Expect more fireworks.

Howard Darmstadter  
Co-chairman  
Investment Securities Subcommittee

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News of the Subcommittee’s activities is set forth at the end of this article. The main focus of the article is on two recent cases dealing with certain practical issues of which letter of credit practitioners and their clients need to be constantly mindful.

1. Perennial Issues. (a) In *Uniloy Milacron Inc. v. PNC Bank, N.A., et al.*, 2008 U.S. Dist. LEXIS 33063, (W.D. Ky. 2008) the applicant requested the issuer PNC Bank to issue a standby letter of credit to the beneficiary to support the applicant’s obligations under an agreement to purchase bottling machines from the beneficiary/manufacturer. Under the letter of credit, the beneficiary was required to present three items: (1) a dated signed certification stating that beneficiary had not received payment within 60 days of the shipment of specified equipment with “Serial Number N01A010088” and another machine with “Serial Number N01A0100089”; (2) copies of the unpaid invoices for the equipment and (3) copies of the bills of lading for the equipment. The equipment was shipped, the applicant failed to pay the remaining purchase price and the beneficiary drew under the letter of credit. The certificate presented was undated and referred to the Serial Number on one invoice as N01A0100088. The issuer dishonored on the basis of three alleged discrepancies: (a) the certification by the beneficiary was not dated; (b) the Serial Number shown on one invoice did not match the serial number in the letter of credit; and (c) the description of the merchandise on the bills of lading did not match the description of the merchandise on the letter of credit, again because of discrepancies in the serial number.

The court found that even if Kentucky were to adopt a “strict compliance” standard under the UCP, the beneficiary’s presentation satisfied such a standard. After detailed discussion the court concluded that there was no possibility that the issuer would have been “misled” by the discrepancies between the presented documents and the letter of credit and that the lack of a date on the certificate was not of material importance given the totality of facts. The discrepancy in serial numbers, in the court’s view, was an obvious typographical error.

The lessons to be learned from the *Uniloy* case are several. From the beneficiary’s point of view, be wary of requirements in a letter of credit which require serial numbers and other detailed information; such data lend themselves to typographical errors and other mishaps. If the beneficiary is in fact stuck with such requirements, particular care should be taken in drafting the presentation documents. Also in this case there was no time to correct the documents after rejection because the beneficiary sent the documents by air courier on Friday, July 28 and they were not received by the issuer until Monday, July 31, the expiry date of the letter of credit. The notice of discrepancies was not sent until very late in the day on July 31. An earlier presentation would have permitted the beneficiary time to correct the alleged deficiencies and avoid the uncertainty and expense of a lawsuit.

(b) In *Sewchez International Limited v. The CIT Group/Commercial Services, Inc., and JPMorgan Chase Bank, N.A.*, No. 2:07-cv-01211-SVW-JWJ (C.D. Cal. September 21, 2007) the beneficiary was a Taiwanese manufacturer of swimwear. It had a
longstanding relationship with the applicant, a U.S. buyer. When the applicant fell seriously in arrears on payment, the beneficiary required that all future shipments would be paid by letter of credit. Unfortunately, over the course of time, certain patterns developed in the procedures for shipping goods. First, beneficiary shipped goods before actual receipt of the letters of credit. Second, the letters of credit required that presentation be made within 21 days of shipment. Because the beneficiary had often shipped the goods many days before the letters of credit were issued, some of the presentations were made beyond the 21-day period. Third, presentations under the letters of credit were routinely discrepant but the discrepancies were waived by the applicant (which waiver was initially concurred in by the issuer and by the applicant’s lender CIT (CIT was the formal applicant on the letters of credit for the benefit of the buyer, but for ease of reference we will refer to the buyer as the applicant). When the applicant ran into financial troubles, CIT refused to grant any more waivers of discrepancies. The discrepancies were severelfold: many presentations were made more than 21 days after shipment and were rejected for that reason, a number of other purchase orders were rejected for typical reasons such as failure to be signed by a named agent for a named carrier, a missing certificate of origin, discrepancies as to how freight was paid, etc. Finally, there were four purchase orders which by themselves were not discrepant but which were submitted with one other purchase order which were presented late. The issuer took the position that those five purchase orders were part of one presentation and because of the discrepancies in one of the purchase orders the issuer was entitled to reject the entire presentation.

After not receiving payment under the letter of credit, the beneficiary sued both CIT and the issuer under various causes of action: (1) intentional fraud and deceit, (2) fraudulent concealment, (3) wrongful dishonor of letters of credit, (4) breach of the covenant of good faith, and (5) conversion. Many of the causes of action were premised on the fact that, despite repeated discrepancies in the past, CIT and the issuer had concurred in the applicant’s waiver of discrepancies and there was an “implied contract” that they would continue to do so. This argument was correctly rejected on the basis of numerous authorities that beneficiary can not rely on past waivers of discrepancies by an issuer to conclude that future discrepancies will be waived. See e.g., UCC Section 5108, Comment 7. The court does an excellent job in dismissing beneficiary’s various causes of action in a well reasoned decision supported by substantial authority.

One point that is of particular interest in the case is the question of what constitutes a single presentation. In this case one package of documents consisted of a single draft that was accompanied by five different purchase orders, four of which were not discrepant and one of which was discrepant. The issuer considered the package of documents to be a single presentation, which it either had to honor or dishonor as a whole. The issuer argued that the five purchase orders should be considered a single presentation because they were submitted all together with one draft requesting payment and that a draft was a required document under the letters of credit. The issuer contended that it was standard international banking practice to treat purchase orders presented with a single draft as a single presentation. The court upheld this argument and rejected the expert testimony of a well-known professor who was an acknowledged expert as to law but not as to international banking practice.
As in *Uniloy*, the beneficiary in *Sewchez* ignored some basic precautions. The goods should not be shipped until the letter of credit is in hand. A beneficiary should not rely on past waivers of discrepancy in expectation that future discrepancies will be waived. If the letter of credit permits multiple presentations, there is an advantage to making multiple presentations so that a discrepancy on one does not taint the others.

2. Report on Dallas Meeting. The main topics discussed at the Subcommittee’s meeting at the Spring Meeting in Dallas were:

   (a) United Nations Convention on Independent Guarantees and Standby Letters of Credit. The Uniform Law Conference and the American Law Institute, together with several Canadian and Mexican organizations, have appointed a Committee for the implementation of the UNCITRAL Convention on Independent Guarantees and Standby Letters of Credit (the "Implementation Committee"). One of the goals of the Implementation Committee is to prepare a Commentary concerning the Convention for submission to the United States Senate in connection with any ratification of the Convention by the Senate. Jim Barnes gave a status report on the activities of the Implementation Committee.

   (b) Governmentally Mandated Forms of Letter of Credit. The International Financial Services Association ("IFSA") has appointed a committee to deal with the insurance industry in addressing some of the issues involved with insurance industry letters of credit. A representative of IFSA was at our meeting in Dallas to describe the goals of the IFSA committee.

   Those goals track that of our Subcommittee’s Task Force on Governmentally Mandated Letters of Credit, that is working with governmental agencies to craft better forms of letters of credit which may be mandated by statute or regulations.

3. Plans for New York. The Subcommittee will meet during the ABA Annual Meeting in New York from 1:30 p.m. to 2:30 p.m. on Sunday, August 10 at the Grand Hyatt Hotel near Grand Central Station. We intend to continue the discussion in Dallas on the UNCITRAL Convention, the activities of the IFSA Committee, the proposed revisions to the Official Commentary via pre 98 and recent cases.
At the spring meeting in Dallas in April, the Payments Subcommittee of the UCC Committee met jointly with the Deposit Products and Payment Systems Subcommittee of the Consumer Financial Services Committee to discuss NACHA’s proposed deposited check truncation (DCT) pilot. As proposed, DCT would permit certain low-value checks, consumer checks for $25 or less, to be truncated and collected through the automated clearing house (ACH) network. Paying banks could request copies of checks presented to them on an exception basis. Unlike ACH applications such as Point of Purchase (POP), Accounts Receivable Conversion (ARC), and Back Office Conversion (BOC), which use checks as source documents to create ACH entries, checks truncated in the DCT pilot would be collected as checks and principally governed by traditional check law.

Oliver I. Ireland, chair of the Deposit Products and Payment Systems Subcommittee, began the presentation with a surprise announcement: NACHA has decided not to proceed with the DCT pilot, at least for the time being. Bank interest in the project seems to have waned as check image clearing has become more widespread. In addition, at least one potential pilot participant insisted on having the ability to obtain copies of check images on demand, a feature incompatible with the proposed architecture of DCT. Nevertheless, Ollie pointed to a recent Federal Reserve study on check payments (http://www.frbservices.org/files/communications/pdf/research/2007_check_sample_study.pdf) as evidence that many low-dollar checks would be suitable for DCT.

Ollie’s co-panelists, Gail Hillebrand and Fred Miller, offered thoughtful critiques of the concept of collecting checks through the ACH network. Gail argued that consumers might be better off with the protections afforded by Regulation E than with the hybrid approach suggested for DCT—having check law govern generally but with certain warranties imported from the ACH rules (e.g., the collecting bank, as ODFI for the ACH entry sent to collect the check, would warrant that the signatures on the check are authentic). For his part, Fred questioned whether the interplay among the ACH rules, check law, and the bilateral or multilateral agreements needed to implement DCT would render the system hopelessly confusing and opaque. He added his voice to those who have suggested that a comprehensive rewriting of payments law might be in order.
Bank Non-Liability for Improper Payment of Checks Bearing Forged Indorsements Drawn Against Trust Accounts: The New Shell Game
Sarah Howard Jenkins

Several recent cases involve suits against payor banks asserting the bank’s liability pursuant to UCC Article 4 for fraud loss from trust accounts. This contextual setting illustrates a quirk in existing yet questionable precedent and should cause sleepless nights for all trust account holders including lawyers. *Saturn & Mazer Title Services, Inc. v. AmSouth Bank*, 64 UCC Rep.Serv.2d 879, 2008 WL 151982 (Tenn. Ct. App. 2008) is the most recent example. Saturn & Mazer, a real estate title service company that conducted real estate closings, was an agent of Ticor Title Insurance Company of Florida and issued title insurance for buyers and their lenders on behalf of Ticor. Saturn & Mazer held an escrow account at AmSouth Bank. The escrow account was the temporary repository for funds received at real estate closings for payment to others such as mortgage companies. One of Saturn & Mazer’s closing attorneys misappropriated funds by forging the signatures of the intended payees on checks drawn on the escrow account and depositing the checks into accounts controlled by her. The payees of the stolen checks did not receive payment and the deeds of trust were not released. After Saturn & Mazer discovered the misappropriations, it paid the monthly mortgage installments due on these mortgages to prevent foreclosure while Ticor resolved the claims for the misappropriated funds.

Saturn & Mazer recovered $190,000 of the misappropriated $331,744 by foreclosing on the attorney’s home after she defaulted on a note issued by her in repayment of the theft. Thereafter, Saturn & Mazer sued AmSouth Bank alleging that the payment of the checks bearing forged indorsements was an improper payment pursuant to Tenn. Code Ann. §47-4-401 and sought to recover the face amount of the checks minus its recovery from the attorney plus the monthly installment mortgage payments. The trial court granted Saturn & Mazer summary judgment on two checks and the monthly mortgage payments and granted AmSouth summary judgment on two other checks because recovery was barred by the statute of limitations. On appeal, the Tennessee Court of Appeals reversed the recovery of the amount of the checks and affirmed the recovery of the monthly mortgage payments holding that Saturn & Mazer, the escrowee, had suffered no actual loss of the funds held in the escrow account. Those funds belonged to others who had been compensated. Only Ticor, a non-customer, bore the actual loss of funds.

This result is remarkable, violating the remedial scheme of the Articles 3 and 4 and one of the public policy goals of Articles 3 and 4 of allocating fraud loss to the party in the best position to minimize or to avoid the loss or to the one who dealt with the forger. The remedial scheme of Articles 3 and 4 ultimately places the loss on either Saturn & Mazer pursuant to UCC § 3-405, if the closing attorney as an independent contractor had “responsibility” beyond mere access to instruments for transporting them to and from the closings, or on the depositary bank utilized by the attorney because the depositary bank breached its presentment warranties to AmSouth.

The impact of the holding in *Saturn & Mazer* only becomes patent when other recent authority is considered. This recent authority makes it clear that banks do not owe duties to

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1 Isaac v. American Heritage Bank & Trust Co., 675 P.2d 742 (Colo. 1984), is cited as authority for limiting recovery by a customer to actual loss incurred by the bank’s payment of an item that is not properly payable.
2 U.C.C. §3-405 defines employee as including “an independent contractor . . . .”
strangers, non-customers such as escrow account beneficiaries. See Rodriguez v. Bank of the West, 162 Cal.App.4th 454, 75 Cal.Rptr.3d 543 (2008). In Rodriguez, Bank of the West permitted an attorney’s office manager, who presented only her personal driver’s license, to open a trust account in the attorney’s name, with a signature card bearing the attorney’s forged signature. The office manager placed money, apparently cash, received from clients in the account and later withdrew the funds. The bank conceded that it violated its internal policies by failing to require indicia of authority to open the account but argued successfully that it owed no duty to the attorney who was not its customer. Likewise in the unpublished opinion in Collins v. National City Bank, 2003 Ohio 6893, 2003 Ohio App. LEXIS 2003, National City was sued by a beneficiary who suffered the loss of funds when funds held in an escrow account were siphoned off after the payment by National City of checks issued on the escrow account. National City had granted a provisional credit on a sizeable forged check deposited into the account and issued checks against the provisional credit at the customer’s request. When National City discovered the forgery, the checks drawn against the escrow account had cleared. The account beneficiary asserted conversion and negligence among other claims. The trial court held that the bank’s payment of checks drawn by the customer was not wrongful and dismissed the conversion claim. On the negligence claim, the trial court held that National City owed no duty to the beneficiary of the account only to its customer. Although factually distinguishable from Saturn & Mazer, Rodriguez and Collins illustrate the blight of account beneficiaries and other strangers under the law.

If the customer is unable to recover payments that were not properly payable from the customer’s account because the funds are held for the beneficiaries of the trust accounts and the beneficiaries are unable to recover as strangers to the payor banks, who is the proper party plaintiff? In Saturn & Mazer, if delivery of the checks to the attorney constituted a constructive delivery to the payees, the payee/mortgagees would have an action in conversion against the payor bank. A payee who has taken an instrument is a proper plaintiff under section 3-420. Limiting recovery to payees may be cost prohibitive. If multiple payees in various locations are required to litigate, the cost of recovery increases or if the payees have been made whole as in Saturn & Mazer and are unwilling to litigate, recovery will be unavailable. But, more importantly, a payee’s right to sue in conversion has limited effectiveness as a solution to the problem. Items bearing forged indorsements are only one type of instrument that is not properly payable. Instruments bearing a forged drawer or maker signature, fraudulently altered instruments, and post dated items are also bases for a demand by the customer. An insurer, such as Ticor in Saturn & Mazer, or the beneficiary who bears the actual loss has, under the foregoing authority, no right to demand payment from the payor bank. The customer whose account has been improperly charged, contrary to its agreement with the payor bank, has no right of redress for the harm to its reasonable expectations.
Task Force on State Certificate of Title Laws  
Alvin C. Harrell, Chair, Lee Anne Leathers-Lutz, Vice Chair

Culminating an effort that began with the creation of an American Bar Association UCC Committee Task Force on State Certificate of Title Laws in the early 1990s, and continued with the participation of the Task Force in the UCC Article 9 revision process through-out that decade, the Section of Business law is preparing to publish the final edition of the Task Force *Compendium of State Certificate of Title Laws*.

The initial purpose of the Task Force was to work with the Article 9 Drafting Committee in an effort to resolve unnecessary points of ambiguity and conflict between Article 9 and state certificate of title (CT) laws, which have led to misunderstandings and misstatements of the law. Revised Article 9 greatly improved the situation, but could not address the deficiencies in state CT laws. The Task Force then turned its attention to participation in the development of UCOTA (the Uniform Certificate of Title Act), designed to offer the states an attractive, modern alternative to often archaic, existing CT laws.

UCOTA resolves most of the remaining problem areas, in a structure that is consistent with current CT office practices and procedures. However, current CT laws vary greatly and contain many types of provisions (e.g., relating to registration, fees, and taxes) not covered by UCOTA. Moreover, the relation between a state’s CT law and the UCC is not always well understood, even among those who regularly work with these laws.

The *Compendium* addresses these remaining issues, first by describing each state’s CT law and its relation to UCC Article 9, in a twenty-two part analysis that highlights the salient points of interest and intersection between these laws. This analysis attempts to explain the content and meaning of the sometimes ambiguous or inaccurate statutory language in state CT laws, and its relation to the UCC. Then, for selected states, the *Compendium* provides a UCOTA Enactment Guide, describing how UCOTA would affect (and could be integrated into) the state’s current CT law. These Enactment Guides will be relevant to parties in all states.

Developed over a period of fifteen years, the *Compendium* is a unique and unprecedented resource that describes, in some detail and with a practical orientation, the sometimes mysterious world of CT laws. The *Compendium* also describes the often misunderstood relation between a state’s CT law and UCC Article 9. It will be a valuable addition to the library of any creditor, consumer, dealer, or lawyer who deals with transactions relating to goods covered by a certificate of title. Publication is expected later this year.
**UNIFORM STATE LAWS SCORECARD**

Survey of Adoptions of Revised Official Text of the UCC<sup>1</sup>

*As of May 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 May 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 is the only state that still has the 1951 version of Articles 3 and 4.
COMMERCIAL FINANCE COMMITTEE

Section of Business Law
American Bar Association

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AUGUST 2008
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ABA BUSINESS LAW SECTION
UCC COMMITTEE

LEADERSHIP

August, 2008
# UCC COMMITTEE LEADERSHIP

[All terms expire at the end of the ABA Annual Meeting in the year indicated]

<table>
<thead>
<tr>
<th>Group</th>
<th>Chair(s) &amp; Vice-Chair(s)</th>
<th>Term Expires</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uniform Commercial Code Committee</td>
<td>Stephen L. Sepinuck (c) Penelope Christophorou (vc) Mario J. Ippolito (vc)</td>
<td>2009 2009 2009</td>
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<tr>
<td>General Provisions &amp; Relations to Other Law</td>
<td>Kristen Adams (c)</td>
<td>2009</td>
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<tr>
<td>International Commercial Law</td>
<td>Kate Sawyer (vc)</td>
<td>2011</td>
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<tr>
<td>Investment Securities</td>
<td>Meredith S. Jackson (co-c) Howard Darmstadter (co-c) Brad Gibson (vc)</td>
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<tr>
<td>Leasing</td>
<td>Teresa Davidson (c) Rutherford C. Hammett (vc)</td>
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<td>Letters of Credit</td>
<td>George A. Hisert (c)</td>
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<td>David K. Daggett (co-c) Candace Zierdt (co-c)</td>
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<td>Secured Transactions</td>
<td>Pauline Stevens (c) Thomas E. Plank (vc)</td>
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<td>Article 7</td>
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<td>2011</td>
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<td>Annual Survey</td>
<td>Russell A. Hakes Robyn Meadows Stephen L. Sepinuck</td>
<td>n/a</td>
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<td>Commercial Law Newsletter</td>
<td>Carol Nulty</td>
<td>2011</td>
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<td>Keith A. Rowley</td>
<td>2011</td>
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<td>Article 9 Forms</td>
<td>Cindy J. Chernuchin</td>
<td>2010</td>
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<tr>
<td>Filing Office Operations &amp; Search Logic</td>
<td>Paul Hodnefield (c-UCC) Jim Prendergast (c-ComFin)</td>
<td>2011 2011</td>
</tr>
<tr>
<td>Liaisons</td>
<td>Group</td>
<td>Chair(s) &amp; Vice-Chair(s)</td>
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<tr>
<td></td>
<td>Consumer Fellows</td>
<td>Gail Hillebrand</td>
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<td></td>
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<td>Yvonne Rosmarin</td>
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<tr>
<td></td>
<td></td>
<td>Alan White</td>
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<tr>
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<td>Diversity Committee</td>
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<td>Pro Bono Committee</td>
<td>Michael Ferry</td>
</tr>
<tr>
<td></td>
<td>Publications Board</td>
<td>Carl Bjerre</td>
</tr>
</tbody>
</table>

| Regional Coordinators | Northeast Region |                     |              |
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|                       | Midwest Region   | Darrell W. Pierce      | 2010         |
|                       | South Central Region | Ruthanne C. Hammett | 2010         |
|                       | West Region      | John A. Beckstead       | 2010         |