Welcome to the third Young Lawyer Forum (“YLF”) newsletter of 2005. It is exciting to see the YLF mature into an active, meaningful and substantive entity of the ABA Section of Business Law (the “Section”). I vividly recall in the Fall of 2003 when Barbara Mayden called to discuss the concept of the YLF. In just over two years, the concept has grown from idea to a vibrant committee that is providing significant benefit to the young lawyers in the Section.

An important step in this progression has been the solidification of the leadership structure for the YLF. The YLF is organized with two Co-Chairs and one Vice-Chair. The concept is for the Vice-Chair to progress into one of the Co-Chair positions. I am currently serving as Co-Chair with Michelle Gallardo. David Gemunder is the YLF Vice-Chair. Following the ABA Annual Meeting in 2006, Michelle and David will lead the YLF as Co-Chairs with Kendall Butterworth moving into the Vice-Chair position. The YLF continues to discuss leadership succession to ensure that active members of the YLF can progress to leadership.

The YLF is structured around five existing Subcommittees. These Subcommittees and their leaders are as follows:

- **Programming/Institute for the New Business Lawyer**
  - Heather Jefferson/Sherwin Simmons
- **Social**
  - Steve Mayer/Richtik Sarkar
- **Pro Bono/Public Service**
  - Kendall Butterworth
- **Newsletter**
  - Andrea Hartley
- **Membership**
  - Olekanma Ekeke

Our Subcommittee Chairs are providing excellent leadership, vision and commitment to the YLF. Feel free to contact them and engage in the active work of these YLF Subcommittees. We have also organized an Executive Council composed of the Section’s Fellows and other members of the YLF who have shown active interest in participating. All members are welcome to join the Executive Council and attend our leadership conference calls and meetings throughout the year.

As we have expressed on numerous occasions, the YLF is our Committee to organize and structure as we determine best provides value to young lawyers in the Section. We have provided substance through newsletters, programming, social and pro bono activities. It seems that once or twice each week Michelle and I are contacted by someone who wants to get actively involved in YLF. We are trying to move people interested in the YLF’s activities into our Subcommittees under the above leadership structure. In addition, the overarching goal of the YLF is to move young lawyers into active participation in the Section’s substantive law Committees. As a result, one idea that I would like to implement is to have the YLF Vice-Chair focus on assimilation efforts to help young lawyers engage in the Section’s active work.

As you can see there is a lot going on with the YLF and a lot yet to do to bring it to full fruition. However, at this point of its life stage, the YLF is thriving. We welcome you to join in these activities and continue
building the YLF. Please enjoy this newsletter and let us know if there is anything we can do to help you get more actively involved in the Section. Please contact me (lupinacci@bakerdonelson.com) or Michelle Gallardo (mgallardo@ford.com) or any of our Subcommittee Chairs with any questions or comments.

Timothy M. Lupinacci  
Chair, Young Lawyer Forum  
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.  
Birmingham, Alabama

Featured Articles


On October 17, 2005, America's bankruptcy laws drastically changed. The changes are the result of the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act") which overhauls the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code"). Although some of the changes became effective upon April 20, 2005, when President Bush signed the Act into law, most of the changes apply to bankruptcy cases and proceedings filed after October 17, 2005.

It is true that most of the changes substantially alter the consumer area of bankruptcy practice. The Act, however, modifies the statutory provisions affecting business bankruptcies as well. Commercial landlords and lenders, trade vendors and other creditors will encounter new issues as a result of the changes. The following is a summary of the most significant changes in regard to reclamation claims, preferences and avoidance actions, the automatic stay, leases of commercial real estate and healthcare.

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Emerging Section Leaders: Jolene A. Yee  
Timothy M. Lupinacci

One of the goals of the Young Lawyer Forum ("YLF") is to provide opportunities for young lawyers to grow into leadership positions in the Section of Business Law (the "Section"). In an effort to promote the Section’s pathways to leadership, the YLF will highlight young leaders who have risen to leadership positions within the Section. This quarter we highlight Jolene A. Yee, Assistant General Counsel for E. & J. Gallo Winery ("Gallo") in Modesto, California.

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Subcommittee Updates

Subcommittee on Programming

The Young Lawyer Forum Programming Committee has a number of upcoming programs scheduled during the ABA Section of Business Law Spring Meeting in Tampa, Florida. The programming includes:
The 3rd Annual Institute for the Young Business Lawyer

Thursday, April 6, 2006
8:15 am – 4:00 pm
Presented by the Section of Business Law
All day programming featuring substantive CLE topics from banking law to M&A law geared for the young lawyer. The afternoon session provides professionalism and ethics CLE. The program is followed by networking opportunities to meet other young lawyers and leaders of the Business Law Section. For more information please visit www.abanet.org/buslaw/ybl.

Friday, April 7, 2006
3:00 pm – 5:00 pm
Presented by the Women's Business Law Network
View from the Bench and Jury Box – a Female Perspective
A reception celebrating women judiciary will immediately follow the program.

Saturday, April 8, 2006
10:00 am – 12 noon
Presented by the Young Lawyer Forum
Hot Topics in Business Law for Young Lawyers – An overview from the Transactional, Litigation and Ethical Perspectives
Hear from the young lawyers who are addressing the latest cutting edge issues in business law. This program will have something for everyone, regardless of practice area or years in practice!

Committee Reports

Committee on Consumer Financial Services

Introduction to Consumer Financial Services Committee - The Committee on Consumer Financial Services includes lawyers whose practices are primarily or partly concentrated in consumer financial services regulation. Most members represent financial services providers, although some represent consumers or their interests, whether in private practice or as public service lawyers, and others are government attorneys or law professors. The Committee focuses on new developments in consumer financial services law in such areas as truth in lending and consumer disclosure; financial privacy, credit reporting, information security, and identity theft; federal preemption of state and local laws; electronic delivery of consumer financial services (e.g., via stored value cards or the internet); credit discrimination and access to such services; consumer financial services litigation and arbitration; residential real estate secured lending (e.g., real estate settlement procedures); personal property (e.g., motor vehicle) secured financing and leasing; and debt collection and consumer bankruptcy. The Committee has a friendly, open atmosphere and encourages active participation by all members, new or existing.

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Committee on Cyberspace

Michael Fleming

The practice of law may be full of hide-bound tradition, but that is no excuse for those who want to find ways to coordinate their legal talents and practices with their own love of technology and electronic commerce. “Cyberlaw” is one term to describe an evolving type of practice that is involved with front-page issues such as internet governance, consumer data security and the policy debates over intellectual property laws. The Business Law Section’s Committee on Cyberspace Law is the ABA’s home for Cyberlawyers. Our placement in the Business Law Section is intentional. Cyberlaw practitioners do...
not identify primarily as technologists and do not fall into traditional categories of intellectual property law – we are business lawyers, transactional and litigation, who deal with technology and its implications as a matter of business. Our Committee cordially invites YLF members to consider joining with us in these endeavors.

The Committee on Cyberspace Law provides a forum for analysis of corporate, transactional and regulatory issues related to the Internet and digital technologies. The Committee works over a wide range of legal disciplines including electronic commerce, communications, contracts, consumer protection, intellectual property, cybersecurity and privacy, jurisdiction, internet governance, electronic assets and online financial activities. The Committee seeks to identify and address legal, business and consumer issues affected by the implementation of emerging technologies and to facilitate the creation of legal infrastructures that protect and support electronic commerce. The Committee provides practical tools and guidance for both practitioners who regularly deal with Cyberlaw issues and for those who encounter them only occasionally.

Our members represent many types of lawyers, with no one constituency overwhelming the others. We have private practitioners, big firms and small to solos. We have government attorneys, academics, new lawyers and retirees. We have those who are clearly in the ‘strong IP law’ camp, and those who take opposing positions. We have lawyers regularly participating from the U.S., Canada, Europe and the Pacific Rim. What we all share is an interest in how technology gets used, licensed, purchased, regulated and viewed as part of today’s legal systems, as well as a belief that lawyers have an important part in how the world wrestles with the issues that come out of the technology.

More...

Committee on Partnerships and Unincorporated Business Organizations

The Partnerships and Unincorporated Business Organizations committee, otherwise known as the "PUBO" committee, gathered in Washington, DC for its Fall meeting. The PUBO committee is working on a number of drafting projects that may be of interest to young lawyers. These drafting projects give young lawyers the ability to participate in a model agreement that will ultimately be published by the ABA Section of Business Law. The young lawyer will not only get credit for participating in authoring the agreement, but will also gain advice and insight from experienced practitioners as to how these agreements are used in the day-to-day practice.

The drafting projects include:
- Model Limited Liability Company Act
- Model Multi-Member Real Estate LLC Agreement
- Model Single Member LLC Operating Agreement
- Model Venture Capital LLC Operating Agreement
- Model Due Diligence Checklist
- Model LLC Interest Redemption Agreement

The PUBO committee has a number of subcommittees that are open to new members, including subcommittees on LLCs, Limited Partnerships, General Partnerships and Business Trusts.

Finally, please join the PUBO committee as it presents "The Alphabet Soup of the Unincorporated Business Organizations – The ABCs of LPs, LLCs, LLPs, LLCs and LLCs" during the 3rd Annual Institute for the Young Business Lawyer, Tampa, Florida. The program is part of an all-day program for young lawyers. The PUBO program is scheduled for Thursday, April 1, 2006, 11:30 am – 1:00 pm.

If you are interested in getting involved with any of the following drafting projects or learning more about the subcommittees, please contact Heather Jefferson at hjefferson@delaurencounselgroup.com
or Sherwin Simmons at ssimmons@shtaxlaw.com. Heather and Sherwin are young lawyers who are active in the PUBO committee and each is currently serving as an appointed Fellow of the Section.

Committee on Pro Bono

The Pro Bono Committee, the Business and Corporate Litigation Committee's Subcommittee on Pro Bono and Public Service and the Young Lawyer Forum again will co-sponsor a public service project during the Section's 2006 Spring Meeting in Tampa, Florida. The goal of this year's project is to focus attention on the damaging effects of domestic violence by providing volunteers the opportunity to entertain and interact with displaced parents and children at The Spring of Tampa Bay, a local domestic violence shelter.

The Spring of Tampa Bay is a nonprofit organization that has been working for over 25 years to improve the lives of families affected by domestic violence, both through community education and outreach as well as through shelter services offering family members the chance for a better future. At any given time, children occupy approximately two-thirds of the available beds at the shelter. Section members attending the 2006 Spring Meeting in Tampa will have the opportunity to volunteer at a field-day-style event organized for children temporarily living at the shelter, including serving lunch, coordinating games and outdoor activities, and handing out prizes. The event is sure to be as exciting and uplifting for Section volunteers as it is for The Spring's clients. Transportation will be provided from the hotels where the Section's meetings will be held. The event is currently scheduled for Saturday, April 8, 2006 from 12:00 p.m. to 2:00 p.m. Please plan to attend this fun and worthwhile event. For more details or to volunteer in advance, please email Mac McCoy at mmccoy@carltonfields.com.

Committee on Small Business

Larry Goldman

Committee Mission Statement

The objective of the Committee on Small Business is to guide US and international corporate and transactional lawyers who counsel clients ranging from closely-held entities to smaller public companies on the myriad of business “life cycle” issues they confront in their practices. These life cycle issues include (i) entity organization and owner agreements; (ii) capital formation, financing and strategic partnering; (iii) employment and compensation matters; (iv) intellectual property protection; (v) corporate governance; (vi) securities law compliance; and (vii) business combinations, restructurings, and breakups. The Committee maintains three substantive Subcommittees focusing on Closely Held Business Entities, Emerging Companies and Securities Regulation. The Committee has long been an advocate before the Securities and Exchange Commission, the Internal Revenue Service and other regulatory agencies of reforms to address the special problems in capital formation confronted by small businesses, including smaller public companies. The annual Government-Business Forum on Small Business Capital Formation, sponsored by the SEC, is one result of past Committee initiatives and was a leading force in the SEC’s adoption of Regulation D. A present Committee initiative, through the Private Placement Broker Dealer Task Force, advocates a simplified registration system for “finders” of financing for early stage companies.

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Committee on State Regulation of Securities

http://apps.americanbar.org/buslaw/committees/CL983500pub/newsletter/200512/home.html
The ABA Committee on State Regulation of Securities would welcome members of the Young Lawyers Forum to join our Committee and encourage them to become active participants.

The Committee, as a whole and through its individual members, monitors and comments on changes in state regulatory policy, both uniform policies proposed by the North American Securities Administrators Association (NASAA) and individual state policies. Through our periodic meetings, reports from state liaisons contained in our meeting books, newsletters and listserv postings, we disseminate timely information to Committee members on changes in state securities laws, Canadian provincial securities laws and federal securities laws that impact state law, and on developments in civil, criminal and administrative enforcement proceedings under state securities laws. We also work with other Business Law Section Committees as necessary to respond to and comment on SEC initiatives and proposals that impact state securities regulation. We are working now with several other Business Law Section Committees to cosponsor timely programs for the next Spring and Annual Meetings of the ABA Business Law Section.

The Committee provides lawyers with a great opportunity to meet Blue Sky lawyers from Maine to the Virgin Islands, from New York to California, and is a helpful resource for Blue Sky law and “lore.” We meet three times a year. The next meetings are scheduled to be held on April 8, 2006 in conjunction with the Spring ABA Business Law Section Meeting in Tampa, Florida, at the Annual ABA Meeting in Honolulu, Hawaii, August 3-9, 2006, and, our best attended meeting in conjunction with the Annual Meeting of the NASAA attended also by many of the state securities administrators we deal with in our law practice, in San Diego, California September 17-20, 2006.

If you have expertise or interest in any particular aspect of Blue Sky law (be it regulatory compliance or enforcement), we would urge you to join our Committee and one or more of our subcommittees. If you have ideas to invigorate our work, information that you would like to share with our members, or issues or questions that you feel the Committee might address, we would be delighted to know about it. We invite you to write a short article for our newsletter, The Blue Sky Bugle. If you have friends or colleagues whose work involves blue sky law (including litigators concerned with enforcement activities), urge them to join the Committee to share our knowledge and contribute their own. Any member of the ABA Business Law Section can easily join for no additional cost on line from www.abanet.org/buslaw.

Quick Links

Institute for the Young Business Lawyer

The Section of Business Law is proud to present the third-annual Institute for the Young Business Lawyer in Tampa! This all-day institute will provide a setting in which the young business lawyer can obtain quality, introductory CLE at an affordable price, as well as be introduced to the many benefits of participating in the ABA and the Section of Business Law. The Institute for the Young Business Lawyer will take place at the Tampa Marriott Waterside Hotel on Thursday, April 6, 2006.

The following programs will be presented:

- Nuts and Bolts of Mergers and Acquisitions.
- Understanding and Documenting Commercial Loans—A Beginner’s Guide.
- The Five Hottest Topics in Employment Law—What Every Young Lawyer Should Know.
The Alphabet Soup of the Unincorporated Business Organizations—The ABCs of LPs, LLPs, LLLPs, and LLCs.
Ethical Issues Facing the Young Business Lawyer.
Almost Everything you Want to Know About the Business Provisions Under the New Bankruptcy Act.

http://www.abanet.org/buslaw/ybl/nosearch/

Section of Business Law 2005 Spring Meeting

With the beautiful coastal city of Tampa as its host, the Section's Spring Meeting will be held this year from April 6 through April 9, 2006. The Section will present 60+ CLE programs and 200 committee and subcommittee meetings over four days making the Spring Meeting the pre-eminent source of information for lawyers seeking the latest developments in business law. Along with an exciting array of prescient programs, you will enjoy an abundance of networking opportunities, exciting social events and top-notch activities!

http://www.abanet.org/buslaw/2006spring/
So You Don’t Know Much About the
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005?
A Summary of the Significant Business Provisions

Written by:
R. Spencer Clift III
Courtney H. Gilmer
Eric L. Pruitt
Alan Lee Smith
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.¹

On October 17, 2005, America's bankruptcy laws drastically changed. The changes are
the result of the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of
2005 (the "Act") which overhauls the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the
"Bankruptcy Code"). Although some of the changes became effective upon April 20, 2005,
when President Bush signed the Act into law, most of the changes apply to bankruptcy cases and
proceedings filed after October 17, 2005.

It is true that most of the changes substantially alter the consumer area of bankruptcy
practice. The Act, however, modifies the statutory provisions affecting business bankruptcies as
well. Commercial landlords and lenders, trade vendors and other creditors will encounter new
issues as a result of the changes. The following is a summary of the most significant changes in
regard to reclamation claims, preferences and avoidance actions, the automatic stay, leases of
commercial real estate and healthcare.

Exclusivity

The Act modifies the "exclusivity" period, which refers to the exclusive right of a debtor
to file a plan of reorganization. While, prior to the Act, the initial exclusivity period to file a plan
of reorganization was 120 days after the bankruptcy filing, extensions were granted routinely
upon motion by the debtor. The Act limits the debtor's exclusive right to file a plan of
reorganization to 18 months.

Reclamation Claims

Reclamation is the right of a seller to recover possession of goods delivered to an
insolvent buyer. Prior to the effective date of the Act, the five basic elements of reclamation
required the seller to establish that (1) the reclaimed goods were shipped on credit; (2) the
reclaimed goods were shipped in the ordinary course of business; (3) the purchaser of the
reclaimed goods was insolvent at the time it received the goods; (4) the vendor made an adequate
reclamation demand within ten days of the buyer's receipt of the goods or 20 days after receipt of

¹ The authors are associates with the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. Spencer
Clift practices in the firm's Memphis, Tennessee office; Courtney Gilmer practices in the firm's Nashville,
Tennessee office; Eric Pruitt practices in the Birmingham, Alabama office; and Alan Smith practices in the Jackson,
Mississippi office.
such goods, if the ten day period expired after the commencement of the case; and (5) the buyer still held the reclaimed goods at the time it received the reclamation demand. The Act expands reclamation rights in certain circumstances, minimizes the effect of reclamation demands on inventory lienholders, and enhances the rights of inventory financiers.

**Priority Status for Goods Shipped within 20 Days of the Bankruptcy Filing.** The Act provides sellers with an administrative expense claim for goods shipped within 20 days prior to the bankruptcy filing. Frequently, the reclamation process is frustrating for sellers of goods as the debtor may use the product, sell the goods, or simply ignore the reclamation demand. The Act provides relief for sellers by conferring administrative expense treatment to a creditor with reclamation rights even if the seller fails to make a demand. This claim is limited, however, to the value of goods received by the debtor in the ordinary course of business within 20 days prior to the commencement of the case. The Act affords sellers with an administrative claim (i.e., a priority claim) for the value of any goods received by the debtor shipped in the ordinary course of business within 20 days prior to the date of the bankruptcy filing. This change provides sellers shipping goods within 20 days of the bankruptcy filing with a claim that is entitled to full payment for the goods provided in that time period if the debtor is able obtain confirmation of a plan of reorganization.

**Extension of the Reclamation Demand Time Period.** The Act extends the period of time in which reclamation demands can be made for goods delivered to the debtor pre-petition from 10 to 45 days. The Act increases the time in which creditors may bring reclamation claims to the latter of 45 days after the debtor receives the goods or 20 days after commencement of the case if the 45 days extends beyond the date of the bankruptcy filing. If the seller fails to timely issue the reclamation demand to the debtor, the seller's reclamation claim is afforded administrative expense (priority) status and is limited to the value of the goods that were received by the debtor within 20 days of the bankruptcy filing.

**Treatment of Reclamation Claims.** If the seller makes the reclamation demand within 45 days after the receipt of such goods by the debtor, the Act requires the debtor to pay for or return the goods. Under prior law, the bankruptcy court could deny a reclamation claim by granting the creditor an administrative expense claim, entitled to payment prior to other unsecured claims, or a lien on the goods. Therefore, debtors will be expected to return the goods if they receive a reclamation demand prior to selling the goods which may impede the ability of debtors to successfully reorganize. The provision may be of limited significance since reclamation demands yield nothing if the goods have already been sold when the demand is made, or if the debtor's inventory is subject to another creditor's blanket security interest. The timing of the receipt of the goods, existing liens on inventory, and the debtor's business process will create interesting scenarios.

**Rights of Existing Floating Lienholders Superior.** The Act reinforces the proposition that a security interest in goods subject to reclamation is prior to the rights of the reclaiming creditor. The Act clarifies that the seller's reclamation claim is subordinate to the rights of a secured creditor with a security in interest in the debtor's after-acquired inventory.

**Preferences and Other Avoidance Actions**
The Act makes a number of changes in the area of avoidance actions, including preferences and fraudulent conveyances.

*Amount of Alleged Preference.* The Act contains a de minimis exception for business debtors preventing them from seeking to recover alleged preferential transfers of less than $5,000.

*Venue for Smaller Preference Actions.* The Act provides that a trustee commencing a preference action for a consumer debt of less than $15,000 or a business debt of less than $10,000 must bring such action in the district in which the defendant resides. An exception to this venue requirement exists if the defendant is an insider of the debtor.

*Modification of the Ordinary Course of Business Defense.* The Act attempts to make it easier for a defendant to assert the ordinary course of business defense in a preference action. Prior to the effective date of the Act, the defendant creditor had to prove that the alleged preferential payment was made both in the ordinary course of business between the defendant and the debtor and in the ordinary course of business terms in the relevant industry. Now, a defendant is only required to prove one of the elements. This will essentially allow defendants to assert the defense when the payments were made in accordance with ordinary business terms between the parties, but not necessarily in accordance with the terms in the relevant industry.

*Expansion of Time in Which to Perfect a Purchase Money Security Interest.* The Act expands the time period within which a creditor can perfect a purchase money security interest from 20 days to 30 days.

*Timing of Fraudulent Transfers.* The Act provides for an increase in the amount of time prior to the petition date in which a trustee may avoid a transfer or obligation incurred by the debtor from 1 year to 2 years.

*Transfers to Insiders Under Employment Contracts.* The Act makes transfers to insiders under employment contract, not in the ordinary course of business, expressly subject to avoidance by the trustee if the debtor did not receive reasonably equivalent value in return for the transfers.

**Amendments Affecting the Automatic Stay**

The Act creates several new exceptions and/or limitations to the automatic stay that is customarily triggered upon the filing of a bankruptcy case. Many of the Act's new or modified automatic stay provisions are of particular importance to commercial and residential landlords. The Act also addresses the problem of chronic repeat filings.

*Landlord's Judgment of Possession.* The Act provides that there is no automatic stay of an eviction proceeding in which the landlord obtained a judgment of possession prior to the bankruptcy filing, if the debtor resides in residential property as a tenant under a lease or rental agreement.
Tenant's Endangerment of Rented Property or Illegal Drug Usage. The Act provides that there is no automatic stay if the landlord is pursuing a possessory action for leased residential property, where the possessory action is based on the Tenant's endangerment of the property or the illegal use of controlled substances on the property. To be exempt from the automatic stay, the possessory action must have been commenced prior to the bankruptcy filing or the endangerment/illegal drug use occurred within 30 days prior to the bankruptcy filing. The landlord is required to file with the bankruptcy court a sworn certificate (under penalty of perjury) setting forth the facts giving rise to the endangerment/illegal drug use exception.

Creditor's Security Interest in Real Property (a/k/a "In Rem" Order). The Act provides a new basis for lifting the automatic stay in situations of a creditor whose claim is collateralized by a security interest in real property (residential or commercial) or if the bankruptcy filing was part of a scheme to hinder, delay or defraud creditors that involved either (a) the transfer of real property collateral without the consent of the secured creditor or court approval, or (b) multiple bankruptcy filings involving the same piece of real property. Where these facts are present, the bankruptcy court may issue an order granting relief from the automatic stay as to the property in question that will be binding not only in the current case, but also in any subsequent bankruptcy the debtor may file within two years.

Repeat Filings by Individual Debtors. The Act provides that no automatic stay is created by subsequent bankruptcy filings, where an individual debtor has already filed two bankruptcy cases within the preceding year that have been dismissed. Similarly, in cases where the debtor has previously filed one prior bankruptcy case within the preceding year that has been dismissed, although the automatic stay is triggered by a second filing, the stay will automatically expire after 30 days unless the bankruptcy court orders otherwise. To obtain a continuation of the stay the debtor must demonstrate that the filing of his/her second case within the one year time frame was done in good faith as to the creditor(s) sought to be stayed.

Repeat Filings by Small Businesses. The Act also creates automatic stay exceptions for multiple filings by debtors who qualify as "small businesses." A small business debtor is defined as a person engaged in commercial or business activities (other than the business of owning or operating real property) who has no more than $2 million in debt as of the date the bankruptcy petition is filed.

Where the small business debtor is (1) already a debtor in a pending small business case at the time a new petition is filed, or (2) was a debtor in a small business case that was dismissed for any reason (or confirmed) within two years prior to the new filing, or (3) the debtor has acquired substantially all of the assets or business of a small business debtor, no automatic stay is triggered by a subsequent bankruptcy filing.

Increased Protections for Good Faith Violations of Automatic Stay. The Act strengthens the requirements imposed on debtors to provide their creditors with notice that bankruptcy has been filed. These enhanced notice requirements are designed to safeguard creditors from claims for automatic stay violations, including punitive damages, in situations where the creditor was
not given fair notice of the existence of the bankruptcy or where the creditor violating the automatic stay acted in good faith.

**Amendments Affecting Leases of Commercial Real Estate**

The Act also makes several changes that directly impact leases of commercial real estate.

**Shortened Deadline to Assume or Reject Commercial Lease.** The Act requires that leases of non-residential real estate must be assumed or rejected within 210 days of the bankruptcy filing. If the lease is not assumed within this time it is automatically deemed rejected, thus entitling the landlord to immediate possession of the property. Only if the landlord consents to an extension will the tenant/debtor be able to obtain additional time beyond 210 days in which to assume or reject a commercial real property lease. This is a significant departure from the former provisions of the Bankruptcy Code, which resulted in courts having the authority to grant virtually unlimited assumption/rejection deadline extensions.

**Damage Claims for Post-Assumption Breach of Commercial Lease.** Under the Act, landlords whose property is damaged when the debtor/tenant has assumed a commercial lease, yet later "reject" the lease (i.e. refuses to perform on the contract) receive a priority expense claim for a portion of their damages. In such cases the landlord's damage claim receives priority as an administrative expense of the bankruptcy estate for all monetary obligations owed under the lease for the two year period following the later of the breach or the debtor's surrender of the property. Any damages incurred by the landlord as a result of debtor's obligations beyond the two year period are treated as a general unsecured claim.

**Cure of Non-Monetary Defaults under Commercial Lease.** The Act mandates that all non-monetary defaults under a commercial lease must be cured prior to the lease being assumed. The Act, however, clarifies that non-monetary defaults which are impossible to cure (e.g., due to the passage of time) do not prevent lease assumption. An example of an incurable non-monetary default would be the tenant in a retail shopping center having "gone dark" and ceasing operations for a period of time; such a lease default cannot be cured after the fact. Thus, assuming that all curable non-monetary defaults have been remedied by the debtor/tenant, assumption of the lease is permitted.

**Shopping Center Leases.** The Act also imposes special "adequate assurance" requirements on debtors/tenants who seek to assume a lease of real property that is located in a shopping center. The Act now requires the tenant to specifically identify the source of funds to be used for future rent, and if the lease is to be assumed and subsequently assigned, financial data regarding the proposed assignee must also be identified. The Act also requires the preservation of the integrity of shopping center lease provisions relating to radius, location, use and exclusivity and tenant mix.

**Health Care Amendments**

The Health Care Amendments contained in the Act impose new requirements in bankruptcy cases involving health care entities.
**Health Care Business Defined.** The Act broadly defines a "health care business" to mean "any public or private entity that is primarily engaged in offering to the general public facilities and services for (i) the diagnosis or treatment of injury, deformity, or disease; and (ii) surgical, drug treatment, psychiatric or obstetric care."

**Storage and Disposal of Patient Records.** The Act creates specific procedures and notice requirements for the disposal of patient records when a health care business seeks relief under the Bankruptcy Code. A debtor-in-possession or a trustee in a Chapter 7, 9, or 11 case must comply with the Act's storage requirements and provide notice to patients regarding the orderly disposal of patient records.

**Patient Transfer Requirements.** The Act affirmatively requires trustees and debtors-in-possession to transfer patients when a health care business is being closed to an appropriate health care facility that (a) is in the vicinity of the health care business being closed; (b) provides patients with substantially similar care; and (c) maintains a reasonable quality of care.

**Cost and Expenses of Closing a Health Care Business.** The Act adds a new subsection providing that certain costs and expenses incurred by a trustee or a federal agency in closing a health care facility will be reimbursed by the estate as an administrative priority claim.

**Patient Care Ombudsman.** The Act mandates the appointment of a patient care ombudsman "to monitor the quality of patient care and to represent the interests of the patients" within 30 days of a Chapter 7, 9 or 11 bankruptcy petition date for all "health care business[es]" unless "the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case." If such an appointment is ordered by the Court, the United States Trustee must appoint one disinterested person to serve as the Patient Care Ombudsman. The United States Trustee may not serve as the patient care ombudsman.

**Exception to Automatic Stay.** The Act creates a new exception to the automatic stay by allowing the Secretary of Health and Human Services to exclude a debtor in the health care industry from participation in the Medicare program or any other federal health care program (as defined in the Social Security Act). It also provides the Department of Health and Human Services expanded debt collection powers against a health care debtor.

**Personally Identifiable Information.** The new provisions protecting personally identifiable information of consumers will influence health care bankruptcy cases. The Act broadly protects "personally identifiable information" provided by an individual to a debtor in connection with obtaining a product or service from the debtor for personal, family or household purposes.

This summary indicates that the Act extends far beyond the consumer topics that have been the focus of many recent media reports. The Act clearly drove an increase in consumer filings during the weeks immediately prior to the effective date as debtors raced to the courthouse to avoid the changes to Chapter 7. However, the full impact of the business
provisions of the Act will be seen in the months and years to come as courts and practitioners react to and implement these changes.
One of the goals of the Young Lawyer Forum ("YLF") is to provide opportunities for young lawyers to grow into leadership positions in the Section of Business Law (the "Section"). In an effort to promote the Section’s pathways to leadership, the YLF will highlight young leaders who have risen to leadership positions within the Section. This quarter we highlight Jolene A. Yee, Assistant General Counsel for E. & J. Gallo Winery ("Gallo") in Modesto, California.

As Assistant General Counsel for Gallo, Jolene engages in a very broad commercial transactions practice. She works frequently with Gallo’s imports group and with their international offices. Often her work encompasses transactions that do not fall within another lawyer’s specialty. She also handles contract disputes and bankruptcy issues.

Jolene had just started her position at Gallo when the Section’s Committee on Corporate Counsel circulated a letter asking interested parties to get involved with the Committee. At her first Spring Meeting, Jolene volunteered to help on a number of projects for the Committee and jumped right into the Committee’s activities. Jolene was later appointed as Committee Vice-Chair and currently serves as its Co-Chair. She also serves on the Section’s Publications Board. Jolene had not previously been involved in the ABA’s Young Lawyer Division, but rather plugged directly into the Section.
Being active in the Section provides Jolene with “immense value in a number of different ways.” She states that “the Section is filled with great fun people” many of whom she now considers good friends. Those friends are people that she feels comfortable calling with work and non-work questions. Jolene believes the Section’s greatest resource is its members, who are often at the forefront of their field. “Having access to such a vast array of knowledge is key,” she says. The Section is also filled with “incredible lawyers who have a penchant for putting on very cutting-edge and topical programs.” Jolene finds that she learns something new and practical at each meeting she attends. She notes that having access to “such incredible CLE is a godsend.” The Section’s Committees provide opportunities “to get involved with projects that truly are current and applicable to a lawyer’s everyday practice.” Whether it is commenting on an ABA resolution or proposed legislation or researching authors for a newsletter, Jolene has found many opportunities to help mold the areas of law in which she practices. “That’s very exciting!” she says.

Jolene encourages young lawyers to attend Section events. “It is a fantastic way to gain access to and be a part of the things that shape our practice.” She states that the cost is relatively low and the payback is immense. She recommends that young lawyers “review the Section’s list of Committees and pick a few that interests you.” Then send the Chair an e-mail “letting them know your interest, and try to attend the next Spring or Annual Meeting.” Attend the Committee meetings and see what they have to offer. Jolene says that you should ask about current projects and see if there is anything that interests you for which you could volunteer. Jolene knows from experience - Committees love volunteers! In fact, she notes that “the Committee on Corporate Counsel is looking for a few good folks ourselves to assist on a number of projects.”
Jolene also recommends that young lawyers make sure to keep things in perspective and prioritize what is important. “That will help you find time for the things that are truly a priority,” she says. Jolene suggests that, as difficult as work might seem, try to find the fun or humor in what you are doing. She believes that there is “almost always something funny about our plight, even when things seem less than ideal (like when you’re a first year associate stuck on a 100,000 page document review, like my brother).”

At the end of the day, Jolene encourages young lawyers to “surround yourself with people who make you laugh and smile, both at work and at play! And give back to your community.” Whether you work on a small pro bono project, volunteer a couple hours at a soup kitchen, or serve on the board of a non-profit, Jolene believes that these projects will fill you with great satisfaction and a sense of purpose. They also serve as a reminder that lawyers can make the world a better place.
1. **Introduction to Consumer Financial Services Committee** - The Committee on Consumer Financial Services includes lawyers whose practices are primarily or partly concentrated in consumer financial services regulation. Most members represent financial services providers, although some represent consumers or their interests, whether in private practice or as public service lawyers, and others are government attorneys or law professors. The Committee focuses on new developments in consumer financial services law in such areas as truth in lending and consumer disclosure; financial privacy, credit reporting, information security, and identity theft; federal preemption of state and local laws; electronic delivery of consumer financial services (e.g., via stored value cards or the internet); credit discrimination and access to such services; consumer financial services litigation and arbitration; residential real estate secured lending (e.g., real estate settlement procedures); personal property (e.g., motor vehicle) secured financing and leasing; and debt collection and consumer bankruptcy. The Committee has a friendly, open atmosphere and encourages active participation by all members, new or existing. **JOIN THE COMMITTEE ONLINE! FREE FOR ALL BUSINESS LAW MEMBERS**

2. **Upcoming CFSC Winter Meeting** – Please join CFSC members and others at the CFSC Winter 2006 Meeting in Park City, Utah. Anyone who attended the CFSC Winter 2005 Meeting in Key Biscayne, Florida this past January knows that the less-structured agenda and opportunities for informal discussion, socializing and recreation at our Winter Meetings cannot be topped! As is our custom, we return every other year to a ski-resort location. From January 7 to 10, 2006, we will meet at the Park City Marriott Hotel in downtown Park City, Utah, near restaurants and shops and close to skiing and other winter recreation. This meeting will begin on a Saturday night, January 7, with a Welcome Reception generously sponsored by Tom Billings and his Salt Lake City-based firm, Van Cott, Bagley, Cornwall & McCarthy, P.C., which will commence at 6:30 p.m. The meeting will end on Tuesday, January 10 at 11:00 a.m. For more information, please access the following links:
   - Downloadable Brochure
   - Hotel Information
   - Registration Form
   - On-line Registration (ABA Members Only)
   - ABA Travel

3. **Current CFSC Projects** - Current Committee projects include:
   - promoting financial literacy by providing a speakers bureau to make financial literacy presentations at local high schools across the country
   - cosponsoring workshops on combating predatory foreclosure practices
   - maintaining the Committee’s Safeborrowing.com website and linking additional useful financial education materials and websites to the site
   - participating in the Business Law Section’s hurricane relief efforts through the Debt Deferment Working Group, which works with financial institutions and other creditors to defer payment of disaster victims’ debts without victims having to resort to bankruptcy; seeks to avoid foreclosures on disaster victims’ properties; works with financial institutions to enable disaster victims to regain access to banking services; enables disaster victims to maximize recovery on insurance claims; enables disaster victims to make effective use of reconstruction loans from the Small Business Administration or other sources; and enables disaster victims to make effective use of other financial assistance that may be available through the Federal Emergency Management Agency or other sources

Contact CFSC Pro Bono Liaison John Ropiequet by email at jropiequet@arnstein.com or call him at (312) 876-7814 if you’d like to be involved with any of the above four pro bono projects. Also, contact CFSC Chair Jeff Langer by email at jlanger@dltlaw.com or call him at (614) 628-1602 with any questions about the Committee.
Practice at the Leading Edge

Join the Cyberspace Law Committee

Michael Fleming

Vice-Chair, Committee on Cyberspace Law

The practice of law may be full of hide-bound tradition, but that is no excuse for those who want to find ways to coordinate their legal talents and practices with their own love of technology and electronic commerce. “Cyberlaw” is one term to describe an evolving type of practice that is involved with front-page issues such as internet governance, consumer data security and the policy debates over intellectual property laws. The Business Law Section’s Committee on Cyberspace Law is the ABA’s home for Cyberlawyers. Our placement in the Business Law Section is intentional. Cyberlaw practitioners do not identify primarily as technologists and do not fall into traditional categories of intellectual property law – we are business lawyers, transactional and litigation, who deal with technology and its implications as a matter of business. Our Committee cordially invites YLF members to consider joining with us in these endeavors.

The Committee on Cyberspace Law provides a forum for analysis of corporate, transactional and regulatory issues related to the internet and digital technologies. The Committee works over a wide range of legal disciplines including electronic commerce, communications, contracts, consumer protection, intellectual property, cybersecurity and
privacy, jurisdiction, internet governance, electronic assets and online financial activities.
The Committee seeks to identify and address legal, business and consumer issues
affected by the implementation of emerging technologies and to facilitate the creation of
legal infrastructures that protect and support electronic commerce. The Committee
provides practical tools and guidance for both practitioners who regularly deal with
Cyberlaw issues and for those who encounter them only occasionally.

Our members represent many types of lawyers, with no one constituency overwhelming
the others. We have private practitioners, big firms and small to solos. We have
government attorneys, academics, new lawyers and retirees. We have those who are
clearly in the ‘strong IP law’ camp, and those who take opposing positions. We have
lawyers regularly participating from the U.S., Canada, Europe and the Pacific Rim. What
we all share is an interest in how technology gets used, licensed, purchased, regulated and
viewed as part of today’s legal systems, as well as a belief that lawyers have an important
part in how the world wrestles with the issues that come out of the technology.

While the Committee rarely takes a substantive stand on any particular controversial
issue, we frequently provide assistance to all sides of a debate by providing reasoned
frameworks and definitions for analysis. Some of our works over the years are in the
forefront of analysis, such as the Model Trading Partner Agreement that helped create a
legal framework for the electronic purchasing systems of the early ‘90s, and a series of
articles from the early 2000’s on strategies for implementing electronic contracting
systems on the Web, which has formed the backbone of most practitioners’ advice on
how to set up e-commerce systems. Cyberspace Committee members have been
recognized as experts in this field outside of the Committee, within their firms or in other public stages, and many have used the Committee as their learning ground to develop that expertise.

Our work products range from magazine articles, formal scholarly journal articles, books, CLE programs presented at ABA meetings or through ABA teleconference systems, and day-long national institutes on significant technology concerns.

We generally meet in person three times a year. Those meetings are of course supplemented with significant on-line discussions and collaborations amongst the members. Along with gatherings at the ABA Annual Meeting each summer and the Business Section Spring Meeting, the Committee has traditionally held its own annual Winter Working Meeting each January. The next “WWM” will be held January 27 and 28, 2006 in Wilmington, Delaware, home to the Potter Anderson & Corroon firm and the DuPont Corporation, both of which are sponsoring this year’s meeting. Information and registration information on the upcoming WWM can be found on the Committee’s home page at http://www.abanet.org/dch/committee.cfm?com=CL320000. Any potential new member is invited to join us – Show up without any agenda or preparation, as we can almost guaranty that if you want to do something you will walk out of the meeting with new friends, new colleagues and a basket of new tasks to keep you busy.

The Committee typically at any one time has at least a dozen threads of ongoing projects, leading to publications, programs or other types of work product. Examples of projects active as of this writing include:
• Monitoring of the World Summit of the Information Society proceedings regarding Internet governance. The Committee has been making presentations on the WSIS since well before the rest of the media began paying attention, and two of the Committee’s members attended the recent Tunis meetings.

• Developing an annotated corporate law department “checklist” for responding to information security breaches.

• Initiating new Model Electronic Transactions Routing Services Agreement, regarding third-party providers that transmit, store, or transform unencrypted electronic data for one or more trading partners.

• Designing and writing content for a website, SafeSelling.org, providing basic information for small businesses selling products and services via the Internet.

• Finalizing white paper regarding practical direction on how to establish "control" over electronic chattel paper (UCC § 9-105), an important step in the transformation of financial services to a truly electronic system rather than a digitized copy of the old paper systems.

• Providing advice to business practitioners on the issues presented by open source software in the context of M&A practice.

• Exploring issues that USA businesses should be aware of when selling to non-USA jurisdictions using electronic contracts.
• Developing an article on eWaste legislation in the US and the EU, exploring corporate risks arising out of the growing mass of disposed electronics

• Drafting white paper on definition of "Malware" (a controversial term) as starting point for developing future work product on how to control or defend against it.

• Developing a series of monographs for companies on policies for preserving electronic evidence in the face of potential litigation – a long-standing concern of the Committee that has become front-page news for many litigators after recent issuances such as the Zulublake opinions.

Most of our issues and projects arise out of a particular member’s concerns and suggestions; the Committee has plenty of room to work with new members who wish to champion an issue. We need enthusiasm and an interest in the subject matter, and rarely have trouble matching people with similar interests to go forward with a project.

For further information, please see our Committee’s home page at http://www.abanet.org/dch/committee.cfm?com=CL320000, or contact our membership subcommittee chair Jackie Scheib at jscheib@rc.com. We look forward to meeting you!

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Committee Mission Statement

The objective of the Committee on Small Business is to guide US and international corporate and transactional lawyers who counsel clients ranging from closely-held entities to smaller public companies on the myriad of business “life cycle” issues they confront in their practices. These life cycle issues include (i) entity organization and owner agreements; (ii) capital formation, financing and strategic partnering; (iii) employment and compensation matters; (iv) intellectual property protection; (v) corporate governance; (vi) securities law compliance; and (vii) business combinations, restructurings, and breakups. The Committee maintains three substantive Subcommittees focusing on Closely Held Business Entities, Emerging Companies and Securities Regulation. The Committee has long been an advocate before the Securities and Exchange Commission, the Internal Revenue Service and other regulatory agencies of reforms to address the special problems in capital formation confronted by small businesses, including smaller public companies. The annual Government-Business Forum on Small Business Capital Formation, sponsored by the SEC, is one result of past Committee initiatives and was a leading force in the SEC’s adoption of Regulation D. A present Committee initiative, through the Private Placement Broker Dealer Task Force, advocates a simplified registration system for “finders” of financing for early stage companies.

January 2006 Meeting. Active members of the Small Business Committee know that our January mid-winter meeting is a highlight of the year. The 2006 mid-winter meeting will be at the Wigwam Golf Resort & Spa in Litchfield Park, Arizona, beginning with a cocktail reception the evening of Wednesday, January 11. The Thursday, January 12 CLE program, “IP Reps and Warranties in Business Transactions: What to Give and What to Get”, will be chaired by David Pamenter of Gowling, Lafleur Henderson LLP, Toronto. The Friday, January 13 program, “Business Lawyers in the Crosshairs - Issues to Spot and Liabilities to Avoid” will be chaired by Cy Johnson and Alison Bost of Womble, Carlyle, Sandridge & Rice, Charlotte, NC. Aaron Hoffman, Senior Vice President for Loss Prevention, Attorneys’ Liability Assurance Society, will also participate in the program. Also on Friday morning, Jared Kaplan of McDermott, Will & Emery LLP, Chicago, will present a short program on the nuts and bolts of new Internal Revenue Code Section 409A. What you do not know may come back to haunt you if you represent clients in matters involving deferred compensation. Hopefully, Jerry will set us on the right path. Depending on interest, we will have a mini-golf tournament on Thursday afternoon, followed by our traditional Committee dinner that evening.

Spring 2006 Business Law Section Meeting. The programs to be sponsored by the Committee at the Spring Meeting of the Business Law Section in Tampa, Florida, April 6-9, are already in the works. John Murphy, Chair of the Committee’s Emerging Companies Subcommittee, is coordinating “The Other Player - The Role of the Investment Banker in Business Transactions,” and Program Chair Eric Levy of Heenan Blaikie, Montreal, is organizing, “Going Public Try-Outs: TSX Venture Exchange and London AIM as Farm Teams for the U.S. Public Market Big Leagues.” A Small Business Committee Forum will give us the opportunity to hear from members of the SEC Advisory Committee on Smaller Public Companies, which expects to issue its report in late March. Our Committee dinner will the evening of Thursday, April 6.

Larry Goldman