Developing and Delivering Substantive Law Content

Chair:

Roland E. Brandel, San Francisco, CA
Former Chair, The State Bar of California, Business Law Section
Former Chair, ABA Business Law Section State and Local Bar Relations Committee
Morrison & Foerster LLP

Panelists:

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Former Content Officer, ABA Business Law Section
Chair, ABA Business Law Section LLCs, Partnerships and Unincorporated Entities Committee
Bradley Arant Boult Cummings LLP

Vincent I. Polley, Bloomfield Hills, MI
Member, ABA Business Law Section Business Law Today Editorial Board
Chair, ABA Standing Committee on Technology and Information Systems
KnowConnect PLLC
I. Introduction: Basic Principles

A. Section service of highest value to members is receipt of information that helps their professional competence

B. Content is your most valuable asset

C. How to create and how to deliver – multiple channels

D. ABA BLS spent several years intensively analyzing content issues, opportunities

E. Result: Content Report: 2009 – a work always “in progress”

II. BLS Content Report: An Overview

III. The Policy Conflicts

A. Goals sometimes conflicting

1. revenue production

2. member service – increase / retain membership

3. exposure for authors / committees / BLS

4. exposure of favored positions to influence others

B. Some options

1. free distribution limited to members

2. delayed access / distribution

3. priced access
4. tiered pricing

IV. Generation of Content

A. Value to creators / author / speakers

B. Use of items created for other purposes – e.g. law firm or internal committee working papers

C. Value to recipients

D. Time, effort to change the “culture” regarding Content creation

V. Delivery of Content – Non-Electronic

A. In person programs

1. members still insist this is the delivery method they prefer, but, near their offices – hence, the Joint Programming project

2. institutes

3. programs at major meetings

4. stand alone programs

B. Hard copy publications

1. Hard copy advantages

2. multiple channel – hard copy and electronic (active and passive)

3. conversion to electronic only – a difficult process that requires careful management (e.g., Business Law Today)

VI. Delivery of Content – Electronic

A. Characteristics

1. Pluses

a. active (e-mail) v. passive (website posting)

b. inexpensive

c. instant delivery

d. selective audience – slice & dice
2. Minuses
   a. need current email address
   b. subject to spam filters
   c. quality control issues
   d. redistributable at no cost to unintended recipients

B. e-Newsletters
   1. Section
      a. Leaders Digest
      b. Inside Business Law (replacing eSource)
   2. Committee Newsletters

C. e-Bulletins
   1. committee only – specialized audience
   2. growing the audience
   3. active sending
   4. timely news flashes / analysis
   5. short to very short
   6. linked to more detailed materials – lengthier write up on Website or elsewhere – or to primary materials (e.g. case report, statute)
   7. use standardized, “branded” template
   8. by nature, no schedule (event dependent), but do not disappear for weeks
   9. robust monitoring / encouragement by leadership

D. Web delivery
   1. Speaking “to” audience –vs– engaging “with” community
2. ABA’s recent focus: Speaking “to” audience; systematic, programmatic focus on:
   a. Organization, navigation, and search
   b. Quality control and Brand maintenance

3. Next up: Engaging “with” community
   a. Uncontrolled content creation
   b. “Brand drift”
   c. Reach people outside email channels

E. Webinars/Video conference
   1. What, how?
      a. Trained production staff?
   2. After-market effect? Economics?

F. Social media
   separate segment -
   “Effective Use of Social Media”

VII. Multi-Purposing or Re – Purposing of Content
   A. Life cycle examples
   B. Automated updates of content (a goal) across silos
INTRODUCTION

The ADVANCE 3 Report (2008) concluded that “Content is the chief asset of the Section. (The possibility exists that) content-derived revenue could exceed dues-revenue within the next few years. Thus, effective content management is crucial. To do this well, we need to take decisions (e.g., about pricing) from within the guidance/structure of a formalized "Business Plan". (The Section will) develop a formal, professional Business Plan to help us assess varying goals (e.g., revenue, membership, service to the profession, etc.), and to establish metrics (so that we can measure progress). Within the structure of a Business Plan, we need centralized, cross-silo coordination and guidance from a Chief Content Officer.”

The resulting Section Business Plan (2008) created a Content Committee chaired by a Content Officer tasked generally with the oversight of Section content. The ADVANCE 3 report and subsequent Business Plan rightly identified deficiencies in the Section’s content management processes and its ability to leverage its content strengths in the marketplace. The creation of the Content Committee was a highly visible corrective action to address those deficiencies.

To that end, the mission of the Content Committee is to develop strategies and tactics that will best enable the Section through its committees to formulate and develop ideas that lead to the creation of content, and to ensure that the production, distribution and evaluation of that content is conducted in a manner that supports and promotes the Section’s goals and its overall commitment to its members, the profession, and the public.

With that mission in mind, the Content Committee has engaged in a review of the Section’s existing content and the processes that are followed to develop tangible content and distribute it to all of the audiences the Section serves. At the core of this discussion was the acknowledgement of a definable life cycle for Section content. This life cycle served as the roadmap for the committee’s discussions. The following report and supporting plan outline the current state of Section content in each of these areas and the recommendations of the Committee for improvements in the development and management of Section content.

The Life Cycle of Section Content

<table>
<thead>
<tr>
<th>Idea Development</th>
<th>Content Creation</th>
<th>Content Distribution</th>
<th>Content Maximization</th>
<th>Content Evaluation</th>
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</table>
IDEA DEVELOPMENT

The ideas that ultimately give rise to content come from a variety of sources:

- Committee CLE
- Committee and Subcommittee work product
- Proposals to the Section Publications Board
- Editorial planning in *Business Law Today* (BLT) and *The Business Lawyer* (TBL)
- Committee Meetings
- Task Force Reports
- Staff
- Inter-member communication
  - “Cocktail napkin” discussions at meetings
  - Committee list serves and online communities
- Industry partners
- Member input
- Other ABA entities
- Outside list serves and discussion boards

Once formed though, the Section looks to its substantive committees to be the masters of their subject matter. Thinking of the Section’s knowledge management as a funnel, the substantive committees should be the ones at the top of the funnel, shepherding relevant ideas toward content utilizing the mechanisms of programs, products, and publications supported by the Section.
In its discussion of this concept of idea development and flow, the Committee identified a number of road blocks that exist in our current practices.

- Ideas tend to stay in the silo coming up with the idea until it becomes content.
- Most of the ideation that occurs within the committees and subcommittees within their meetings and on list serves never gets beyond those actively involved in the discussion at the committee/subcommittee level.
- Rank and file members who do not attend meetings have no clear mechanism to participate in the content creation process.
- It is difficult to capture and evaluate the volume of ideas generated on internal and external online communities and list serves where many ideas are discussed.
- Member’s time is short when practice is hot, ideas are flying, and the Section would want to respond with content.
- Content that is presented at meetings, even in formal CLE programs, is often NOT effectively shared with or communicated to other Section content creators. While summaries of all reviews are circulated, the volume of information presented makes sorting and prioritization difficult.
- It is the nature of our committees to protect their “turf,” and this may be aggravated by the Sections visible recognition of content creation and not collaboration.

**GOAL:** Establish processes and develop tools within the Section that promote the efficient and methodical capturing of potential content and make that potential content available to all content generators.

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<tr>
<th>Action</th>
<th>Responsible</th>
<th>Date</th>
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<tbody>
<tr>
<td>Conduct regular conference calls of the Content Committee with representation from all content generators.</td>
<td>Content Committee</td>
<td>Ongoing</td>
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<tr>
<td>Conduct and deliver to the Content Committee data on the emerging interest areas of Section members, business law practitioners and the greater business community.</td>
<td>Council Committee on Member Service. Council Committee on Planning</td>
<td>Annually</td>
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<tr>
<td>Incorporate reporting on ideation activities into the standard committee reporting process.</td>
<td>Council Committee on Committee Support and Structure.</td>
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<tr>
<td>Continue exploration of relationships with outside parties and involve them in the regular flow of committee activity.</td>
<td>Membership Committee</td>
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<td>Provide an online bulletin board for Section content managers (BLT, TBL, Publications, and CLE staff and member leaders) to post projects currently in the pipeline.</td>
<td>Staff</td>
<td>August, 2009</td>
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<tr>
<td><strong>Provide an online bulletin board for committees to share programming ideas and suggest collaboration.</strong></td>
<td><strong>Staff</strong></td>
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<td><strong>Expand the role of committee publishing liaisons to be content liaisons, tasked with monitoring idea flow within their committee and pushing those ideas around the committee and to other content generators. Provide these liaisons with the tools required to do this effectively (reporting channels, online planning and collaboration tools).</strong></td>
<td><strong>Content Committee</strong> <strong>August, 2009</strong></td>
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<td><strong>Use student members with a keen interest in subject matter to assist in recording ideation activities (monitoring list serves, capturing ideas at meetings etc.).</strong></td>
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<td><strong>Provide a secure online workspace for committees</strong></td>
<td><strong>Staff</strong> <strong>January 2010</strong></td>
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<td><strong>Provide regular formal training to committee leadership on how ideas move to content (using already effective committees as examples) and the manner in which quality program materials easily evolve into content.</strong></td>
<td><strong>Content Committee</strong> <strong>Annually at Section Midwinter Meeting</strong></td>
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Foster a spirit that leads to natural (unforced) collaboration and provide more visible recognition to collaboration that leads to larger, stronger content than would have been possible by an individual committee.

**CONTENT CREATION**

The work of committees becomes deliverable content in a number of ways:

- Reports and surveys submitted to TBL
- BLT solicits chairs for mini-theme content support
- Current issue presentations proposed by committees to Educational Programming throughout the year. Typically delivered telephonically by the Center for CLE.
- New publications on developments in the law (proposed by or solicited from committees) and updates of existing committee publications (2/3 of titles)
- 22 eNewsletters published by committees, articles re-circulated in eSource
- Posting of papers and other materials on Committee website.

Additionally, the work of individual members also becomes deliverable content:
- Author submission (unsolicited) to TBL
- BLT solicits articles from members individually and encourages redrafting of client memos for “Keeping Current” columns. Articles are solicited from presenters at Spring and Annual Meeting programs.
- One CLE teleconference is produced by BLT every two months based on an article from the current issue of the magazine.
- Educational Programming, with the assistance of the ABA CLE staff, monitors all meeting presentations for programs that can be reproduced for subsequent presentation.
- Author submissions of publications with a request to publish
- Updates of individually authored publications
- CLE program materials and audio posted in Online Program Library

Just as there were roadblocks to idea development, the Committee’s review revealed a number of challenges that the Section faces in producing deliverable content from those ideas. Typically publication in TBL or BLT can take 6 months from the initial submission. Publications typically take 12 months, with inconsistent performance by committees authoring publications, usually taking longer.

**GOAL:** To the greatest extent possible, streamline the process employed by all content generators that leads to deliverable content.

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<td>Review manner in which TBL Surveys are proposed and accepted for publication. Publish TBL Surveys only in summary in the journal, then print in full as an annual publication (with CD), supported by a CLE program to promote maximum usability.</td>
<td>BLT Editorial Board</td>
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<td>Strip out key ideas and concepts from TBL articles that are in editorial process and distribute as “flash” information prior to belated publication.</td>
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<td>Maintain a database of all content authors for all content generators to assist in recruiting experts to new projects and promote repurposing of previous work.</td>
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<td>Clarify communication channels for committee input to BLT articles and mini themes.</td>
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<td>Cross list CLE opportunities in published content whenever and wherever possible.</td>
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<tr>
<td>Develop a pool of “professional” moderators</td>
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for distance CLE offerings.

Encourage repurposing of content in rejected publications as articles in BLT or TBL when appropriate.

Develop templates to allow committees to push out committee generated content on hot topics in a more timely manner and in a less formal manner than a full newsletter.

- Make publications available in whole or in part via the webstore, especially those titles with sample forms, agreement or other model documents.
- In light of the prohibition on publishing reviews of Section books, explore new mechanisms for ABA publications to be featured in Business Law Today (e.g. articles on the book topic by the author).
- Expand subscription sales of committee works that can be updated annually.
- Encourage content liaisons within the committee to use e-newsletter content to spur larger and greater content (push to other
- Bring committee content under an index that focuses on key topical areas.
- Develop publication production templates to assist authors and reduce cost and time to publication.
CONTENT DISTRIBUTION

What is the current standing of the recommendations of the Ad Hoc Committee on Content Distribution?

Business Law Today

At present, all content remains open to members and non-members online without charge. The editorial board considered the recommendation to adopt three-tier pricing for content, but felt retaining open access was necessary to maintain maximum author exposure and marketing effect for the Section. Also, until such time as planned improvements are made to the webstore, the recommendation is not possible Cross marketing is far more robust and is an area that is targeted for expansion.

The recommendation to promote the availability on line was deferred in favor of the release of eBLT, an electronic version of the print publication released one month after publication.

The Business Lawyer

Until such time as planned improvements are made to the webstore, the recommendation to adopt three-tier pricing for articles in The Business Lawyer is not possible. The recommendations or author bios and hyper-linking citations to their source were considered but have not been adopted due to the labor intensive nature of both of these tasks.

Searching for TBL articles continues to be problematic and requires close and immediate attention.

ESource

E-source content remains open to all. It is sent directly to Section members who can forward the content to peers and colleagues. Each issue is placed in a public access archive. If material is used in eSource that would otherwise be in a members-only section of the website, it remains in the members-only area, but a copy is placed in a public library. Balancing member value and promotional value remains an issue for the publication, with present practice favoring promotional value.

Publications

Three tier pricing is in place for all hard copy books. The ability to download a PDF of entire book is slowly progressing. True electronic publishing is still a goal, but will require improvements to existing systems. Improvements to webstore also needed to support a “cherry-picking” sales model for purchase of customer selected content. Moving forward on development of systems to support subscription sales of publications that are regularly updated.

CLE Program Materials
Native and non-native PDF’s of all submitted program materials are posted in the Section’s online library and tagged to support the library’s internal search function.

New Content Distribution Recommendations

- Encourage development of a business law specific RSS Feed to business law practitioners encompassing all ABA content to which the Section would be the primary contributor.
- Explore development of advanced electronic versions of Business Law Today and The Business Lawyer with the goal of reducing the proliferation of the print versions through an “opt-in” subscription for print. This discussion should consider the production timeline of the publication, how the publication is used by its readers, the technology that is available for electronic publication, and the impact such a move might have on in-house and paid advertising.
- Work with IS to better understand the search algorithms employed by the internal ABA Google appliance and ensure that TBL and BLT articles are appropriately tagged and formatted to be returned in searches.
- Segregate original materials from non-original program materials in the Online Program Library.
- Ensure that migration of the Program Library is a viable option for any new library developed by IS using the new Sharepoint CMS.
- Make individual book chapters and forms from publications available for individual purchase through the webstore. Work with IS and ABA publishing to clearly articulate needs and goals.
- Establish the necessary systems to reliably sell publications that are regularly updated on a subscription basis. (Look to non-member magazine subscriptions for a model. Canvas other Sections that could profit from such a system.)
- Identify those publications that would generate significant interest among non-English speaking audiences (e.g. Corporate Directors Guidebook) and provide translated editions.
- Explore alternatives to posting meeting materials in a format that can be easily used on wireless devices.
- Improve the hardware and access points provided at meetings for printing program materials.
- Explore options for print on demand services for meeting attendees.
- Provide an itinerary planner for program attendees as a service to them and an indicator of program interest for meeting planners setting the rooms and preparing materials.
- Open eSource as a vehicle for quick publication of the original work of individual members and committees.
- Coordinate efforts with the staff and leadership of the Section of Litigation to establish a standard model for distribution of granular content (articles, podcasts, etc.)
TARGETING OUR CONTENT “SWEET SPOT”

Q1. Low Revenue Value / Low Membership Value = Why do we even offer it?
Q2. Low Revenue Value / High Membership Value = How do we get it to more members?
Q3. High Revenue Value / Low Membership Value = How can we maximize our earnings?
Q4. High Revenue Value / High Membership Value = How can we price aggressively and offer meaningful member discounts?

What content distribution channels are necessary to enhance to the maximum extent…

a) the education and abilities of business lawyers (members and non-members)
b) the reputation of those Section members creating the content
c) the image of the Section
d) the public outreach of the Section

CONTENT MAXIMIZATION

Concepts to broaden exposure and repurpose content.

- Explore merging of BLT and eSource into a web-based service to provide real time delivery of articles and content as it is available.
- Expand distribution of MP3 recordings of CLE programs and substantive committee activities.
- Feature articles by book authors in BLT on the subject of their book.
- Make partial release of publications available in a manner that does not undercut sales of the whole volume.
- Early release of TBL surveys in electronic format, perhaps through authoring committee, being cautious to maintain the value of the piece that appears in print.
- Make committee newsletters and newsletter articles easily searchable and available for sale to non Section members.
- Ensure that any content published electronically is done so in a way that it is accessible via the content aggregators that are most commonly used (Lexis/Westlaw)
- Formally express searchability, granulated saleability, and smooth tiered pricing as our key IS requirements.
- Explore broader and supported use of free software instead of drawn out development of proprietary systems.
  - How can rejected TBL articles be put to better use, noting that authors are typically only submitting for publication in that journal.

CONTENT SUNSET

- Under new CMS, ensure that sunset date is attached to all content.
- Establish archiving policies that support preservation of the Section’s content while at the same time removing roadblocks to the quick and clean identification of current content.
- Explore development of a searchable archive separate from main web files to reduce the prominence of old content in search returns.
Leader's Digest
March 31, 2011

E-mail not displaying properly? Click here to view it in your web browser.

- **Want Phone and Dial-in Info for Your Non-CLE Meetings in Boston?**

- **Go Global at the Pro Bono Breakfast.**

- **Be a Mentor to a Law Student at the Spring Meeting.**

- **Would Your Committee Benefit From the Expertise of a Legal Luminary? Nominations for Business Law Advisors Are Due 5/13/2011.**

- **TIP of the Week!**

- **Leadership Calendar**

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**Want Phone and Dial-in Info for Your Non-CLE Meetings in Boston?**

New this year!!! It is not necessary to send staff an advance request for a speaker phone and dial-in information for your Committee and Subcommittee meetings at the 2011 Spring Meeting! Every NON-CLE hotel meeting room will be equipped with a speaker phone. Each room will have its own dedicated domestic and international phone number and access code.

These numbers will be meeting-room-specific, not Committee-specific. Meetings are scheduled back-to-back in each room. To avoid confusion, meetings should end promptly at the time indicated on the schedules. The Alphabetical Schedule will be available on the webiste with dial-in information on Monday, April 4, 2011 or 312.988.5588 for assistance.

Please contact Kate Dooley at Kate.Dooley@americanbar.org.

**Go Global at the Pro Bono Breakfast.**

Participate in a Spring Meeting tradition, the Pro Bono Breakfast. The breakfast is open to all and is sponsored this year by Sullivan & Worcester. This year’s breakfast panel discussion is Pro Bono: Go Global! Breakfast speakers include representatives from ACCION International, DLA Piper’s New Perimeter, and Merck. The breakfast will be held Friday, April 15, from 7:30 a.m. to 9:00 a.m. in the Newberry/Gloucester Rooms on the second floor of the Westin Copley Place Boston Hotel. Encourage your committee members to attend. RSVP to allyn.oconnor@americanbar.org.
• **Be a Mentor to a Law Student at the Spring Meeting.**
The Section is seeking volunteers to serve as meeting mentors to law students attending the Spring Meeting through a program called "Senior Counsel". This program requires very little time commitment but is enormously valued by our students and is personally rewarding to those mentors who have participated in the past. Mentors are encouraged to learn about the student's interests, suggest programs and events that may be of interest to them, allow the student to shadow them in a program or meeting if appropriate, and generally make the student feel welcome at the meeting. Anyone interested in mentoring should contact Heather Wallace at heather.wallace@americanbar.org as soon as possible.

• **Would Your Committee Benefit From the Expertise of a Legal Luminary? Nominations for Business Law Advisors Are Due 5/13/2011.**
Business Law Advisors are individuals who have distinguished themselves as practitioners, teachers, or government officials in one or more of the areas in which Committees of the Business Law Section are active. As a Committee, you may nominate an individual who fits this criterion to join your Committee for a two year term and receive funding to Section and Committee meetings. Please spend time at the Spring Meeting with your Committee considering who your Committee would like to nominate. To read a special note from the Co-Chairs of the Committee, Lawrence Goldman and Steven Mayer, and for information on how to submit a nomination form, click here.

• **TIP of the Week!**
Looking to get more members involved in your Committee meeting being held at the Section Spring Meeting? Send a Committee meeting e-mail invitation to your entire membership through your Committee listserv. Make sure to include the date, time, location and call-in information for the meeting and attach your meeting agenda and materials. In-person meetings are a terrific opportunity for members to meet each other and get involved in the Committee’s work!

The ABA's email domain has changed to @americanbar.org. Ensure delivery of Leader's Digest every week - add ababusinesslaw@americanbar.org to your "safe folder", "address book", "friend list", or "white list" of approved e-mail senders. Your e-mail address will only be used within the ABA and its entities. We do not sell or rent e-mail addresses to anyone outside the ABA.

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American Bar Association | 321 N Clark | Chicago, IL 60654 | 1-800-285-2221
Submit a Nomination for the 2011 Jean Allard Glass Cutter Award by TOMORROW!

The Section's Diversity Committee is seeking nominations for its 19th Annual Jean Allard Glass Cutter Award. The award will be presented during the Section Luncheon at the 2011 Spring Meeting in Boston, MA. The Jean Allard Glass Cutter Award is presented to an exceptional woman business lawyer who has made significant contributions both to the profession and to the Section of Business Law. The award is named for Jean Allard, the first woman to chair the Section. For more information and to submit a nomination, please click here. The deadline to submit a nomination is tomorrow, February 11, 2011.

Early Bird Registration for Spring Meeting Extended Until 2/18/2011.

Early Bird registration has been extended! Save on your Spring Meeting registration by registering before February 18, 2011. The meeting will have over 50 CLE programs on all aspects of business law all, substantive committee meetings, and social events. Spread the word to your committee members and colleagues.

For a copy of the Spring Meeting Brochure click here. To register for the meeting, click here.

Public Service Project with Junior Achievement.

On Wednesday April 13, the Young Lawyer Committee, along with the Pro Bono Committee and the Business and Corporate Litigation Committee’s Pro Bono and Public Service Subcommittee, will host the students of the Boston area JA Academy / Marian L. Heard Scholars Program for an afternoon of business ethics and pizza. JA Academy is a Junior Achievement program that teaches high school students the basics of creating and running a business. If you or your Committee members want to participate in the Project or learn more about the Section’s partnership with Junior Achievement to promote youth financial literacy, contact the staff at Allyn.OConnor@americanbar.org.
TIP of the Week!
Want to connect with your Committee members in between in-person meetings? Set-up a committee conference call! E-mail Kate Dooley, Section Administrative Assistant, at kate.dooley@americanbar.org to reserve your preferred date and time on the conference line. Kate will provide you with a dial-in number, conference code and simple instructions on how to run the call as moderator.

All calls are toll-free! International callers must use dial-in numbers specific to their country or region. Click here to view toll-free international dial-in numbers.

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FEATURE ARTICLES

Canadian M&A: Eleven Trends for 2011
By Richard E. Clark and Curtis A. Cusinato
U.S. investors attracted by Canada’s robust M&A market should take note of these 11 trends and developments.

Smaller Reporting Companies: Disclosure and Governance Considerations
By Sanjay M. Shirodkar and Kristi Darnell-Weichelt
Smaller reporting companies have unique concerns in comparison to larger public companies.

Director Liability, the Duty of Oversight, and the Need to Investigate
By Jeremy S. Piccini
To satisfy a corporate board’s duty to investigate, utilizing outside counsel may be the best option.

DEPARTMENTS

Keeping Current
Recent developments in business law

Intellectual Property:
The ‘Work for Hire’ Doctrine and Start-up Technology Companies
By Elaine D. Ziff

Consumer Credit:
California Supreme Court Expands Retailers’ Liability Under Credit Card Privacy Laws
By Paul S. Rosenlund

Training for Tomorrow
Practical guidance for business lawyers

An Introduction to Negotiations for Future Transactional Lawyers
By Susan M. Chesler

Focusing on Pro Bono
Pro bono efforts by business lawyers

Youth Financial Literacy:
What Business Lawyers Can Teach Students
By Allyn O’Connor

INSIDE BUSINESS LAW: Highlights of Committee Work Product

Entrepreneurs and the American Dream:
Perspectives on the Startup Visa Act

CLE Events

Upcoming CLE Program:
Live Webinar

Securitization Reform:
Dodd-Frank Changes the Rules
What is the Startup Visa Act? If you work in immigration, you may already know that the ABA Business Law Section played an instrumental part in the creation of the Startup Visa Act of 2010, which would provide a mechanism for immigrant-entrepreneurs to enter or remain in the United States to build businesses. For background on the Startup Visa initiative and the ABA Business Law Resolution behind it, read this article from the Young Lawyer Committee Newsletter. And don’t miss Barbara Mayden’s speech to the ABA House of Delegates in support of the Startup Visa Resolution. The full Resolution can be found here.

For a real-life immigrant success story, look no further than this Q&A with Vinod Khosla, founder of Sun Microsystems, among other innovative companies, found in Preferred Returns, the Newsletter of the Private Equity and Venture Capital Committee.

- Updates in Banking Law
- Community Economic Development
- Municipal Bankruptcy
- Spotlight on Consumer Financial Services

**RECENT COMMITTEE NEWSLETTERS**

- State Regulation of Securities - *Blue Sky Bugle* (April 2011)
- Corporate Counsel (April 2011)
- Commercial Finance and Uniform Commercial Code - *Commercial Law Newsletter* (Spring 2011)
- Legal Opinions - *Legal Opinions Newsletter* (Spring 2011 - Volume 10, no 3)
- Nonprofit Organizations (Second Quarter, 2011)
- Business Bankruptcy (March 2011)
- Banking Law - *Banking Law Committee Journal* (March 2011)
- Young Lawyer Committee (March 2011)
- Government Affairs Practice (Volume 2, Issue 1 - Winter 2010-2011)
- Community Economic Development (Winter 2011)

[All Committee Newsletters »](#)
OTHER NEWSLETTERS BY SECTION MEMBERS

- Miscellaneous IT Related Legal News (MIRLN) (5 - 26 March 2011 (v14.04))

"Jan, I've got a situation in here— I seem to be running early!"
Doing Business in Canada

- If you are interested in the M&A market in Canada, don’t miss the 2010 Deal Points Study on Canadian Private Targets, published by the Mergers & Acquisitions Market Trends Subcommittee. This in-depth study analyzes 62 Canadian private targets acquired in 2007, 2008, and 2009, and includes valuable comparisons to U.S. markets.

- Do you represent an investment fund manager doing business in Canada? If so, you should be aware of recent actions by the Canadian Securities Administrators, who have re-vamped the registration rules relating to non-Canadian securities dealers and advisers. For a summary of the issues, check out Rebecca Cowdery and Paul Findlay’s article in the Blue Sky Bugle.

- Green Investing and Environmental Due Diligence

- Lending Through the Credit Crisis

- Update on Proxy Issues and Executive Compensation

- Privacy in Cyberspace
If you work with corporate boards, do you think the stay on the SEC’s new proxy access rules means you don’t have to worry about them yet? For a thorough argument of why the time to consider structural corporate governance issues is now, consider this article by Charles Nathan and Paul Kukish, presented at a panel on proxy access offered by the Federal Regulation of Securities Committee at the Business Law Section Fall Meeting.

Now is also a good time to consider the impact of proxy advisory firms, and what their advice can mean for corporate governance issues and hedge fund activism. Make time for this program from the Corporate Governance Committee.

> **Materials** | **Audio (part 1)** | **Audio (part 2)**

With 2011 now underway, you may also want to review some practical guidance on the executive compensation issues imposed by the Dodd-Frank Act that are now in force. A great overview can be found in the materials from this presentation by the Federal Regulation of Securities Committee at the ABA Business Law Fall Meeting [Materials | Audio]. For an in-depth look at the potential impact of the say-on-pay provisions, complete with considerations for presenting these issues to shareholders, check out this program sponsored by the Corporate Governance Committee [Materials | Audio].
Joint Report from the Chairs

As we approach our Spring Meeting in Boston from April 14-16, in the interest of efficiency and space-saving, we have decided to prepare a Joint Chair Report. We hope you will find it useful.

For those of you who have not already registered, the Spring Meeting will be held at the Copley Marriott and Westin Copley Place hotels in Boston from April 14 through 16. Both the UCC and Commercial Finance Committees have an outstanding series of programs and meetings for your education and enjoyment. Our collective programs are as follows:

1. Thursday, April 14, 8:00 a.m. to 9:30 a.m. (Marriott – Salon F, 4th Floor) - STUMP THE CHUMPS RETURNS, chaired by Norman Powell and Kristen Adams, with an esteemed set of panelists.

2. Thursday, April 14, 10:30 a.m. to 12:30 p.m. (Marriott Salon F, 4th Floor) - CURRENT STATE OF THE SYNDICATED LOAN MARKETS, chaired by Bridget Marsh.

3. Thursday, April 14, 2:30 p.m. to 4:30 p.m. (Marriott Salon F, 4th Floor) - WHAT EVERY DEAL LAWYER SHOULD KNOW ABOUT CONSUMER REGULATION, chaired by Thomas J. Buiteweg and Michael Ferry.

4. Friday, April 15, 10:30 a.m. to 12:30 p.m. (Marriott, Salon F, 4th Floor) - A MIDNIGHT RIDE: A CALL TO ARMS ON THE CHALLENGES ON DOCUMENTING THE RIGHTS OF SWAP PROVIDERS IN COLLATERAL SHARED WITH LENDING SYNDICATE, chaired by E. Perry Hicks.

5. Friday, April 15, 2:30 p.m. to 4:30 p.m. (Marriott, Salon F, 4th Floor) - LEHMAN-MORE THAN TWO YEARS LATER: LESSONS FOR SECURED PARTIES, DERIVATIVE COUNTERPARTIES AND OWNERS OF CUSTODY FINANCIAL ASSETS, chaired by Edwin E. Smith.

6. Saturday, April 16, 8:00 a.m. to 10:00 a.m. (Marriott Salon F, 4th Floor) - COMMERCIAL LAW DEVELOPMENTS, chaired by Steve Weise and Theresa Wilton Harmon.

7. Saturday, April 16, 10:30 a.m. to 12:30 p.m. (Marriott, Salon F, 4th Floor) - DIFFICULT DEBTORS: PEOPLE AND NATIONS AND TRUSTS, OH MY!, chaired by Sandra Rocks and Bradley Gibson.

These will be terrific programs, and we encourage all to attend. We thank the Chairs and panelists for their hard work in putting these programs together.

There are still a few tickets remaining for the UCC/ComFin joint dinner on Thursday, April 14 at Turner Fisheries in Boston. Please contact one of us (pchristophorou@cgsh.com or...
June 5-9, 2011 – International Association of Commercial Administrators (“IACA”) 34th Annual Conference – Winnipeg, Manitoba. The 34th IACA Annual Conference will be at the Delta Winnipeg in Winnipeg, Manitoba, Canada. More information is available at the IACA’s website.

August 5-8, 2011 – ABA Annual Meeting – Toronto, Ontario. Registration is now open for the ABA Annual Meeting! Please click here for information on registration, hotels, airfare and more. You will need your passport if you are coming from the U.S., so be sure to check that yours is current. For passport information, please click here.

November 16, 2011 – 11:00 a.m. to 4:00 p.m. ET – Joint ComFin and UCC Fall Meeting – Marriott New York Marquis in New York, New York. The Joint ComFin and UCC Meeting will be held Wednesday, November 16, 2011, in New York in conjunction with the Commercial Finance Association Annual Convention. An entire day of CLE will be provided. More details will become available at the ComFin and UCC Committees’ websites.


Questions Sought for Stump the Chumps
Kristen Adams and Norm Powell, as co-chairs of the ever popular “Stump the Chumps” program which will be held at 8:00 a.m. EDT on April 14, 2011, at the ABA Spring Meeting, are seeking interesting (and yet not merely theoretical) questions of commercial law and secured transactions for their panel of experts. You are invited to submit questions that have arisen in your practice or teaching or that just generally keep you up at night by email to Kristen or Norm. Be sure to come to the meeting to see if you stumped the chumps!

Track the 2010 Amendments to UCC Article 9
Last year, the Uniform Law Commission and American Law Institute approved the first significant changes to UCC Article 9 since the 1998 revision. The 2010 amendments address a limited number of issues; however they include significant changes to the rules for debtor name sufficiency in Section 9-503 and the statutory safe harbor forms in Section 9-521.

State legislatures began consideration of the 2010 amendments last year. To follow related legislation and review each bill’s current status use the subcommittee website: “Uniform Commercial Code: Legislative Enactment of Revised Article 9.”
Protecting Lender Interest in Borrower Insurance Proceeds

A 90-minute CLE webinar/teleconference will be presented by Frederic J. Giordano with an interactive Q&A and will be held Tuesday, April 12, 2011, at 1:00-2:30 p.m. EDT.

This webinar will provide counsel for lenders and financial institutions with a review of how insurance proceeds are treated under the UCC and bankruptcy law. The panel will discuss recent legal developments impacting insurance requirements in financing transactions and outline loss mitigation strategies for lenders.

LSTA Publishes New Model Credit Agreement Provisions

Bridget Marsh, Deputy General Counsel, LSTA

On March 25, 2011, the Loan Syndications & Trading Association (“LSTA”) published a new Model Credit Agreement Provisions (“MCAPs”).

Originally published in 2005, the MCAPs include the boilerplate provisions typically found in any credit agreement. Agency, assignment, and yield protection (amongst other) provisions were created as model language for the syndicated loan market and have been widely adopted since their first release. Notably, the new publication, which was vetted by the LSTA legal membership, has been expanded to include model defaulting lender language.

After Lehman filed for bankruptcy in 2008, lenders, who had traditionally focused on the borrower’s creditworthiness, began to assess the viability of the other lenders in their syndicate and any potential risks should one of them default under the credit agreement. In response to these concerns, the market began to develop defaulting lender language for inclusion in syndicated loan deals. After taking account of defaulting lender clauses as they evolved post-Lehman, the LSTA led a member project to create a standard form of defaulting lender language for inclusion in an expanded form of the MCAPs. At the same time, the LSTA seized the opportunity to refresh the MCAPs to reflect current market practice.

The new defaulting lender language provides that a lender is a defaulting lender if it has failed to fund a portion of its loans within two days of being required to fund, has notified the agent that it does not intend to comply with its funding obligations (or failed to confirm that it will comply) or made a public statement to that effect, or has, or has a parent company that has, become the subject of a bankruptcy proceeding. Once classified as a “defaulting lender”, such lender’s vote is generally disregarded for any required lender vote. Consequently, when determining whether required lender approval has been met, the defaulting lender’s outstanding term loans, unused commitments, and amounts drawn under a revolver are to be disregarded. However, a defaulting lender still retains a voting right for certain key matters. The language also provides that the borrower may rely on the so called “yank a bank” provision to replace a defaulting lender and require such lender to assign its loans and unfunded commitments to an eligible assignee.

The LSTA and its members continue to work on the MCAPs’ tax language and expect that language to be finalized in Spring 2011.
NEW CHALLENGES PUT FCC LICENSE “PROCEEDS” COLLATERAL IN JEOPARDY

By Paige K. Fronabarger, Wilkinson Barker Knauer, LLP

Recent challenges to established precedent are shining a spotlight on the risks secured creditors face where the intended loan collateral includes proceeds of airwave licenses or authorizations granted to borrowers (or guarantors) by the United States Federal Communications Commission (“FCC”). The FCC licenses of broadcasters, wireless communications companies and other media businesses are essential to their business operations, are often their most valuable assets, and generally cannot be subject to a lien. Consequently, the right of a secured creditor to obtain a lien on the proceeds of FCC licenses (especially upon the sale or other disposition of such licenses after a default) is crucial to the secured creditor’s ability to realize the enterprise value of such borrower (or guarantor). Therefore, one can argue, that such right is also crucial to the ability of broadcasters, wireless communications companies and other media to access affordable credit.

Under its federal mandate, the FCC is required to regulate the public airwaves and ensure that only qualified persons or entities hold licenses.\(^3\) Section 301 of the Federal Communications Act of 1934, as amended (the “Act”), states that the government controls the airwaves and may give permission “for the use of such channels, but not the ownership thereof.” And while the Act does not expressly prohibit granting a security interest in an FCC license, the FCC, by its rules and policies, has adopted that prohibition and courts have upheld it.\(^3\) The rationale behind the FCC’s prohibition is that enforcement of a lien on an FCC license could result in foreclosure and transfer of the license without FCC approval.\(^4\)

The FCC and, until recently, lower courts, have not left lenders without any remedy. Both have recognized a secured lender’s right to create and enforce a security interest in the proceeds from sale or other disposition derived from the sale, transfer or other disposition of FCC licenses. Recognition of this right largely arose in response to the Bankruptcy Court in the Western District of Wisconsin’s summary judgment in *In re Tak Communications, Inc.*.\(^5\) The *Tak* court found that the security interests granted to Tak’s creditors in its FCC licenses (including the right to sell the business holding the licenses as a going concern) were prohibited under the communications laws.\(^6\)

Later in *MLQ Investors, L.P. v. Pacific Quadracasting*, a court-appointed receiver sold all of the assets of a debtor’s radio station.\(^7\) Upon conclusion of the sale, the district court directed the receiver to distribute all of the sale proceeds (including those derived from the sale of the radio station’s FCC licenses) to its secured creditor. Following an earlier court’s holding in *In re Ridgely Communications, Inc.*,\(^8\) the *MLQ* court rejected *Tak* and ruled that the creditor had perfected its security interest because the creditor sought to protect its interest in the proceeds of the station licenses. In reaching this result, the Bankruptcy Court in *MLQ*, like the court in *Ridgely*, recognized a distinction between a licensee’s public right to transfer its license and the licensee’s private right to receive money from the sale of its license, which is treated as a “general intangible” under the Uniform Commercial Code perfectible prior to sale of the license.\(^9\)

In 1994, the FCC addressed the question directly in its order in *In re Cheskey.*\(^10\) An aggrieved party asked the FCC to deny an assignment application filed in furtherance of a bankruptcy court ordered license sale because the order required the sale proceeds to be paid to the licensee’s secured creditor. The FCC expressly rejected the holding in *Tak*. Instead, the FCC determined that its 1988 decision in *In re Bill Welch*\(^11\) provided precedent that a security interest in the proceeds of the license sale does not violate FCC policy.

DO YOU WANT TO...

- WRITE FOR AN OFFICIAL ABA PUBLICATION?
- GET PUBLISHED, WITHOUT TOO MUCH OF A TIME COMMITMENT?
- CONNECT WITH OTHER MEMBERS OF THE UCC OR COMFIN COMMITTEES?

If so, submit an article for possible publication in a future issue of the Commercial Law Newsletter. Publishing an article with the Commercial Law Newsletter is a great way to get involved with the UCC Committee and the ComFin Committee. Articles can survey the law nationally or locally, discuss particular UCC or Commercial Finance issues, or examine a specific case or statute. If you are interested in submitting an article, please contact one of the following Commercial Law Newsletter Editors – Carol Nulty Doody, Kelly L. Kopyt, or Christina B. Rissler.
The FCC’s statement in Cheskey has not stopped debtors and junior creditors from challenging a first lien creditor’s right to the full enterprise value of the company in a bankruptcy sale. In 2004, the Wisconsin Bankruptcy Court in In re Media Properties approved the sale of a television station’s assets (including its FCC license) to a third party.12 After closing, the station’s prior “all assets” secured lender asserted a claim against the sale proceeds. The trustee for the bankruptcy estate objected to the claim on the grounds that the creditor’s security interest in the license was limited to “sale proceeds as they may have existed prior to bankruptcy,” of which there were none.13 The trustee argued that any proceeds from a post-petition station sale were “after-acquired” property and not subject to the creditor’s pre-petition security interest under 11 U.S.C. § 552.14 Since the creditor is precluded from taking a security interest directly in the FCC license, the trustee reasoned that the creditor was precluded from perfecting a security interest in the proceeds derived from the sale of that same asset under 11 U.S.C. § 552(b).15 The Wisconsin Bankruptcy Court rejected the trustee’s assertion on the grounds that a portion of the license remains after the FCC prerogatives are carved out, and that such remaining interest may be secured as a general intangible which continues in proceeds by operation of law under UCC § 9-203(g).16 In addition, the In re Media Properties court noted that 11 U.S.C. §552 gives “the bankruptcy court considerable latitude to apply pre-petition security interests to post-petition proceeds.”17 Several other courts have reached a similar conclusion. For example, the 11th circuit in In re Beach Television Partners agreed “with the developing case law that recognizing a security interest in the proceeds from the sale of an FCC broadcasting license, does not contravene the FCC’s authority to regulate broadcast frequencies.”18

But on October 19, 2010, the Bankruptcy Court for the District of Colorado ignored the body of precedent favoring creditor’s rights to license proceeds and denied a first lien creditor’s security interest in proceeds from a future sale of the debtor’s estate.19 Radio broadcaster Tracy Broadcasting Corporation (“Tracy”) borrowed money from Valley Bank and Trust Co. (“Valley Bank”) pursuant to a promissory note which was secured by a commercial security agreement that conferred a security interest in Tracy’s “general intangibles” and the proceeds thereof. Valley Bank filed UCC financing statements listing Tracy’s “general intangibles” and “proceeds” as collateral. In August 2009, Tracy filed for bankruptcy and the bankruptcy court appointed a Chapter 11 trustee on February 16, 2010. A pre-petition unsecured creditor commenced an adversary proceeding, arguing that Valley Bank did not have a security interest in the FCC license or its future proceeds because such rights were pre-petition rights and proceeds from a post-petition settlement agreement which would result in the sale of the station was after acquired property.20 Since the 10th Circuit Court of Appeals had not yet addressed whether a license holder may confer a security interest in the proceeds of an FCC-approved transfer, the Bankruptcy Court was not bound by in-circuit precedent. While the Colorado Bankruptcy Court acknowledged that a number of cases have followed Ridgley by recognizing that an FCC license includes certain private rights which can be secured as a general intangible, it expressly rejected the Wisconsin court’s application of Section 552 of the Bankruptcy Code in In re Media Properties. Section 552 prohibits a “security interest from encumbering any value that the estate may receive from any future transfer of the license.”21 At the time of Tracy’s bankruptcy, any sale of Tracy’s FCC licenses was subject to two contingencies: 1) negotiation of a purchase agreement and 2) FCC approval of the sale. Since neither condition had been satisfied as of the petition date, the Court found that Section 552 of the Bankruptcy Code was dispositive, and unlike the debtor in In re Media Properties. Tracy did not have a sufficient pre-petition interest in a sale and therefore could not transfer such interest to the bank.22 The In re Tracy Broadcasting Corporation case is currently on appeal.

On November 9, 2010, Sprint Nextel, citing In re Tracy Broadcasting Corporation, took a similar position and filed a challenge in Terrestar Network, Inc.’s bankruptcy case alleging that the plan developed by the trustee violated the communications laws because it impermissibly granted senior secured noteholders a lien in Terrestar’s FCC Licenses (and the proceeds from such sale).23 The Sprint Nextel claim remains pending before the U.S. Bankruptcy Court for Southern District of New York. How that court will rule is unclear because the Second Circuit Court of Appeals has not yet addressed this question.

Last, a similar issue was raised as part of the bankruptcy of ION Media Networks, Inc. (formerly Paxson Communications Corporation) (“ION”). In that case, ION had issued $725 million of secured first lien debt and $405 million of secured second lien debt which were each secured by liens on substantially all of the assets of the company. “FCC Licenses” were included in ION’s description of “Collateral.” A separate provision excluded from the Collateral grant certain “Special Property” defined as “any permit, lease, license agreement or other personal property ... to the extent that any requirement of law ... prohibits the creation of a security interest therein.”24 Second lien creditor, Cyrus Master Fund Ltd (“Cyrus”) challenged ION’s proposed plan of reorganization which granted all first lien creditors an interest in the enterprise value of ION and specifically included the proceeds from the sale of FCC licenses held by ION’s wholly owned license subsidiaries. The case raised two main issues: first, whether the first lien creditors had obtained a valid lien on the FCC Licenses and/or the proceeds of the FCC Licenses and second, whether language in the intercreditor agreement between ION’s first and second lien creditors prohibited Cyrus from contesting the validity or enforceability of those liens.

The ION Bankruptcy Court did not answer Cyrus’s question as to whether the liens in the FCC Licenses were perfected. Instead, the Bankruptcy Court broadly enforced Cyrus’s waiver in the intercreditor agreement. So while the ION decision provides strong support for the enforcement of pre-bankruptcy waivers and intercreditor agreements, it did not address whether the first lien creditor had an enforceable interest in the license proceeds.
These challenges collectively raise concerns about the treatment of FCC license proceeds in bankruptcy. Despite recent FCC policy statements promoting competition and innovation in the marketplace and a desire for expanded deployment of high cost communications networks, FCC licensees remain prohibited from using their licenses as valuable financing collateral to build those very networks.

Until Tracy is reversed, the Supreme Court addresses the split among the circuits or the FCC changes its rules to permit lenders to take security interests in a debtor’s FCC licenses subject to prior FCC approval, communications lenders should proceed with caution—especially if their loans could be subject to the jurisdiction of the Bankruptcy Court in the District of Colorado.

AN ATTEMPT TO “DEMYSTIFY” QUEBEC SECURED TRANSACTIONS LAW (PART II)

By Kiriakoula Hatzikiriakos, McMillan LLP

The first Part of this Article drew a portrait of the basic Quebec secured transactions concepts and vehicles. In our attempt to demystify Quebec law in this area, we explained the Civil Code of Quebec (“CCQ”) concepts and compared them to those found in Article 9 of the Uniform Commercial Code (“art. 9 of the UCC”). This approach proved very useful and demonstrated that, in terms of functionality, the CCQ security concepts are not so different from those found under art. 9 of the UCC.

In this Part II, we will delve a little further into the Quebec secured transactions regime. We will present particular issues often encountered in financing transactions involving Quebec debtors or assets. Again, wherever possible, we will draw parallels between the CCQ and art. 9 of the UCC. While preparing Part I, we contemplated this Part II would address the following issues:

(1) How can you protect your client’s interest in goods sold to a Quebec buyer? How is a “purchase money security interest” treated under Quebec law?
(2) Have you ever had a consignment agreement governed by New York law with property being consigned to a Quebec-based consignee? How do you protect your client’s rights as consignor in Quebec?
(3) How are sales (assignments) of accounts receivables treated and perfected in Quebec?
(4) How is security structured in Quebec in the context of a syndicated lending transaction? Are you familiar with the concept of “fondé de pouvoir”?
(5) Which conflict of law rules should the lender be aware of when structuring a cross-border transaction with significant assets in Quebec?

However, given the number of topics involved and to keep you interested, we decided to cover the first two topics enumerated above in this Part II and, the three following topics in Part III of this series.

II. Particular Quebec Secured Transactions Issues

A. Purchase Money Security Interests

The purchase money security interest concept (“PMSI”), as understood under art. 9 of the UCC, does not exist as such under the CCQ. This obviously raises the following question: how does (i) the seller who sold goods to a buyer on credit, or (ii) the third party who extended credit to the buyer to allow it to purchase goods, protect itself? Does a security interest in the goods give the seller or the third party special priority over other secured creditors? The CCQ does offer protection but not without presenting some interesting challenges.

One way for a vendor to ensure a better position over a prior registered security interest in future assets of its buyer-debtor is for the vendor to register a “vendor’s hypothec” on the assets sold. The protection is not, however, automatic. Certain conditions must be fulfilled: a hypothec must be created in the deed of sale and be registered at the Register of Personal and Movable Real Rights (“RPMRR”) within 15 days after the sale, and the prior registered security interest must have been granted before the purchase of the goods. Note that the hypothec has to be created “in the deed of sale” and the “sale” is understood to apply to a “one-time” transaction, not to “ongoing/from time to time” asset sales and purchases such as those governed by a master sale and purchase agreement. If the vendor-seller relationship is an ongoing one which contemplates sales of goods from time to time, then a deed of sale must be entered into for each sale and registered within 15 days thereafter. Evidently, these requirements are much more cumbersome than the PMSI conditions under art. 9 of the UCC. What about the third party who finances the purchaser?

Unlike the PMSI regime which can benefit a third party who finances the purchaser, the “vendor’s hypothec” does not extend to this third party. It is possible however for the financier to benefit from the rights granted to the vendor under the vendor’s hypothec, but a
few additional steps must be taken. Once the vendor’s hypothec is registered, the financier can request a hypothec on the purchase price balance and on its accessory (the vendor’s hypothec) or simply, an assignment of the foregoing. Again, this will only give the financier the vendor’s rights as previously described. A new hypothec (or assignment) will need to be entered into if the transaction is governed by a master sale agreement.

Since the vendor’s hypothec regime seems to be limited to a “one-time” sale and must be registered within 15 days after the sale, how else can the vendor or its financier protect itself if it fails to meet these requirements?

A conventional hypothec (security interest) could be included in the sale agreement. A few issues with this alternative… If it is difficult to describe the goods sold, the hypothec may charge the universality of the debtor’s-buyer’s assets. In this scenario, personal property searches need to be conducted at the RPMRR to assess the existence of other creditors because a hypothec ranks according to its date and time of registration. If other creditors exist, the vendor or its financier will need to negotiate subordination agreements with existing creditors in order to benefit from a first-ranking position on the goods sold.

If no creditors exist at the time of registration of the hypothec, it is not uncommon for the deed of hypothec to include a provision whereby the creditor benefiting from a hypothec on all of the vendor’s assets renounces its rights to the exercise of any hypothecary rights (remedies) ensuing from its hypothec, other than on the goods financed by such creditor. This contractual undertaking can be made known to third parties consulting the RPMRR. Hence, a subsequent creditor consulting the RPMRR will be able to see that the hypothec granted to the vendor’s financier charges all the buyer’s assets, but was truly put in place to ensure recourse by such financier to the assets financed.

Evidently, the vendor’s hypothec regime is not as convenient as the PMSI. To the extent the relationship between a vendor and a purchaser is of the nature of an instalment sale (conditional sale), where the vendor reserves title to the assets until payment in full of the sale price, the vendor can publish (register) its ownership right in the goods sold at the RPMRR. An instalment sale under Quebec law is a term sale where the seller reserves ownership of the property sold until full payment of the sale price. The reservation of ownership (retention of title) in respect of personal property acquired for the service of operation of an enterprise needs to be registered within 15 days from the sale to be effective against third parties from such date. With this filing in hand, the vendor shows the world that it is the owner of the assets sold. No subordination agreements with prior ranking creditors of the purchaser are required and the vendor can take back the property from the defaulting purchaser in the manner prescribed by the CCQ.

The CCQ also allows for the registration of the reservation of ownership rights of the seller at the RPMRR where the agreement between the parties contemplates sales of the property “of the same kind” on an ongoing basis (ie. master instalment sale agreement). Unlike the “15 days of the sale” registration requirement for a “one-time” instalment sale, no specific timeframe for registration of the seller’s reservation of ownership rights under a master instalment sale agreement is prescribed. If a creditor is financing the buyer’s acquisition, whether it be in the context of a “one-time” instalment sale or in a master instalment sale agreement, the creditor can inherit the seller’s reservation of ownership rights. The transfer (assignment) of such rights to the financier needs to be published (registered) at the RPMRR to be effective against third parties.

As more fully described in Part I of this article, registration of rights under a master agreement preserves all the rights of the seller or transferee (e.g. financier) in the sold property and in the universality of movable property of the same kind that may be involved in sales or transfers in the ordinary course of business between two enterprises following the registration. An important advantage of a reservation of ownership filing is avoiding the need to negotiate subordination agreements with creditors of the buyer. The seller retains title to the assets sold and, therefore, they do not become part of the buyer-debtor’s estate until such time as full payment of the sale price has been made.

From a conflict of laws perspective, when do the CCQ rules come into play? When should the seller or the buyer’s financier consult with Quebec counsel to ensure its interest in the assets sold is properly protected?

Under the CCQ, the conflict of law rules relating to security differ from those applicable to real rights and to sales. Presenting all the relevant rules is beyond the scope of this article. What one needs to keep in mind is that if the sale agreement involves a Quebec buyer, the contract is governed by Quebec law or the sold property is located (or is destined to arrive) in Quebec, prudence dictates to consult with Quebec counsel and make the relevant filing at the RPMRR.

B. Consignments
Consignment agreements are not defined under the CCQ, nor under any other specific legislation. Therefore, they are considered “innominate” contracts. Given the absence of any statutory framework for consignments, we need to turn to the judicial authorities for guidance as to how a consignment agreement is conceived and interpreted under Quebec law. Quebec courts are pretty consistent in applying the following criteria, which in fact are very similar to the common law criteria, to assess whether an agreement is a true consignment:

1. Existence of an agreement or contract;
2. Identification of the goods placed in consignment in a manner such that they are not confused with the other goods belonging to the consignee;
3. Separate bookkeeping methods in order to distinguish the product of the sale of the goods placed in consignment from the product of the consignee’s other sales in the course of the latter’s business operations;
4. Payment of the price due by the consignee after the sale by the consignee of the goods placed in consignment;
5. Return of goods unsold to the supplier; and
6. Parties’ behaviour in the execution of the “consignment” agreement conforms to such agreement.

The Quebec Superior Court in the Trizec case (which first established the criteria) clearly stated that all of the elements need to be complied with for an agreement to be recognized as a consignment agreement.

Quebec courts have been rigorous in applying the above criteria. In the event the consignment agreement or the supporting documentation does not fulfill this criteria, the consignor can find itself in the unfortunate situation where its ownership interest in the purported consigned goods is not recognized or transferred over to the consignee or a third party purchaser. Furthermore, if the consignee goes into bankruptcy, the consignor would not be entitled to exercise the remedies it would otherwise have if a true consignment was in place, such as possession of the goods which can be identified or entitlement to the proceeds of sale following a sale by the consignee’s trustee in bankruptcy.

Unlike the protection afforded to consignors under art. 9 of the UCC, the consignor’s interest in the consigned goods is rather precarious under Quebec law. The consignor’s interest in the goods is not a “security interest”, even less a PMSI. In fact, the consignor’s interest cannot be published and, therefore, rendered effective against third parties, as is the seller’s ownership right in assets sold pursuant to an instalment sale, as previously discussed. Consignment agreements differ from instalment agreements in many ways. The criteria set out above by the courts apply to establish consignment agreements, not instalment sales. Accordingly, “converting” or “adapting” a consignment into an instalment sale in order to allow for publication (registration) of the consignor’s interest in the goods sold as if it were a reservation of ownership is not reflecting the true nature of the transaction. At the outset, such a filing may seem like an “easy” way to evidence the consignor’s title in the goods. However, it may not mean much when the consignee’s trustee in bankruptcy enters the picture. … In that context, the reservation of ownership filing may cast a shadow on the true nature of the transaction between the parties and place the consignor in a difficult position. If the trustee relies on the filing and argues that the transaction is a conditional sale and the buyer has paid for the goods and, hence, has become the owner, then the consignee’s creditors would have first claims on such assets, leaving the consignor in a very vulnerable position.

So what is the consignor to do in order to protect its rights in the goods consigned? The safest way to ensure that a Quebec court would characterize a transaction as a consignment is to specifically enumerate the Trizec case criteria in the agreement. The agreement should also indicate that it is the intention of the parties to enter into a consignment agreement. Above and beyond this, in practice, the parties should be able to demonstrate that they are taking the necessary measures to ensure that the criteria are complied with (e.g. labeling the consigned goods for purposes of identification).

Furthermore, the consignor can require a hypothec on all of the consignee’s assets as security for the payment and performance of the consignee’s obligations. To avoid making this hypothec an impediment to subsequent potential creditors of the consignee, it would be
wise to have the consignor renounce in favour of the consignee and the consignee’s present and future creditors to exercising any hypothecary rights and remedies on the charged property (collateral) other than on the goods sold by the consignor to the consignee. Obviously, the hypothec will only charge the ”goods sold” once the assets enter the consignee’s estate, that is once the goods are resold by the consignee to a third party.

* This Part II has demonstrated that the laws of Quebec, particularly in the areas of purchase money security interests and consignments, do not offer the same protection art. 9 of the UCC grants to vendors and consignors. As we discussed, protection mechanisms are available in the CCQ, but they are not always as “convenient” as what is offered under art. 9 of the UCC. This being said, it is crucial for U.S. counsel representing a vendor or a consignor to consult with a Quebec expert when faced with a transaction involving Quebec assets. This must be done at an early stage in the transaction in order to benefit from the best protection Quebec law has to offer. Also, let’s keep in mind that “tailoring” an already negotiated and, perhaps even, an executed agreement to Quebec law can be a daunting task. That is why advice on Quebec law should be obtained as soon as possible in order to avoid unwarranted surprises and compromising the chance of having a secured position!

Stay tuned for Part III in the next issue:
- How are sales (assignments) of accounts receivables treated and perfected in Quebec?
- How is security structured in Quebec in the context of a syndicated lending transaction? Are you familiar with the concept of “fondé de pouvoir”?
- Which conflict of law rules should the lender be aware of when structuring a cross-border transaction with significant assets in Quebec?

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**UCC Spotlight**

By Kristen Adams, Professor, Stetson University College of Law, Vice Chair of the UCC Committee and Stephen L. Sepinuck, Professor, Gonzaga University School of Law, former Chair of the UCC Committee.

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.

*Diesel Props S.R.L. v. Greystone Business Credit II LLC,* 631 F.3d 42 (2d Cir. 2011)

In this case, the court confused contract rights with property rights, with the result that it improperly limited a secured party’s rights and remedies.

The debtor was the U.S. distributor of shoes manufactured by two Italian subsidiaries of Diesel S.p.A. (Diesel). The distribution agreement required that the debtor, at the end of each sales campaign, provide Diesel with a list of the sales orders collected. The debtor’s major financier, Greystone Business Credit II LLC ("Greystone"), had a security interest in all of the debtor’s assets. Greystone also entered into tripartite agreements with the debtor and the Diesel subsidiaries. Those agreements detailed the circumstances under which Greystone would finance new inventory and pay the Diesel subsidiaries.

In 2007, when the debtor was in default on various revenue covenants in its loan agreement with Greystone, Diesel shipped more goods to the debtor for which Diesel was never paid. Diesel terminated the distribution agreement and sued Greystone for failure to make payment under the tripartite agreements. Diesel also designated its U.S. subsidiary as its U.S. distributor. That subsidiary had no experience selling to retailers and no information about retailers’ prior orders from the debtor. However, the subsidiary hired a former employee of the debtor who provided the subsidiary with the debtor’s “order book,” a complete list of the debtor’s open orders. The subsidiary used this information to generate substantial sales. One employee referred to the order book as the hired employee’s “dowry” and wrote that “Christmas came early this year.”

Greystone counterclaimed for unjust enrichment, seeking recovery for the value of its “purloin[ed]” collateral: the order book. The district court awarded judgment for Greystone, both on Diesel’s claim against it and on Greystone’s counterclaim. On appeal, the Second Circuit affirmed the judgment with respect to Diesel’s claims but reversed with respect to Greystone’s counterclaims.
The court's analysis of the unjust enrichment action was rather brief. It wrote that, in general, a first-in-time principle applies to determine the priority of a security interest. Thus, a secured creditor takes subject to the rights of a person whose interest in the collateral preceded the secured creditor’s interest. Quoting cases dealing with warrant rights, the court stated that a later-in-time assignee can take priority over an earlier claimant if the later assignee was a bona fide purchaser, but that status requires that the purchaser have no knowledge of the adverse claim. Because Greystone was aware of the terms of the distribution agreement when it acquired its security interest, it took subject to Diesel’s earlier rights. The court expressly stated that “when a creditor takes a security interest in collateral to which it knows a third party has even an unperfected contract right, it takes that interest subject to those pre-existing [rights].”

The court’s analysis is flawed, primarily because the court seems to have confused contract rights with property rights. In the warrant cases the court relied upon, the earlier transaction created – at least arguably – property rights in the warrants. Thus, when the security interest attached, it attached (so the argument goes) only to the remaining rights the debtor retained. In this case, however, it does not appear that Diesel had property rights in the debtor’s order book. All the court said about the distribution agreement was that it gave Diesel a contractual right to information – information contained in the order book. Nothing in the court’s analysis indicates that Diesel ever received an assignment of or security interest in the order book itself. In other words, the debtor promised to provide information to Diesel in the future, but that is different from making a present transfer of property rights. In the absence of such a transfer, Greystone’s security interest in the order book should have trumped Diesel’s contractual rights. See § 9-201(a).

Even if Diesel had some property rights in the debtor’s order book, it was incumbent on the court to ascertain the nature of those rights. If Diesel’s rights were a security interest – in other words, if the rights secured the debtor’s obligations under the distribution agreement, which seems likely – then priority should have been governed by Article 9, not by some common-law, first-in-time principle. Because Greystone’s security interest was perfected while Diesel apparently did nothing to perfect, Greystone should have had priority under § 9-322(a)(2).

The most troubling aspect of the court’s analysis is not the result reached, but the blithe indifference to Article 9 and the quick embrace of common-law principles. It is certainly true that the UCC is built upon a large edifice of common law that continues to supplement the Code’s rules. See § 1-103(b). But the Code should be the starting point of any priority analysis, and supplemental principles of common law should not be used to supplant the Code’s statutory directives or undermine its policies.

*In re Mwangi*,

432 B.R. 812 (9th Cir. B.A.P. 2010)

Rarely does one come across a case as fundamentally flawed and dangerous as this one. The fact that it was issued by the Ninth Circuit Bankruptcy Appellate Panel – a court with extensive expertise and wisdom in commercial law and whose decisions have never before been spotlighted in this column – makes it all the more disturbing.

The case involves the right of a bank to place an administrative freeze on the bank account of a bankruptcy debtor. Wells Fargo Bank runs a computer comparison of the names of all new Chapter 7 bankruptcy debtors against its list of deposit account holders. Upon discovering that the Mwangis had filed a chapter 7 petition, Wells Fargo froze their deposit accounts and sent a letter to the chapter 7 trustee seeking instructions about what to do. The trustee did not respond but the debtors did. Claiming 75% of the funds in the accounts as exempt, the debtors demanded that Wells Fargo release funds to them. Wells Fargo refused and sent a letter to the debtors’ counsel. The letter stated that the deposit account was an asset of the bankruptcy estate and that, pursuant to the Bankruptcy Code, Wells Fargo was required to follow the trustee’s directions, at least until the time for objecting to the debtor’s exemption claim had expired. Unsatisfied with this response, the debtors sought sanctions for willful violation of the automatic stay. The bankruptcy ruled for Wells Fargo and the debtors appealed.

The BAP began by analyzing the Supreme Court’s decision in *Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995). It interpreted that decision as holding merely that an administrative freeze on a bank account did not violate § 362(a)(7), the stay of post-petition setoff. As to § 362(a)(3), which stays any act to exercise control over property of the estate, the BAP said that the Supreme Court merely did not want to interpret that rule as proscribing what § 542(b) authorizes, and hence the Supreme Court’s decision was limited to when a bank was acting as creditor with setoff rights. In other words, according to the BAP, a freeze to preserve setoff rights was permissible, but a freeze as stakeholder was not.

The BAP then moved on to the standing issue. After correctly concluding that the deposit account was property of the estate – not property of the debtors – the BAP nevertheless ruled that the debtors had standing to claim violation of the stay. In other words, the bank exercised control over property of the estate but the debtor could claim damages for any injury thereby. On the issue of whether the freeze violated the stay, the court wrote:
Wells Fargo could have paid the account funds to the trustee; it did not. Wells Fargo could have released the account funds claimed exempt to the [debtor] when demand was made; it did not. Wells Fargo could have sought direction from the bankruptcy court, by way of a motion for relief from stay or otherwise, regarding the account funds; it did not. Instead it chose to hold the funds until a demand was made for payment that it alone deemed appropriate. If that is not “exercising control over” the funds, we do not know what is.

Say what? Release the funds to the debtors? Surely not. At the time of the debtors’ demand, the deposit account was property of the estate and the period for objecting to the debtors’ exemption claim had not expired. Releasing the funds to the debtors would have been improper, see § 542(b) (payment should be “to, or on the order of, the trustee”), and would have subjected Wells Fargo to liability to the estate should the bankruptcy court later sustain an objection to the claimed exemption.

The other options mentioned by the court – paying the trustee or seeking a court order – were certainly things Wells Fargo could have done. But requiring them would be bad policy. The trustee might well be happy to have the funds earning interest in a bank account and might not want the hassle and expense of opening a new deposit account at another institution merely to hold the funds for what in all likelihood will be just a few weeks (until the time for objecting to exemptions expires). Seeking a court order requires paying a lawyer and consumes judicial resources, costs likely not to be justified given the small amount that will often be at issue ($1,300 in the Mwangi case).

Aside from a miserly view of the Supreme Court’s decision in Trumpf and a misguided view of what Wells Fargo could or should have done differently, there is a bigger problem with the BAPs decision. The court suffered from a critical misconception. Throughout its opinion, the BAP repeatedly referred to the “account funds,” as if the funds were a re at issue in the case. But that is not what a deposit account is. “A deposit account is not vault cash or a bailment of any kind. It is merely the unsecured promise of the bank to repay the estate.” Show Me the Money, 25 Clark’s Secured Transactions Monthly 7, 8 (Dec. 2009).

Thus the issue should not have been whether Wells Fargo exercised control over the “account funds,” but whether it exercised control over the deposit account. For the court to criticize Wells Fargo for “holding the funds until a demand was made for payment that it alone deemed appropriate” ignores the fact that this is exactly how a depositary bank honours its deposit account obligations. Indeed, given that Wells Fargo, on its own initiative, wrote to the Trustee acknowledging the obligation and seeking instructions about what to do with the deposit account, it is hard to see how Wells Fargo was improperly exercising control over the deposit account.

The implications of the BAP's analysis are deeply troubling. To say that a bank by refusing to pay “exercises control” over the “funds in the account,” and therefore violates the automatic stay, is to say that any account debtor whose creditor is in bankruptcy violates the stay by failing to pay when due. Indeed, it arguably turns almost every breach of contract into a stay violation. Such an expansive view of § 362(a)(3) cannot be squared with § 542.

Fortunately, at least four other courts have rejected the reasoning used by the BAP in Mwangi, each in a case involving Wells Fargo Bank. See In re Zavala, 2011 WL 476874 (Bankr. E.D. Cal. 2011) (debtor lacks standing to complain and, in any event, the freeze does not violate the stay); In re Bucchino, 439 B.R. 761 (Bankr. D.N.M. 2010) (same); In re Young, 439 B.R. 211 (Bankr. M.D. Fla. 2010) (same); In re Phillips, 2010 WL 3943730 (Bankr. M.D.N.C. 2010) (temporary refusal to pay the debtors served to both maintain the status quo and preserve property of the estate for the trustee, and thus did not violate the stay). Moreover, the BAP's decision is reportedly on appeal to the Ninth Circuit. Nevertheless, for now the BAP decision is binding within the Ninth Circuit – a point blithely and bravely ignored by the court in Zavala – and that in turn puts banks in a real bind.

In re Royal West Properties, Inc., 441 B.R. 158 (Bankr. S.D. Fla. 2010)

This case concerns the proceeds of mortgage receivables. The court reached the correct result but its reasoning was slightly off the mark in at least two important respects.

The debtor was a retailer of vacant lots in Florida. The debtor sold many of its lots on credit, taking back a mortgage in the lot sold. To raise capital, the debtor borrowed from numerous “investors” and in return gave each a security interest in one or more mortgage receivables. These security interests were perfected by possession of the mortgage note. Many of the debtor’s customers defaulted and the debtor settled some of their obligations, often by accepting a deed in lieu of foreclosure. When the debtor later went into bankruptcy, the trustee challenged whether the investors whose receivables the debtor had settled held a perfected security interest in the lots the debtor re-acquired.

The court began its analysis by questioning whether the debtor had authorization to settle the mortgage receivables. Quoting § 9-315(a)(1), the court noted that a security interest in collateral does not continue in collateral sold if the secured party authorizes the sale...
free and clear of the lien. Then, noting that a security interest automatically attaches to proceeds of collateral, § 9-315(a)(2), the court concluded that if the investors authorized the debtor to dispose of the mortgage receivables, their claims would not be secured by any collateral, including the re-acquired vacant lots.

This conclusion is wrong. While an authorized disposition of collateral free and clear does cut off the security interest in the original collateral, it does not prevent the security interest from attaching to proceeds. This is evidenced by the different language of paragraphs (1) and (2) of § 9-315(a). The former, dealing with the security interest in the original collateral, includes an exception for sales free and clear. The latter, dealing with the security interest in identifiable proceeds, does not. Moreover, from a practical standpoint, secured creditors would almost never authorize a sale free and clear if that meant they also waived any interest in the proceeds.

The court then moved on to whether the investors had authorized the debtor to settle the mortgage receivables. Relying on the fact that the investors had done nothing to “police their investment” – they had never contacted the mortgagors to advise them of their interests and had allowed the debtor to continue to service the receivables – the court concluded that the debtor had either actual or implied authority to settle the receivables. This conclusion seems reasonable as a matter of agency law but the court should have examined Article 3 on who may enforce an instrument. After all, an obligor on an instrument is not an “account debtor,” see § 9-102(a)(3), and nothing in Article 9 deals with who may enforce the instrument maker’s obligation. See § 9-404 cmt. 5.

Having erroneously concluded that the investors obtained no security interest in the re-acquired lots because they had authorized the debtor to dispose of their receivables free and clear, the court nevertheless discussed whether, if the investors did have a security interest in the lots, that security interest was perfected. Citing to the perfection rules of § 9-315(c), (d), the court observed that the security interest would be perfected only for twenty days. After that, none of the three rules in § 9-315(d) would allow perfection to continue. The investors had not perfected in the receivables by filing and, even if they had, perfection in the lots cannot be accomplished by filing in the UCC office. Cf. § 9-315(d)(1). The lots were clearly not cash proceeds. Cf. § 9-315(d)(2). And the investors had not recorded their interests in the real estate records. § 9-315(d)(3).

The court’s conclusion is correct but its analysis was faulty. Security interests in real estate are outside the scope of Article 9. See § 9-109(d)(11). As a result, neither the temporary perfection rule of § 9-315(c) nor the rules in § 9-315(d) for extending that perfection applies. Indeed, one can make a strong argument that even the automatic attachment rule of § 9-315(a)(2) does not apply. Accordingly, for the investors to have a perfected interest in the re-acquired lots – and perhaps for them to have any interest in those lots – they must have complied with the real property law of Florida. Because they had not done so, the interests could not withstand the trustee’s strong arm powers.

Nevertheless, the court’s ultimate conclusion that the investors lost to the trustee was correct.

Useful Links and Websites

Compiled by Commercial Law Newsletter Co-Editors Carol Nulty Doody, Kelly Kopyt, and Christina Rissler.

Please find below a list of electronic links that our members may find useful:

1.  www.lexology.com – In cooperation with the Association of Corporate Counsel, Lexology provides articles and practical tips relating to the practice of law.

2.  The UCCLA-W-L listserv is sponsored by West Group, publisher of the “UCC Reporting Service.” The listserve is an e-mail discussion group focusing on the Uniform Commercial Code. To subscribe to the UCCLA-W-L listserve, go to http://lists.washlaw.edu/mailman/listinfo/ucclaw-l


6.  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/Centers-Programs/commercial_law_center/default.asp

7.  The International Association of Commercial Administrators (“IACA”) maintains links to state model administrative rules (MARS) and contact information for state level UCC administrators. This information can be accessed at http://www.iaca.org
8. Persons or entities may be disqualified from holding a license for a number of reasons including, but not limited to the type of licenses involved, foreign ownership, cross-ownership or spectrum cap limitations and character questions.

9. There have been two exceptions to this policy. First, the FCC itself has taken an exclusive security interest in licenses subject to the auction installment payment program and a senior security interest in the proceeds of a sale of an auctioned license. Second, in 2004, the FCC revised its rules to permit licensees who borrow money from the Department of Agriculture’s Rural Utilities Service (“RUS”) to grant a security interest in their wireless licenses to RUS, subject to prior FCC approval of any transfer of control. See Report and Order and Further Notice of Proposed Rulemaking, FCC 04-166, in WT Docket Nos. 02-381, 01-14, and 03-202, adopted July 8, 2004, and released September 27, 2004.


With your help, our list of electronic resources will continue to grow. Please feel free to forward other electronic resources you would like to see included in future editions of the Commercial Law Newsletter, by sending them to Carol Nulty Doody or Kelly L. Kopyt, the Uniform Commercial Code Committee Editors or Christina B. Rissler, the Commercial Finance Committee Editor.
16 Id at 250.
17 Id.
18 In re Beach Television Partners, 38 F.3d 535, 536 (11th Cir. 1994).
20 Id.
21 Id.
22 Id.
23 See Objection of Sprint Nextel Corporation to Motion of the Debtors for Interim and Final Orders: (I) Authorizing Debtors to Obtain Post-Petition Financing; (II) Authorizing Debtors to Use Cash Collateral; (III) Granting Adequate Protection to Prepetition Secured Parties; and (IV) Scheduling a Final Hearing (Entered: 11/09/2010), available at TerreStar Networks Inc., et al., Docket No. 124.
25 I would like to extend my appreciation to my colleague and friend Clifton Jarin, associate in the Financial Services group of McMillan LLP who assisted me in this Part.
26 Art. 2954 Civil Code of Québec.
27 For conditions of a valid hypothec, see Part I of this Article, section I. A.
28 See art. 2956 CCQ.
29 The RPMRR application for registration form contains a section where parties can make public particular facts relating to the filing.
30 See art. 1745 CCQ.
31 The Ontario Personal Property Security Act, R.S.O. 1990, c. P.10 (“PPSA”) applies to a conditional sale: see s. 2(a).
32 Art. 1749 CCQ.
33 Art. 2961.1 CCQ. The registration is effective for a period of 10 years and may be renewed. The article provides that the registration of reservations of ownership must relate to the “universality of movable property of the same kind that may be involved in sales or transfers in the ordinary course of business between persons operating enterprises”. There has not been any case law prescribing the parameters of a sufficient description of property “of the same kind” for the purpose of the filing. The challenge is to provide a description such that the seller’s title to the assets sold would not be compromised against a trustee in bankruptcy of the buyer and its creditors. This can be difficult where the buyer deals with more than one seller of similar assets. Note that art. 2961.1 CCQ also applies to the registration of rights of ownership under leasing contracts and of rights under leases with a term of more than one year.
34 Art. 1745 and 2961.1 CCQ.
36 For security, see art. 3102 ssq. CCQ; for real rights, see art. 3097 CCQ (situs); for sales, see art. 3114 CCQ.
37 As discussed previously, the filing could be a “vendor’s hypothec” (art. 2954 CCQ); a reservation of ownership filing for an instalment sale agreement (art. 1745, 2961.1 CCQ) or a conventional hypothec on the buyer’s property.
38 Under Quebec law, a consignment is a transaction in which a person delivers goods to a merchant for the purpose of sale, but no definition is provided such as under art. 9-102(a)(20) UCC.
39 See art. 9-109(a)(4) UCC.
40 Under Quebec law, there are three categories of agreements: nominate, innominate and mixed. Nominate agreements are regulated by the CCQ or by another specific statute. A contract of sale is an example of a nominate contract. Innominate agreements are contracts that have not been addressed by the legislative authorities. Mixed agreements are contracts that are derived from two or more nominate contracts, for example a sale and service agreement.
42 Art. 9-103(d) UCC (consignor’s inventory purchase money security interest). The PPSA applies to a consignment that secures the purchase price of goods supplied thereunder: see s. 2 PPSA.
43 The hypothec amount should be set high enough to cover the total amount of indebtedness contemplated under the consignment agreement.
In recent years, we have seen a subtle change in the approach to legal opinion practice. I believe there has been a trend away from the “easier path” espoused by the TriBar Committee in its seminal 1979 report (“Legal Opinions to Third Parties: An Easier Path”) and reaffirmed in its 1998 report (“Third-Party ‘Closing’ Opinions”), and an increased concern over exposure to claims and liability, resulting in more defensive practice.

This trend has been reflected, for example, in greater use of express exceptions, assumptions and limitations and reduced reliance on customary practice, and in resistance to a greater number of particular opinions that historically were not of concern. It also is seen in a reduced willingness to make professional judgments and more of an eye on litigation outcomes, especially the question “will I be able to win on a motion to dismiss.”

Although this trend might be consistent with the desire of some to reduce or eliminate entirely third-party opinions or at least remedies opinions, to the extent that third-party opinion practice is to continue, this trend is not, in my judgment, helpful to the opinion process. This is because, when opinions are given, opinion givers and opinion recipients have nowhere to go but to give and receive third-party legal opinions based on a common understanding of customary practice and to exercise appropriate professional judgment in doing so.

This is not to say that some recalibration of opinion practice should not take place, both in the nature of the opinions given and in improving communications between opinion givers and recipients. For example, TriBar is revisiting its guidance on opinions on choice-of-law and forum selection provisions to see whether it might be better for some underlying assumptions to be stated expressly. Also, it is appropriate to revisit the care used in giving opinions and the procedures followed to assure their quality. Our Committee is in the process of analyzing the results of an opinion office practices survey we distributed, and these results should provide helpful insights on internal approaches to opinion practice. In addition, the Working Group on Legal Opinions has made a major contribution through its biannual seminars analyzing opinion practices and focusing awareness on the importance of risk mitigation.

These are healthy steps but they should take place in an overall context that recognizes the importance of customary practice as the bedrock of third-party legal opinions and the acceptability, and indeed necessity, of well-informed professional judgment. Only in this context can legal opinion practice operate effectively and efficiently for the benefit of our clients and to meet their legitimate expectations.

It is my expectation that the joint project of this Committee and WGLO, working with state and local bar groups, to seek to identify the breadth of consensus that exists regarding customary practice will make a major contribution to establishing a proper context for legal opinion practice and, by doing so, will move us further down, if not the “easier path,” then the “right path.”

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Future Meetings

ABA Section of Business Law Spring Meeting
Marriott Copley Place Hotel
Boston, MA
April 14-16, 2011

Committee on Legal Opinions

Friday, April 15, 2011

- Committee Meeting. 8:30 a.m. – 10:30 a.m.
- Program: Ground Rules for Giving Outbound Cross Border Opinions. 3:00 p.m. – 4:30 p.m.
- Reception (sponsored by Edwards Angell Palmer & Dodge LLP). 5:00 p.m. – 6:30 p.m.

Committee on Federal Regulation of Securities, Subcommittee on Securities Law Opinions

Friday, April 15, 2011

- Subcommittee Meeting. 2:00 p.m. – 3:00 p.m.

Committee on Professional Responsibility

Saturday, April 16, 2011

- Committee Meeting. 9:00 a.m. – 10:30 a.m.

Committee on Audit Responses

Saturday, April 16, 2011

- Committee Meeting. 10:00 a.m. – 11:00 a.m.

Working Group on Legal Opinions
New York, New York
May 3, 2011

ABA Annual Meeting
Westin Harbour Castle
Toronto, Ontario
August 5-8, 2011
Practice Corner

We inaugurate with this issue practice pointers from experienced opinion givers and recipients on issues that frequently arise in opinion practice. The first practice pointer is from Lou Hering and Melissa DiVincenzo of the Morris Nichols firm, Wilmington, Delaware.

Opinion Considerations for Agreement Provisions
Extending Statutes of Limitations

Like the law in many other states, subject to the exception noted below for contracts under seal, Delaware law does not permit the extension of a statute of limitations by contract. See Shaw v. Aetna Life Insurance Co., 395 A2d 384, 386-387 (Del. Super. 1978). While many practitioners may be familiar with this prohibition, some may not have considered the types of provisions that could be construed to run afoul of the prohibition and the implications for certain legal opinions. Practitioners providing enforceability opinions on provisions that could be construed as contractual extensions of the statute of limitations should be aware of the prohibition and, more importantly, the ways in which the issue can arise. For example, many private company acquisition agreements require the seller to indemnify the buyer post-closing for losses arising from a breach of the seller’s representations and warranties. The parties may approach this through a combination of survival clauses and contractual indemnification obligations. Such indemnification obligations may, by their terms, extend for a number of years post-closing and, in the case of a breach of certain representations, such as authority and capitalization, may extend indefinitely.

For purposes of Delaware law, if practitioners are asked to provide enforceability opinions with respect to such agreements, they should be aware that provisions purporting to allow recovery for breaches of representations and warranties beyond the three-year statute of limitations applicable to contract claims may not be enforceable as a matter of public policy. Under Delaware law, a claim for breach of representations or warranties can accrue at closing, such that an agreement that obligates the buyer post-closing for losses arising from such a breach for more than three years could constitute an impermissible attempt to extend the statute of limitations by contract, absent a basis for tolling of the statute. See CertainTeed v. Celotex Corp., 2005 WL 217032 (Del. Ch. 2005) (distinguishing between direct claims for breach of representations and warranties between the contracting parties, which accrue at closing, and claims for reimbursement for third-party claims, which may not accrue until payment is made to the third party).

From an opinion standpoint, if the potential infirmity is not addressed in the agreement, practitioners should consider specifically qualifying the opinion as to such provisions or noting that they will be subject to the applicable statutes of limitations. One possible form of opinion qualification would be to include the following statement: “We express no opinion as to the enforceability of any provision in
the [Transaction Documents] to the extent it violates any applicable statute of limitations.” Alternatively, the opinion could identify the specific sections of the documents that raise the concern and note that the enforcement of those sections “would be subject to any applicable statute of limitations.” From a drafting standpoint, practitioners could consider drafting the obligation as a covenant requiring future performance as losses are incurred rather than as a provision requiring reimbursement for breach of representations and warranties. In addition, practitioners could consider following certain formalities to create a contact under seal because, under Delaware law, a contact under seal is subject to a twenty-year statute of limitations. See Whittington v. Dragon Group L.L.C., 991 A2d 1, 10-12 (Del. 2009). For a discussion of the formalities to be met in creating a contract under seal, see Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC, 2010 WL 975581 at *1-*2 (Del. Ch. 2010); Kirkwood Kin Corp. v. Dunkin’ Donuts, Inc., 1995 WL 411319 at *4-*6 (Del. Super. 1995). However, to the extent that a court will apply the statute of limitations of the forum, rather than of the chosen law, it may be necessary to couple the provisions relating to a contract under seal with a forum selection clause agreeing to litigate exclusively in Delaware (which itself could possibly be subject to challenge). See “Special Report of the TriBar Opinion Committee: The Remedies Opinion – Deciding When to Include Exceptions and Assumptions,” 59 Bus. Law. 1483, 1498-1502 (2004) (forum selection clauses).

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[Editor’s Note:] It is in part for the reasons discussed by Louis and Melissa that many opinion givers include express exceptions from their enforceability opinions for contractual waivers of statutes of limitations. Louis and Melissa have suggested two possible approaches. In Reade Ryan’s and Andy Kaufman’s excellent list of “Boilerplate Exceptions,” they include another regarding waivers of statutes of limitations: “We express no opinion as to any waiver of any statute of limitations.” As they note, “[m]any jurisdictions do not permit waivers of statutes of limitations, and in those that do the enforceability of such waivers is often limited or restricted. For example, in New York, Section 17-103 of the New York General Obligations law, and Kassner & Co. v. City of New York, 46 N.Y.2d 544, 415 N.Y.S.2d 785, 389 N.E.2d 99 (1979) and related case law, restrict the enforceability of such waivers.”]

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Notes From the Listserve

[Editor’s Note: Dialogues on the Committee’s listserve are not intended to be authoritative pronouncements of customary opinion practice, but represent the views of individual lawyers on opinion topics of current interest. Members of the Committee may review the comments referred to below by clicking on the “Archives” link under “Listerves” on the Committee’s website.]

Attesting to the growing popularity of the Committee’s listserve, there have been 14 legal opinion queries from our members since our Fall 2010 issue. (Our “Notes from the Listserve” in the Winter 2010 issue was devoted solely to providing an index of listserve dialogues since commencement of this feature (October 2008) through our Fall 2010 issue.) Seven of the dialogues that generated numerous responses are summarized here.
1. **“As If” Remedies Opinions on Loan Documents Drafted by Lender’s Counsel**

Notwithstanding the passage of more than twelve years since TriBar’s acknowledgement of the “growing acceptance” of the “as if” remedies opinion (TriBar Report (1998), “Third-Party ‘Closing’ Opinions,” § 4.6), the topic continues to generate controversy. J.W. Thompson (“Topper”) Webb of Miles & Stockbridge P.C., Baltimore, by his inquiry of December 13, 2010 asked for the listserv’s reaction to a lender’s counsel’s refusal to accept his firm’s enforceability opinion on loan documents drafted by lender’s counsel. The loan documents designated the law of the lender’s firm’s home state, where Topper’s firm does not practice, as the “chosen” law of the loan documents. In addition to opinions on due authorization and execution and related “corporate” opinions, Topper’s firm offered to provide an opinion for its Maryland client that (i) a Maryland court, and a federal court sitting in Maryland applying Maryland choice of law principles, would respect the choice of law in the loan documents, and (ii) notwithstanding the choice of law in the loan documents, if the court were to apply Maryland law, then the loan documents would constitute enforceable obligations of Topper’s client, subject to normal exceptions (bankruptcy, equitable principles, etc.).

The consensus of those who responded to Topper’s inquiry is that his approach was standard and “market” and perhaps even generous in offering the choice-of-law opinion (Jon Cohen, Snell & Wilmer, Phoenix; Jerry Grossman, Luce, Forward, Hamilton & Scripps LLP, San Diego; and Joel Greenberg, Kaye Scholer LLP, New York), albeit this response was not unanimous. Charles Menges of McGuireWoods LLP, Richmond, Virginia, observed that, in his experience, the “predominant practice [is] to have a lawyer in the state whose law governs the transaction . . . issue the enforceability opinion.”

As Ed Wender of Venable LLP and Ed Levin of Gordon Feinblatt, Rothman, Hoffberger & Hollander, LLC, both of Baltimore, pointed out, if a lender insists upon an enforceability opinion on documents prepared by its own counsel whose chosen law is the state in which that counsel practices, then there is an argument that the lender should get the enforceability opinion from its counsel. Ed Levin cited in support of this position the observation of the Real Estate Opinion Letter Guidelines published by the American College of Real Estate Lawyers Opinion Committee and by the ABA’s Section of Real Property, Probate & Trust Law’s Legal Opinions Committee that requesting the enforceability opinion in such circumstances from borrower’s counsel “normally should not be necessary and may not be cost justified.”

Another common approach, noted by Tom Kearns of Olshan Grundman Frome Rosenzweig & Wolosky LLP, New York, is to assume “that for the purpose of our opinion, _____________ law [the chosen law of the loan documents] is the same as _____________ law [the law covered by the opinion] with respect to the Loan Docs.” Some noted that this is a less desirable form of the “as if” opinion because of the artificiality of the assumption.

Summing up, Chair Stan Keller observed that in his experience the “as if” remedies opinion is acceptable in most U.S. transactions and that sometimes the “as if” remedies opinion is coupled with a choice-of-law opinion. Typically, it is only when a matter justifies the extra expense entailed or the “as if” opinion is inadequate (e.g., when an opinion is required by an indenture or under federal securities law) that local counsel is retained to render the enforceability opinion under the chosen law.

2. **Enforceability Opinion on a General Release**

Tim Hoxie of Jones Day LLP, San Francisco, by his email of January 3, 2011, asked the listserv for its views about rendering an enforceability opinion on a general release or on a contract containing such a release. While Tim acknowledged the standard exceptions typically taken in an opinion letter for
broad waivers of statutory rights and future defenses, he observed that there should be no inherent reason one could not give such an opinion.

The consensus of the responders was to focus on what rights are being released. The more specific the release the better able the opinion giver should be to assess the validity of the release in terms of public policy, statutory limitations, and the consideration given for the release. Broadly-stated releases not specifically focused would require too many exceptions and investigation to be cost effective (Nelson Crandall, Enterprise Law Group, Inc., Menlo Park, California, Abigail Watts-FitzGerald, Hunton & Williams, LLP, Miami, and Kathleen Hopkins, Real Property Law Group, PLLC, Seattle). Cynthia Baker of Chapman and Cutler LLP, Chicago, concurred: “While I do think it is possible to give an opinion on enforceability of known, choate and specifically identified causes of action or rights, in most instances it is not worth the cost as the releasee could get that advice from its own counsel.” Moreover, noted Cynthia, in the context of releases of claims in an actual dispute, the custom is not to provide a legal opinion.

As Committee Chair Stan Keller summed up:

“The responses seem to indicate a consensus that opinions on the enforceability of releases, whether as standalone agreements or as provisions in other agreements on which opinions are typically given, can raise issues, and that the work required to give them, especially given the limitations that may be required, often make such opinions of doubtful benefit.”

3. **UCC Security Interest Opinions & Assumptions about Chosen Law**

Haywood Barnes of Poyner Spruill LLP, Charlotte, North Carolina, set off an important dialogue on UCC security interest opinions by his query of January 6, 2011. Haywood recited the practice of borrower’s counsel rendering both a remedies opinion and a security interest opinion under local law when the chosen law of the security agreement is that of another state. Should a firm in this situation, asked Haywood, “assume, for purposes of giving an opinion on perfection by filing, that a valid security interest exists under the law of the contract?” (Emphasis in original.) Steve Weise of Proskauer Rose LLP, Los Angeles, promptly responded that the “perfection opinion is based on the attachment opinion as given in the opinion letter under local (not contract) law and there’s no need to assume attachment under the law that actually applies to attachment.” Joseph Heyison of Daiwa Capital Markets, New York, concurred that “there is no need under conventional practice to consider the validity of the interest under the law of the contract,” but that the opinion giver should consider whether the “contract contains provisions that make it unenforceable under the assumed [local] law.”

Focusing on the two separate opinions — the remedies or enforceability opinion and the security interest opinion — Jack Burton of Rodey, Dickason, Sloan, Akin & Robb, Santa Fe, New Mexico, noted that separate assumptions apply to each. As to the remedies opinion, the opinion giver sometimes will assume, “contrary to [the] law chosen in the loan documents, [that] the law of [the] state where the borrower is located will govern the documents,” and, the opinion giver will separately assume, as to the security interest opinion, “that a valid, binding and enforceable security interest is created by the loan documents.” Charles Menges of McGuire Woods, LLP, Richmond, Virginia, concurred that “the perfection opinion should not be given unless it is assumed that a valid security interest was granted under the actual law governing the security agreement.” Evan Borenstein of Curtis, Mallet-Prevost, Colt & Mosle LLP, New York, added that “[i]n order to eliminate any doubt, the opinion giver can expressly assume that local law governs attachment for both the attachment and the perfection opinions.”
Steve Weise responded that an opinion recipient accepting an “as if” opinion on attachment cannot be expecting to get an opinion on attachment (via the perfection opinion or otherwise) under the chosen law of the contract. “So,” observes Steve, “while an assumption is harmless in that sense, it’s also duplicative.”

Jerry Grossman of Luce, Forward, Hamilton & Scripps, LLP, San Diego, helpfully closed with a form of his firm’s perfection opinion.

[Editor’s Note: The TriBar security interest opinions report (“U.C.C. Security Interest Opinions — Revised Article 9,” 58 Bus. Law. 1449 (2003)) articulates principles and guidelines relevant to Haywood’s inquiry:

- The remedies opinion on a security agreement and the security interest opinion are separate opinions that address different subjects. The remedies opinion addresses the formation of a contract and the enforceability of the opinion giver’s client’s undertakings in that contract. The security interest opinion addresses the satisfaction of the U.C.C.’s requirements for establishing and preserving the secured party’s interest in the collateral. § 2.2.

- The remedies opinion should not be interpreted, in the TriBar Committee’s view, “to cover the attachment of the security interest.” § 2.2 n. 42.

- As TriBar noted,

  “Although lawyers often refer to the entire agreement as a ′security agreement,’ . . . strictly speaking for purposes Article 9 the term ′security agreement′ is limited to the relevant language creating or providing for the security interest. . . . A contract that includes a security agreement may be effective as a contract although it fails to create a security interest, . . . .” § 2.2 n. 42.

- A security interest opinion does not address which state’s law governs the perfection, the effect of perfection or non-perfection, or the priority of the security interest. § 2.1(d). A remedies opinion on the security agreement covers the enforceability of the choice-of-law provision in the security agreement. However, an opinion on the enforceability of a choice-of-law provision in the security agreement does not address what law governs the perfection, the effect of perfection or non-perfection, or the priority of the security interest. § 3.2.

Consistent with the observations of the TriBar report, but expanding them to presciently address Haywood’s query, the Uniform Commercial Code Committee of the Business Law Section of the California State Bar, in its June 2005 report on Legal Opinions in Personal Property Secured Transactions, notes:

“Consistent with the foregoing, a [security agreement remedies opinion] is customarily viewed as not implicitly containing an opinion as to
the creation, attachment, perfection or priority of a security interest (including any clause granting a security interest). Similarly, a [security interest opinion] is customarily viewed as not implicitly containing an opinion as to the enforceability of a security agreement against any particular party. Accordingly, except to the extent the same opinion letter expressly covers both opinions (a practice that is fairly common), (1) qualifications that are appropriate for a [security agreement remedies opinion] are unnecessary and need not be included in a [security interest opinion], and (2) a qualification that the opinion giver is assuming the enforceability against the parties of the relevant security agreement is unnecessary for purposes of a [security interest opinion].”

California Report at 7 (footnotes omitted).

4. Challenging an Opinion Giver’s Assumption as to the Genuineness of Signatures

As TriBar and this Committee (in its Legal Opinion Principles) note, opinion givers commonly assume, among other things, “that the original documents furnished them are authentic and that the signatures on executed documents are genuine,” and further note that this assumption is understood without being stated expressly in the opinion letter. TriBar, “Third-Party ‘Closing’ Opinions” (1998) § 2.3(a); Legal Opinion Principles III(D).

What should you do when lender’s counsel, notwithstanding this authority, insists that you as the opinion giver delete from your closing opinion an express assumption regarding the genuineness of signatures on the loan documents? This question was put to the listserv on February 18, 2011 by Evan Borenstein of Curtis, Mallet-Prevost, Colt & Mosle LLP, New York, and triggered a strong response. Evan expressed his concern that, under his circumstance where the express assumption was rejected, if the express assumption were omitted, in reliance upon customary practice, as articulated by TriBar and this Committee, then his omission of the assumption might be construed as an “implicit opinion that the signatures are in fact genuine.”

The overwhelming response was to encourage Evan to stick to his guns and retain the exception, notwithstanding the attention this issue has received since an action was filed in New York State Court (no. 603 819/2009) in December 2009 by Fortress Credit Corp. and an affiliate against Dechert LLP on a closing opinion rendered on loan documents that had been forged by Marc Dreier. As numerous responders pointed out, the genuineness of signatures and the authenticity of documents are factual matters that do not call upon the legal competence of counsel.

How about lenders that permit an express assumption as to the genuineness of all signatures, except those of the opinion giver’s client? As Michael Sherman of Cozen O’Connor, Philadelphia, noted, he always resists even that restriction, “unless there will be a physical closing (which rarely happens these days), I witness the signatures of the officers who sign on behalf of the borrower, and I know who they are.” If these conditions do not apply, then he explains that his client “doesn’t want to have to spend the extra money to have someone from our office travel to the client’s office (which is often in another city) to watch the officers sign,” and, reports Michael, that typically ends the discussion, with the lender acquiescing to the unlimited assumption.

On the other hand, John Hay of Gust Rosenfeld P.L.C., Phoenix, reported that he normally acquiesces in requests to remove the assumption as to the genuineness of the signatures on documents signed by his client. However, that means that he accepts the responsibility to satisfy himself that his firm’s clients have, in fact, signed the documents. Where he does not know the clients or otherwise
cannot verify personally that their signatures are genuine, he relies “on notarizations or statements by people who do know whether the signatures are genuine” (e.g., an incumbency and signature certificate). In such cases, he includes an express statement of such reliance in his opinion letter.

Dick Howe of Sullivan & Cromwell LLP, New York, commented that once the issue has been raised by the opinion recipient’s counsel, the opinion giver can no longer rely on the unstated assumption that the signatures to all documents are genuine, but must state the assumption (unless the opinion giver is prepared to verify the genuineness of signatures). Dick, however, makes the point that, once the issue is raised, the opinion giver needs “to find out from the lender why it is concerned.” It could be that it is simply a lawyer-raised point (familiarity with the *Dechert* case, perhaps) in which case raising the question may make the objection to the stated assumption go away. If the opinion recipient’s counsel persists, then “the only way to confront the issue is to make the lender resolve it. The lender is the one who decided to make the loan, and it necessarily had to decide to trust the borrower.”

5. **Enforceability Opinions on Loan Documents in which MERS (Mortgage Electronic Registration Systems) Corporation is Named as Nominee for Lender**

On February 21, 2011, Chair Stan Keller passed along a request from a member of the Committee for input on appropriate exceptions that should be taken when rendering enforceability opinions on loan documents in which MERS Corporation is named as the “nominee for the lender.” Several commentors agreed with Steve Weise of Proskauer Rose, LLP, Los Angeles, that since real estate enforceability opinions do not address perfection of the mortgage or deed of trust or compliance with the procedural rules that would govern any foreclosure of the mortgage or deed of trust, no exception need be taken. Others, referring to the significant publicity that residential foreclosures in general and MERS in particular have received (see, in this regard, Michael Powell’s and Gretchen Morgensen’s article on MERS (“MERS? It May Have Swallowed Your Loan,” *New York Times, Sunday Business*, March 6, 2011, page 1) and pointing to state law decisions holding a deed of trust or mortgage unenforceable where the beneficiary or mortgagee is not the lender (Douglas F. Landrum, Jackson DeMarco Tidus Peckenaugh, Irvine, California) suggested the inclusion of an explicit exception or assumption. Eric Marcus of Kaye Scholer LLP, New York, gave the following assumption he reported has been accepted by institutional lenders:

“We have assumed that in any foreclosure or other enforcement action under the Mortgage, the plaintiff in such action will be the true and lawful owner of the Mortgage and Note and will be able to demonstrate such ownership to the satisfaction of the applicable court or the plaintiff is [a] party . . . authorized to bring such action pursuant to applicable law and will be able to demonstrate such authorization to the satisfaction of the applicable court.”

6. **Auditor Request for Opinion on Historical Compliance of Prior Issuances of Securities with Securities Laws**

Brian Farmer of Hirschler Fleischer P.C., Richmond, Virginia asked the listserv on February 23, 2011 for its reaction to a request by a Big 4 accounting firm for an opinion from a private issuer’s counsel that all securities offerings made by the issuer have been in compliance with available exemptions under the Securities Act of 1933. Brian’s client had recently engaged the Big 4 accounting firm as its auditors. Its prior issuances of securities included both equity and debt offerings conducted with a view to compliance with applicable federal and state private placement exemptions. In addition, the client had issued restricted stock and granted stock options to its directors, officers, and employees under an equity incentive plan.
The consensus of the responders was that the opinion should be resisted. As all the responders noted, the amount of time and effort to render such an opinion can be substantial and therefore not cost justified, even when requested by later investors as to previous issuances of securities. Moreover, as noted by Committee Chair Stan Keller and Doug Landrum of Jackson DeMarco Tidus Pecknappau, Irvine, California, such a request coming from an auditor can raise disclosure and confidentiality issues under the ABA’s 1975 Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information (“Statement”) if, as Stan noted, “there were faulty offerings for which the statute of limitations had not yet run.” For example, the Statement’s guidance on addressing “unasserted possible claims” is quite restrictive, counseling that such claims should be addressed by issuer’s counsel to the issuer’s auditors only at the request of the client and only if the client “has determined that it is probable that a possible claim will be asserted, that there is a reasonable possibility that the outcome (assuming such assertion) will be unfavorable, and that the resulting liability would be material to the financial condition of the client.” Statement — “Loss Contingencies.”

Even when such a broad “historical compliance with securities laws” opinion is requested by subsequent investors, experienced counsel in venture and high-tech financings resist rendering such broad opinions, a resistance endorsed by California’s Opinions Committee in its “Report on Selected Legal Opinion Issues in Venture Capital Financing Transactions,” 65 Bus. Law. 161, 179-180 (2009).

Note: This request should be distinguished from a request for an opinion on the company’s current capitalization (i.e., authorization, valid issuance, non-assessibility) that is sometimes requested by new auditors. This opinion can be handled like a third party capitalization opinion but should be considered from a cost/benefit perspective by the client.

7. Postscript: Curing Prior Deficiencies in Authorizations of Share Issuances

Jeffrey Ostrager of Curtis, Mallet-Prevost, Colt & Mosle LLP, New York, had what appeared to be a general housekeeping question by his inquiry of February 24, 2011 when he asked whether, for any “deficiencies” in prior board authorizations of share issuances and equity award grants, it would be “sufficient for the Board to adopt a general resolution authorizing all prior share issuances/equity awards, . . .” Several commenters suggested various techniques for the Board to pursue in providing the corrective authorization, including specifying varying amounts of detail as to the prior issuances. The dialogue turned more serious when Wena Poon, San Francisco, cited an important article by Stephen Bigler and Seth Tillman from the August 2008 issue of The Business Lawyer (“Void or Voidable?—Curing Defects in Stock Issuances Under Delaware Law, 63 Bus. Law. 1109). As that article develops at length, and as the authors/editors presciently noted in the headnote to the article, curing defective authorizations of share issuances is not as easy as it might first look, even to the experienced business practitioner:

“It is not unusual for a Delaware corporation’s stock records to have omissions or procedural defects raising questions as to the valid authorization of some of the outstanding stock. Confronted with such irregularities, most corporate lawyers would likely attempt to cure the defect through board and, if necessary, stockholder ratification. However, in a number of leading cases, the Delaware Supreme Court has treated the statutory formalities for the issuance of stock as substantive prerequisites to the validity of the stock being issued, and the court has determined that failure to comply with such formalities renders the stock in question void, i.e., not curable by ratification.”

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Gail Suniga of Fenwick & West LLP, Palo Alto, brought Steve Bigler himself into the discussion to confirm that the void/voidable distinction retains its robustness in Delaware and continues as a trap for the unwary. To accentuate the point, Gail forwarded a copy of the then three-days’ old opinion of Vice Chancellor Laster in Olson v. EV3, Inc., 2011 WL 704409 (Del. Ch. Feb. 21, 2011). The decision is important reading for any counsel confronted with an opinion request to address the valid issuance of prior issuances of shares, and we thank Gail for bringing it to the listserv’s attention.

In his decision, Vice Chancellor Laster addresses the payment by ev3 for services rendered by plaintiff’s class-action counsel in securing corrective provisions and procedures in a two-step merger agreement between ev3, Inc. and Covidien Group S.a.r.l. The merger agreement provided for the grant of a top-up option by ev3 to Covidien to permit Covidien, upon a successful tender offer for the outstanding shares of ev3, to effect a short-form merger under Delaware law. (By exercise of the top-up option, Covidien could acquire a sufficient number shares to effect a short-form merger.) The merger agreement initially presented by the parties provided for a top-up option with an exercise price equal to the share price offered by Covidien in its tender offer, and permitted Covidien to pay for the shares in cash or by the issuance of a promissory note “on terms as provided by [Covidien], which terms shall be reasonably satisfactory to [ev3].”

In the process of settling the case, plaintiff’s counsel negotiated revisions to these terms, including a specification of the material terms of the promissory note and a requirement that the par value of the shares subject to the top-up option be paid in cash in all events. Moreover, the agreement settling the litigation required that the amendments be approved by the ev3 board of directors at a meeting where the terms and operation of the top-up option were to be thoroughly reviewed and the necessary statutory determination of the sufficiency of the consideration payable for the shares would be made.

Vice Chancellor Laster concluded that the services rendered by plaintiff’s counsel justified the fee. His characterization of the deficiencies in the original terms of the top-up option should give pause to all counsel contemplating the giving of an opinion on prior issuances of shares:

“As originally structured in the Merger Agreement, the Top-Up Option and any shares issued upon its exercise likely were void. See STAAR Surgical Co. v. Waggoner, 588 A.2d 1130, 1137 (Del. 1991). To the extent a short-form merger closed in reliance on the resulting shares, the validity of the Merger could be attacked. The invalidity of that transaction in turn could have called into question subsequent acts by the surviving corporation.”

2011 WL 704409 at *11.

The ev3 decision did not directly address how or when defective share issuances could be cured or as of when a cure would be effective. The ability to cure defects may turn on the nature of the defect. For example, a defect in authorizing the corporation’s capital may not be subject to cure, while defects in board actions authorizing an issuance might more easily be dealt with. Sometimes, the situation may require extensive actions such as a curative merger, an exchange offer or even a bankruptcy filing. What the ev3 decision illustrates is that one should carefully consider the nature of the “deficiencies” in prior board authorizations of share issuances and equity award grants before crafting corrective measures.

Bigler – Tillman in their article (at pages 1144-1148 and see note 194 at page 1142) suggest that in many cases the UCC should provide a cure for shares in the hands of a “protected purchaser.” Unfortunately, an unreported bench decision by Chancellor Chandler of the Delaware Chancery Court handed down after publication of the Bigler – Tillman article held that a “protected purchaser” under the
UCC is not “protected” and has no interest in shares issued by a Delaware corporation whose issuance was void. Noe v. Kropf (no. 4050-CC) (Del. Ch. January 15, 2009), available here [Control + Click].

We have not been able to summarize all of the opinion dialogues that have occurred on the listserv since the Fall 2010 issue of the newsletter. Those not summarized here address opinions on a spouse’s community property exposure for pre-marital debts and on the propriety of assuming an original mortgage was duly recorded when rendering an opinion on an amendment to the mortgage; negative assurance letters on disclosure documents used in follow-on offerings when the precise underwriting discount is not disclosed to investors at the time of sale; customary diligence for LLC member or manager power and authority opinions; and enforceability opinions on “make-whole premiums” in convertible notes. To review these dialogues, go to the “Archives” link under “Listserves” on the Committee’s website.

As always, members are encouraged to raise legal opinion issues on the listserv and to participate in the exchange. Members also are encouraged to bring new developments (such as recent case law or newly identified issues) to the attention of Committee members through the listserv.

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Legal Opinion Reports

Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests

In 2006, the TriBar Opinion Committee (the “Committee”) published a report “Third-Party Closing Opinions: Limited Liability Companies”, 61 Bus. Law. 679 (2006) (the “TriBar LLC Report”) in which it discussed at length three opinions commonly given when a limited liability company (“LLC”) enters into a financial transaction: the opinions on an LLC’s formation, existence and good standing; power to enter into the transaction; and authorization, execution and delivery of the agreement governing the transaction. The Report also discussed, in a limited way, the opinion on the enforceability of an LLC’s operating agreement. A focus of the Report was the ability of non-Delaware lawyers to give these opinions on Delaware LLCs.

During the last few years, the Committee has been working on a supplemental report (the “Supplemental LLC Report”) that deals with opinions sometimes given to purchasers of interests in an LLC (“LLC Interests”). Those include opinions on the issuance of LLC Interests, the admission of members to the LLC, and the payment obligations of purchasers and holders of LLC Interests resulting from their ownership of LLC Interests. The Supplemental LLC Report was completed in March 2011 and

1 The URL is http://works.bepress.com/seth_barrett_tillman/107/
The Supplemental LLC Report discusses the key similarities and differences between opinions on the stock of a corporation and opinions on LLC Interests and the relevance to opinions on LLC Interests of opinions commonly given on the interests of limited partners in limited partnerships. In particular, the Report explains why some of the opinions traditionally given on corporate stock, such as the opinions that stock is duly authorized, fully paid and nonassessable, do not translate well into opinions on LLC Interests. The Report explains that a “duly authorized” opinion is not appropriate for an LLC because LLCs typically do not have a pool of interests for future issuance analogous to the authorized shares of a corporation and are not required to file a document analogous to a corporate charter with the Secretary of State showing the number and type of LLC interests authorized for issuance. (The reasons the Report offers for not giving the fully paid and nonassessable opinion are discussed below.) Thus, with regard to creation and issuance of LLC Interests, the Report suggests that the opinion simply state that “the LLC Interests have been validly issued.” According to the Report, a “validly issued” opinion means that LLC Interests have been issued in compliance with the requirements of the applicable LLC statute and the LLC’s operating agreement (and certificate of formation, if applicable) and that their terms do not violate any requirements in the applicable LLC statute or the operating agreement. The Report observes that a “validly issued” opinion does not address the enforceability of the terms of the LLC Interests.

2. Admission As Members.

Purchasers sometimes request an opinion on their admission as members. They do so because, if not admitted as members, they normally are not entitled to exercise membership rights. This opinion, which the Report suggests be worded to say “Purchasers have been duly admitted as members,” is similar to the opinion given to purchasers of limited partnership interests confirming their admission as limited partners. Under many state LLC statutes, including Delaware’s, purchasing or otherwise acquiring an LLC Interest does not by itself make a person a member. Instead, the applicable LLC statute typically requires that specified conditions be satisfied unless the LLC’s operating agreement (and certificate of formation) otherwise provides. The Supplemental LLC Report notes that operating agreements often specify conditions for admission and that those conditions may differ depending on whether a member is being admitted when the LLC is being formed or at a later time. The “duly admitted” opinion means that purchasers of LLC’s Interests have been admitted as members of the LLC in compliance with the conditions in the operating agreement and any applicable statutory requirements (and, depending on the state, any conditions in the LLC’s certificate of formation). The opinion also means that if an entity is being admitted it meets the statutory definition of “member” in the applicable LLC statute. The Supplemental LLC Report also discusses when the opinion covers requirements for admission contained in purchasers’ subscription agreements.

3. Additional Payments and Contributions.

Purchasers of LLC Interests sometimes request an opinion on their obligation to make payments and contributions to the LLC. In lieu of a “fully paid and nonassessable” opinion, the Supplemental LLC Report suggests the following:

“Under [name of LLC statute under which LLC was formed], Purchasers have no obligation to make further payments for their purchase of LLC Interests or contributions to LLC solely by reason of their ownership of LLC Interests or [their status as members of LLC] [except as provided in their Subscription Agreements or the Operating
Agreement] [and except for their obligation to repay any funds wrongfully distributed to them].

The bracketed exception to this opinion for obligations arising under purchasers’ Subscription Agreements and the Operating Agreement excludes from the opinion’s coverage purchasers’ obligations to make future payments or contributions to the LLC under those documents. The Report comments that this exception often will be used because in many cases operating agreements will contain numerous post-closing payment obligations and purchasers ordinarily do not need an opinion to tell them what future payments they have agreed to make. The Report suggests that the quoted opinion be given in lieu of an opinion that LLC Interests “are fully paid and nonassessable” because it conveys its meaning more clearly and because, unlike in the corporate context, “fully paid” and “nonassessable” typically are not defined by statute.

4. Personal Liability For LLC Debts.

Purchasers of LLC Interests sometimes also request an opinion analogous to the opinion often given to purchasers of limited partnership interests that as members of the LLC they will have no personal liability to third parties for the debts, obligations and liabilities of the LLC. The Report expresses the hope that over time this opinion will not be requested as recipients come to understand that purchasers of LLC Interests have no more liability for an LLC’s debts than stockholders have for a corporation’s debts. Recognizing, however, that requests will not stop being made any time soon, the Report suggests that the opinion, if given, be combined as follows with the opinion quoted above:

“Under [name of LLC statute under which LLC was formed] (“Act”), Purchasers have no obligation to make further payments for their purchase of LLC Interests or contributions to LLC solely by reason of their ownership of LLC Interests [or their status as members of LLC] and no personal liability for the debts, obligations and liabilities of LLC, whether arising in contract, tort or otherwise, solely by reason of being members of LLC [except in each case as provided in their Subscription Agreements or the Operating Agreement] [and except for their obligation to repay any funds wrongfully distributed to them].

The quoted opinion covers only liabilities arising under the LLC Act “solely by reason of being members” and no other liabilities. The phrase “solely by reason of being members,” which appears in Section 18-303(a) of the Delaware LLC Act, excludes from the opinion liabilities attributable to: (i) a purchaser’s status as a controlling person under the securities laws, environmental laws or other laws, (ii) a purchaser’s service in another capacity, for example, as a manager or an officer of the LLC, (iii) a purchaser’s own tortious or wrongful conduct, and (iv) application of a piercing-the-veil or similar doctrine.
The Supplemental LLC Report is intended to assist both opinion givers and recipients in transactions involving the purchase and sale of LLC Interests. As co-reporters for the Report, we obviously are biased, but the Report has been a long time coming, and we hope this brief summary will convince readers that it merits a close look.

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Getting Out from Behind the [Article] 8 Ball: Special Report of the TriBar Opinion Committee: Opinions on Secondary Sales of Securities

For years many lawyers representing sellers of securities in private or public secondary sales have given opinions to buyers, often without the lawyers for the sellers or the buyers having an understanding of the relevant rules of Article 8 of the Uniform Commercial Code and the effect Article 8 has on these opinions. As a result, many opinions have been requested and given that do not tie to the provisions of Article 8. TriBar has taken up this matter and has just completed a report on these opinions, which will appear in the May 2011 issue of The Business Lawyer.

1. Focus on the Rights of the Acquirer.

As Jim Fuld suggested over thirty-five years ago in one of his seminal articles on legal opinions, the proper focus of these opinions should be not on what the seller has to sell but on what the acquirer receives. Fuld, “Legal Opinions in Business Transactions — An Attempt to Bring Some Order Out of Some Chaos,” 28 Bus. Law. 915, 935 (1973). A secondary sale opinion should therefore consider and address what the acquirer will receive. This approach conforms to the structure of Article 8 and makes the opinion a straightforward effort once one distinguishes between a security (and a certificated security and an uncertificated security) and a security entitlement. As is typically the case with a TriBar report, the report provides illustrative language on how secondary sale opinions and the related assumptions might be worded.

Under Article 8, a person can hold an interest in a security in one of two ways: directly or indirectly through a securities intermediary. When a security is held indirectly, it is referred to as a “security entitlement.”

An opinion on the rights of a buyer of a security addresses whether the buyer has acquired the security free of adverse claims. An opinion on the rights of an acquirer of a security entitlement addresses whether the acquirer has acquired a security entitlement and whether an action can be asserted against the acquirer based on an adverse claim to a financial asset (or alternatively to the “shares” being sold). A secondary sale opinion relies in large measure on express and implied factual assumptions, including assumptions concerning the acquirer’s lack of notice of adverse claims.
2. **Value of the Opinion.**

A secondary sale opinion typically requires little particularized legal analysis. The legal conclusions it expresses flow automatically from the assumptions on which it is based, and these assumptions are usually as apparent to the opinion recipient as they are to the opinion giver. The TriBar report suggests that the acquirer in a secondary sale should consider, therefore, whether a secondary sale opinion will meaningfully assist the acquirer given the time and expense involved in preparing the opinion. If not, the acquirer should consider foregoing the opinion.

3. **Use Article 8 Concepts.**

Article 8 provides one set of rules for securities held *directly* by a holder and a different set for interests in securities held *indirectly* through a securities intermediary. Following the terminology of Article 8, the report refers to the bundle of rights a holder has in interests held indirectly as a “security entitlement”, refers to a person who buys a security as the “buyer” or “acquirer,” and refers to a person who acquires a security entitlement as the “acquirer.” Similarly, the report uses the term “direct holding” to refer to a security held directly by a buyer and the term “indirect holding” to refer to the indirect interest with respect to a security that an acquirer has through ownership of a security entitlement. For example, the customer of a broker dealer whose securities are held in street name owns a security entitlement because shares held in street name are typically held of record by a nominee of Depository Trust Corporation (“DTC”).

*No title opinions.* The report concludes that title opinions regarding a security or a security entitlement should not be requested. Among other things, they are not necessary under the structure of Article 8. Further, the report states TriBar’s belief that an opinion giver should not be asked to confirm that it does not have knowledge of adverse claims that might be asserted with respect to the security or the security entitlement.

*The core of the opinion.* Whether a security is held directly or indirectly, Article 8 provides a buyer of a security or an acquirer of a security entitlement for value, who has no notice of adverse claims, with strong protection from adverse claims, if standard procedural steps are followed in connection with the acquisition of the security or the security entitlement.

4. **The Opinion to a Buyer of a Security.**

A “protected purchaser” under Article 8, in addition to acquiring the basic rights of a buyer of a directly held security (i.e., all of the rights that its seller had or had the power to transfer), also acquires its interest free of any adverse claim to the security.

To be a “protected purchaser” of a security, a buyer is required to:

- give value;
- not have notice of any adverse claim to the security; and
- obtain “control” of the security.

In a secondary sale, a buyer of a certificated security obtains “control” of the security if the certificate has been delivered to the buyer and indorsed to the buyer or in blank pursuant to an effective indorsement. A buyer of an uncertificated security typically obtains “control” of the security by having the security registered in the buyer’s name on the records of the issuer.
5. **The Opinion to an Acquirer of a Security Entitlement.**

When the beneficial owner of a security does not hold the security directly, typically a “top-tier” securities intermediary (DTC for most publicly-traded securities) is the direct holder of the security and the beneficial owner is the holder of a security entitlement. A security entitlement holder has no direct rights under Article 8 against the issuer of the security. Article 8 refers to a person holding a security entitlement as the “entitlement holder.”

In a secondary sale where the seller holds a security entitlement, the acquirer does not acquire the seller’s security entitlement. Rather, the acquirer acquires a different security entitlement from the acquirer’s securities intermediary (even if the acquirer’s securities intermediary is the same as the seller’s). An acquirer can also receive a security entitlement even if its seller holds a security if the transfer is processed through a securities intermediary.

Because the acquirer of a security entitlement does not hold a “security,” it cannot be a “protected purchaser” of a security. Rather it acquires rights with respect to the security entitlement.

Similarly to a protected purchaser of a security, an acquirer of a security entitlement is protected from adverse claims if:

- the acquirer has no notice of an adverse claim; and
- gives value.

This is true even if the claim exists against the rights of the top-tier securities intermediary in the security, against the rights of the seller or another securities intermediary in the chain, or against the rights of anyone else to whom a property interest in the security might arguably be traced under non-Article 8 law.

Because an entitlement holder’s protection from an adverse claim depends only on its lack of notice of the adverse claim and its giving of value, and not on whether the top-tier securities intermediary is a “protected purchaser” of the security transferred to the intermediary, the TriBar Committee believes that an opinion addressing the rights of the top-tier securities intermediary is superfluous and should not be requested.

6. **Other Matters Covered by the Report.**

The report discusses in detail:

- How to confine the scope of the opinion to matters covered by UCC Article 8;
- How to deal with choice of law issues, including how to address those issues in the opinion letter;
- Which assumptions are implied and which should be stated expressly, including the express assumption on the buyer’s or acquirer’s lack of notice of adverse claims; and
- How to word the opinion itself.
In its simplest form the opinion to the buyer of a security may be worded as follows:

[Name of buyer] [will be] [is] a protected purchaser of the [Shares].

And one form of the basic opinion to the acquirer of a security entitlement may be worded as follows:

[Name of acquirer] has acquired a security entitlement with respect to [insert number] of securities [describe type] and, if [name of acquirer] does not have notice of an adverse claim to a financial asset to which the security entitlement relates, no action based on the adverse claim may be asserted against [name of acquirer] with respect to the security entitlement.

An opinion on the acquisition of an outstanding security or security entitlement with respect to an outstanding security is based on particular facts, most importantly the acquirer’s giving of value and lack of notice of adverse claims on the part of the acquirer that often are assumed in the opinion. The legal conclusions that flow from these facts permit lawyers to give secondary sale opinions without having to determine whether the seller had title to the security or security entitlement involved in the transaction.

The secondary sale opinion states what Article 8 provides based on facts that are at least as apparent to the acquirer (or its counsel) as they are to the opinion giver, and which are typically assumed by the opinion giver. In addition, Article 8 is the same for all practical purposes in every state. In view of these considerations, before requesting this opinion recipients should consider whether it adds sufficient value to justify the time and expense involved in preparing it.

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ABA Real Property Committee on Legal Opinions in Real Estate Transactions:
Legal Opinions to Federal Agencies

The Committee on Legal Opinions in Real Estate Transactions (the “Real Estate Opinions Committee”) of the ABA’s Section of Real Property, Trust and Estate Law (“Section”) has formed a subcommittee to examine the various legal opinions that federal agencies require in real estate finance transactions. The initial focus of the subcommittee is the form of legal opinion required by the Department of Housing and Urban Development (“HUD”) in multifamily mortgage loans insured by the Federal Housing Administration. The subcommittee is also examining the opinion letters required by the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac”) in multifamily mortgage loan transactions that are originated by lenders in the private sector and sold to Fannie Mae or Freddie Mac, as well as legal opinions required by other federal agencies in other types of real estate-related transactions.
The HUD form of opinion has been a major source of frustration for real estate lawyers. According to the instructions that accompany HUD’s form of opinion letter, the HUD opinion language is non-negotiable, and HUD’s field counsel generally follow those instructions to the letter. This is true even though certain language in the form is no longer legally correct. Moreover, the form requires an opinion that most law firms are extremely reluctant to give, namely, a statement that the borrower has all governmental permits and licenses required for the construction and operation of the multifamily project.

Fortunately, HUD is currently in the process of revising its FHA-insured multifamily mortgage loan forms, including the form of legal opinion. In addition, the Real Estate Opinions Committee sponsored a CLE program on the subject of HUD, Fannie Mae and Freddie Mac opinions at the Section’s Spring Symposia in May 2010, and jointly sponsored with the Section of Business Law a CLE program on opinions to federal agencies at the ABA Annual Meeting in San Francisco in August 2010. A representative from HUD’s Office of General Counsel participated in both of these programs. In January 2011, the subcommittee met with the Office of the General Counsel to present the subcommittee’s views on the HUD form of opinion and followed this meeting by submitting written comments. At the time, HUD indicated that it intended to publish the final forms of the loan documents and legal opinions in February 2011 and to begin using the revised forms in May 2011, but so far nothing further has been published.

The Fannie Mae and Freddie Mac opinion forms generally are not as far removed from modern opinion practice as the HUD form and are somewhat negotiable. However, the subcommittee still intends to work with Fannie Mae and Freddie in improving the forms and their negotiability. Other federal agencies with opinion forms that the subcommittee will examine include the Rural Utilities Service of the Department of Agriculture, which provides financing for, among other things, biomass power plants, and which requires a form of opinion that has not been updated in many years.

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Document Review Reports to Third Parties

At the November 19, 2010 meeting of the Legal Opinions Committee, Jim Rosenhauer, Chair of the Business Law Section’s Task Force on Delivery of Document Review Reports to Third Parties, reported on the Task Force’s work and indicated that its report would be finalized in the first quarter of 2011. The report addresses the practice of sharing “diligence reports” prepared by counsel for a purchaser in an acquisition transaction with third parties, such as lenders to the purchaser, and the issues the sharing of such reports raises for counsel preparing diligence reports. (See the summary of Jim’s report in the Winter 2010 issue of the newsletter, at pages 5-6.) The report is now final and will be placed in the Committee’s Legal Opinion Resource Center on its website. Interested parties may also contact Jim at jjrosenhauer@hoganlovells.com.
Membership

If you are not a member of our Committee and would like to join, or you know someone who would like to join the Committee and receive our newsletter, please direct him or her to the ABA Section of Business Law website: [http://www.americanbar.org/groups/business_law.html](http://www.americanbar.org/groups/business_law.html), click “Committees,” and scroll to Legal Opinions. If you have not visited the website lately, we recommend you do so. Our mission statement, prior newsletters, and opinion resource materials are posted there. For answers to any questions about membership, you should contact our membership chair Anna Mills at amills@vwlawfirm.com.

Next Newsletter

We expect the Summer issue of the newsletter to be circulated in July of this year. Please forward cases, news and items of interest to Stan Keller (stanley.keller@eapdlaw.com) or Jim Fotenos (jfotenos@greeneradovsky.com).
Message from the Chair

This edition of the Banking Law Committee Journal includes four articles on a wide range of topics. Howard Eisenhardt of BuckleySandler has contributed a fascinating piece on the deposit insurance treatment of IOLTA accounts, while Sara Emley and Manley Williams of the same firm offer their insights and perspective on the Federal Reserve's proposed regulation implementing the ability-to-pay provisions of the CARD Act. Puzzled by preemption after Dodd-Frank? Robert Cook and Timothy Meredith of Hudson Cook explain how Dodd-Frank alters the preemption landscape for federally chartered real estate lenders. And last, but not least, Schiff Hardin's Lori Buerger tells how well-prepared bidders can take advantage of exciting opportunities to buy small failed banks from the FDIC. I look forward to seeing these distinguished writers and many other Banking Committee members at our Spring Meeting in Boston, April 14th through 16th!

Sally Miller
Chair, Banking Law Committee
smiller@iib.org

Featured Articles

Lawyers’ Trust Accounts Benefit From Unlimited Deposit Insurance
Howard Eisenhardt
The financial crisis that began in September 2008 and resulted in many bank failures caused some lawyers to reconsider the rules applicable to trust accounts. While frequent users of trust accounts are probably familiar with relevant developments...
during the financial crisis, other attorneys may benefit from a bit of background on these accounts.

When lawyers receive funds of clients, they must hold the funds separate from their own funds, and typically use trust accounts for this purpose. Client funds can include financial settlements or advance legal fees, for example. The funds of multiple clients can be held together in a single trust account, which is a fiduciary account. Combining the funds of multiple clients is customary if the net interest on the money would not be enough to compensate for the costs of maintaining separate accounts for the clients.

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**Who’s Entitled to a Credit Card? Perspectives on the Fed’s Independent Ability to Pay Amendment**

**Sara Emley and Manley Williams**

**Note:** On March 18, 2011 the Federal Reserve Board adopted the amendments to Regulation Z discussed in the article below generally as proposed. For more information see: [http://www.federalreserve.gov/newsevents/press/bcreg/20110318b.htm](http://www.federalreserve.gov/newsevents/press/bcreg/20110318b.htm).

Americans are devoted to credit cards, as evidenced by the nearly $800 billion in credit card debt and other revolving credit outstanding at year-end 2010. More than half of all US households have credit card debt. But our fixation on credit has led to some hard landings recently, with credit card delinquencies rising more than 150% from 2006 to 2009. As delinquencies triggered late payments, increased interest rates, and over-the-limit fees, the contractual rate and fee provisions in credit card agreements became a rallying point for public protest and media attention. Among the outcomes of a Congressional focus on credit card practices was the Credit Card Accountability Responsibility and Disclosure Act of 2009 (known as the CARD Act), which President Obama signed on May 22, 2009.

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**Real Estate Lending Preemption After Dodd-Frank**
Robert A. Cook and Timothy P. Meredith

In the aftermath of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Act"), national banks and federally chartered savings banks have been concerned about the Act's impact on federal preemption of state laws with respect to consumer financial services transactions. In assessing this impact, many have overlooked the fact that, while Dodd-Frank effects a sea change for most existing preemption rules, it made only one change to the preemption rules for real estate lending transactions: the Act increases the level of scrutiny courts give to the Office of the Comptroller of the Currency's ("OCC" or "Comptroller") real estate lending regulations. Although this change is not nearly as comprehensive as the changes Dodd-Frank made to other preemption rules, it does introduce an element of uncertainty to the real estate lending preemption analysis. Further, as a practical matter, banks should consider that in the current environment, the Comptroller is likely to be a far more less aggressive advocate of preemption than it has been in the past.

More...

FDIC-Assisted Transactions: Target Sizes Shrink, but Opportunities Remain Large
Lorraine M. Buerger

It's no surprise that the tally of bank failures continues to mount. As the first quarter of 2011 draws to a close, the total number of bank failures during the current cycle of turmoil in the banking industry has topped 350. According to the Federal Deposit Insurance Corporation ("FDIC"), last year's 157 bank failures was the highest number since 1992. Last year is predicted by many (including the FDIC itself) to represent the high point in the ongoing wave of bank failures. However, with more than 850 banks remaining on the FDIC's list of problem institutions as of the most recently-published FDIC Quarterly Banking Profile, the pace of failures in 2011 is most likely to abate only slightly from the peak.

More...
USDA STUDY PUTS CA FARMS AHEAD OF THE REWABLES CURVE

In the first nationwide survey of renewable energy production and use by America’s farmers (Survey), the USDA’s National Agricultural Statistics Service recently revealed that California leads the nation in the number of farms that produce renewable energy.

According to the survey based on 2009 assessments, 1,945 California farms reported use of wind turbines, methane digester and/or solar panel use, with solar panels used most often for renewable energy production. In addition to the type of renewable energy produced, the survey provides detailed information on installation costs, outside funding, installation year, and utility savings from the use of on-farm renewable energy production.

Agriculture – the key to human civilization

For more information about the Business Law Standing Committees, please see the standing committees web page.

These periodic e-mails are being sent to you because you expressed interest in receiving updates from the Agribusiness Committee of the State Bar of California’s Business Law Section. As a Section member, if you would also like to sign up to receive e-bulletins from other standing committees, simply click HERE and follow the instructions for updating your e-bulletin subscriptions in My State Bar Profile. If you have any difficulty or need assistance, please feel free to contact Susan Orloff Section Coordinator of the Business Law Section. If you are not a member, or know of friends or colleagues who might wish to join the Section to receive e-bulletins such as this, please click HERE to join online.

To keep up-to-date on the latest news, case and legislative updates, as well as events from the Business Law Section and other Sections of the State Bar of California as well as the California Young Lawyers Association (CYLA), you can follow them on Facebook or add their Twitter feed.
FINANCIAL INSTITUTIONS COMMITTEE MEETING
BUSINESS LAW SECTION, STATE BAR OF CALIFORNIA
MEETING NOTICE AND AGENDA
March 8, 2010
9:30 a.m. – 11:30 a.m.
By Video Conference

LOS ANGELES
Sheppard, Mullin, Richter & Hampton LLP
333 South Hope Street
41st Floor, Room 41 SE

SAN FRANCISCO
Sheppard, Mullin, Richter & Hampton LLP
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17th Floor

DIAL-IN NUMBER IF JOINING BY PHONE:
Dial in #: 800-281-5354
Call Confirmation No.: 704550

(CWE STRONGLY ENCOURAGE MEMBERS TO JOIN IN-PERSON AT ONE OF THE THREE VIDEO LOCATIONS.)
AGENDA

1. Roll call and self-introductions. (Joe Sanchez)
2. Approval of minutes of prior meeting (Richard Rogan)
3. Chair's Report
4. BLS Executive Committee Report (Nina Ortega)
5. Craig Cardon from Sheppard Mullin Richter and Hampton, LLP will discuss the Pineda v. Williams-Sonoma California Supreme Court decision regarding merchant collection of customer zip codes.
6. David Tollen from Adeli & Tollen, LLP will provide an overview of technology contract issues faced by financial institutions and 7 common mistakes made by financial institutions.
7. Pending California Legislation Update by Bob Mulford
8. Open Meeting: Other items of interest (Committee members)
9. Adjourn

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Century 21 Real Estate LLC v. All Professional Realty, Inc. (1/24/11 ED CA) 2011 U.S. Dist LEXIS 6604

Franchisor Century 21 terminated franchisee’s brokerage for non-payment of royalty fees. Despite this, franchisee continued to use franchisor’s trademarks and filed an action in Sacramento Superior Court seeking to remain a franchisee. Century 21 removed the franchisee’s action to the Eastern District of California and filed its own lawsuit for trademark infringement and breach of contract. After an initial hearing on franchisor’s motion for preliminary injunction, the court ordered an evidentiary hearing. After the hearing the court ruled that the applicable standard for granting preliminary injunctions is set forth in Alliance for the Wild Rockies v. Cottrell (9th Cir. 2010) 622 F3d 1045, 1053: “serious questions going to the merits and a hardship balance that tips sharply towards the plaintiff can support issuance of an injunction, so long as the plaintiff also shows a likelihood of irreparable injury and that the injunction is in the public interest.” On the merits, the court found that Century 21 properly terminated the franchise agreement for good cause under the terms of the agreement and the California Franchise Relations Act. Based on the testimony elicited at the evidentiary hearing, the court determined that the franchisee did not pay fees owed, and had no excuse for not doing so. The court found irreparable injury as the franchisee’s continued use of the trademark resulted in a loss of control of the mark by Century 21 and loss of control of its reputation and goodwill. With respect to balancing equities and the public interest the court found that franchisee’s continued use of the marks would falsely represent to the public that the franchisee was in good standing with Century 21 when, in fact, they were not. Accordingly, the court granted a preliminary injunction against the franchisee’s use of any Century 21 marks.

Sultan Hameed v. IHOP Franchising, LLC (2/10/11 ED CA) 2011 U.S. Dist LEXIS 14041

Plaintiff is the representative of a putative class of IHOP franchisees alleging (1) that, although he replaced virtually all the equipment in the restaurant over time per the terms of the franchise agreement, IHOP continued to charge him full rent under the terms of his original equipment
lease, (2) he was denied a development loan by IHOP for discriminatory reasons and (3) the property taxes he was required to pay under his sublease with IHOP more than doubled when IHOP passed on those costs to him after the owner of the property sold the premises. The first amended complaint alleged violation of the unfair competition law as well as breach of contract. IHOP filed a motion to dismiss and to strike. The court determined that the statute of limitations for an unfair competition claim had expired as such a claim would have accrued at the time the franchise agreement was signed since it should have been obvious to the franchisee that he was required both to replace the equipment and yet to remain responsible for payments under the equipment lease. The court also granted motions to dismiss directed to the claims regarding the development loan and the property tax issue as plaintiff failed to amend his pleading to address the court’s concerns regarding lack of detail in the original complaint.

**Passport Health, Inc. v. Travel Med, Inc.** (2/9/11 ED CA) 2011 U.S. Dist LEXIS 14049

During term of the franchise agreement, franchisor instructed franchisee to create a website using a name that was close to the name of franchisor Passport Health. Accordingly, franchisee, with the consent of the franchisor, created a website for itself called passporthealthncs.com. Franchisee was later terminated for failure to make royalty payments. For some time after termination franchisee continued to use the website, including later re-directing visitors to a new site called travelmedinc.com. Franchisor sued for trademark infringement, cyber squatting, and breach of contract, and moved for summary adjudication of liability on those claims. The court found that the passporthealthncs domain name was confusingly similar to the registered trademark of franchisor, and ordered entry of a permanent injunction against its use by franchisee. The court denied the motion for summary judgment addressed to the cyber squatting claim as it found that there was triable issue of fact on whether the franchisee acted with bad faith intent given that they originally created the website name with the permission of franchisor. Franchisor also moved for summary judgment on its claims for unpaid royalties under the franchise agreement. Defendants argued that franchisor was guilty of unclean hands by engaging in wire fraud regarding franchisee’s group purchase obligations. The court found that this conduct was unrelated to the obligations under the franchise agreement and therefore did not constitute a defense to the summary judgment motion.

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Cyberspace Law Committee E-Bulletin

LEGAL CHALLENGE TO SPYING ON CITIZENS IS REINSTATED

Earlier this month, the Second Circuit handed down what will likely be its most consequential decision of the year, *Amnesty Int’l USA v. Clapper*, 2011 U.S. App. LEXIS 5699 (2nd Cir. March 21, 2011), reinstating the constitutional challenge of numerous plaintiffs to a statute passed in 2008 which vastly expanded surveillance of American citizens. The lower court had dismissed the case for want of standing, effectively cutting off judicial review of the constitutionality of the Act.

For years the U.S. Government has been eavesdropping on U.S. citizen’s international calls, and surreptitiously intercepting international email. First came the Bush administration’s secret surveillance program, which caused quite a ruckus when it was discovered. But in 2008 Congress passed the FISA Amendments Act (“FAA”) (“FISA” stands for the Foreign Intelligence Surveillance Act). Under the FAA, every conversation and email between someone in the U.S. and someone located in a designated list of foreign countries can be monitored.

Previously, the U.S. Government had to “submit an individualized application for surveillance identifying the particular target, facility, type of information sought, and procedures to be used,” and make a showing of “probable cause to believe both that the surveillance target is a ‘foreign power’ or agent thereof and that the facilities to be monitored were being used or about to be used by a foreign power or its agent.” By contrast, with the FAA the Government could seek an omnibus order authorizing interception of “...[a]ll telephone and e-mail communications to and from countries of foreign policy interest — for example, Russia, Venezuela, or Israel — including communications made to and from U.S. citizens and residents” — in short, the FAA took a giant step toward totalitarian surveillance. Using data mining techniques and powerful computers, it is now possible for the Government to conduct surreptitious surveillance of *everyone* in the United States communicating by voice or computer with a person in a listed country.

The District Court had ruled that the plaintiffs had no standing to challenge the law, even though declarations by prominent lawyers, human rights activists, and journalists were submitted attesting that:

[E]ach of the plaintiffs has alleged that the risk of being
monitored causes additional injuries beyond the mere fact of being subjected to a putatively unconstitutional invasion of privacy. The risk of being monitored by the government threatens the safety of their sources and clients, impedes their ability to do their jobs, and implicates the attorneys' ethical obligations. ... Attorneys Royce and McKay, who represent Guantanamo Bay prisoners and others, assert that they risk disclosing litigation strategies to the opposing party (the U.S. government) and violating ethical obligations if their communications with co-counsel, clients and their family members, experts, and investigators around the world are monitored.

As a result, they attested that they had ceased engaging in such conversations on the telephone and by e-mail, and had been forced to engage in costly international travel for personal meetings in lieu of electronic communication.

Does such foreboding about future consequences give rise to constitutional standing to challenge the FAA? The trial court said no, but the Second Circuit concluded that the actual expenditure of funds did establish injury-in-fact (the first element of standing). The court then found causation resulting from passage of the FAA, and accepted (because the Government had not claimed otherwise in the trial court) the plaintiffs’ assertion that the cause of their expenditures was the avoidance of interception under the FAA (the second element of standing). Finally, the court held that the plaintiffs’ apprehension of interception was directly traceable to the challenged statute and was not the product of mere paranoia) (the third element of standing). Perhaps most significant for future cases, the court held that the individual plaintiffs did not have to prove that they had been, or certainly would in the future be, monitored as a result of passage of the FAA: “[T]he fact that the government has authorized the potentially harmful conduct means that the plaintiffs can reasonably assume that government officials will actually engage in that conduct by carrying out the authorized surveillance.” (Slip. Op. at 55.)

As a result, assuming the decision survives further Government efforts to have it reviewed, this case will return to the District Court for a hearing on the merits and a second chance to rule on the constitutionality of the FAA.

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Roland E. Brandel is a Senior Counsel in the San Francisco office of the international law firm of Morrison & Foerster. He is a member of, and served as the first chair of, the firm’s financial services practice group. He has written several books, including The Law of Electronic Fund Transfer Systems, The Community Reinvestment Act, Policies and Compliance, and Truth in Lending: A Comprehensive Guide and numerous articles on financial service topics.

He has served as Chair of the ABA’s Consumer Financial Services Committee, Chair of the California State Bar's Financial Institution Committee, Chair of the Legal Advisory Committee of the National Center on Financial Services, Chair of the California State Bar Business Law Section, and President of the American College of Consumer Financial Services Lawyers. Mr. Brandel, as part of a National Conference of Commissioners on Uniform State Laws (NCCUSL) major effort to rewrite UCC Articles 3 and 4 and create new Article 4A, served as ABA Advisor to NCCUSL and chaired the ABA Ad Hoc Committee on Payment Systems.

He was appointed by the Federal Reserve Board as a charter member of its Consumer Advisory Council and served two terms on the Council. He has been presented with lifetime achievement awards by the American College of Financial Services Lawyers, the Business Law Section of the State Bar of California and the California Bankers Association.

Additionally, he has chaired the ABA Business Law Section’s State and Local Bar Relations Committee, its Ad Hoc Committee on Content, its Member Services Committee, and its Ad Hoc Committee on Business Courts. He has twice served as a member of the Council of the Section.
Scott E. Ludwig is a member of the regional law firm of Bradley Arant Boult Cummings LLP (Huntsville, Alabama office), where his practice is devoted to business law (incorporated and unincorporated entities) and tax law. Scott is a member of the American College of Tax Counsel; listed in The Best Lawyers in America (Biotechnology, Corporate, Non-Profit/Charities, Tax, and Trust and Estates) and Who’s Who in American Law, and is a Fellow in the American Bar Foundation. He is actively involved in the ABA’s Business Law Section where he is the chair of the Committee on LLCs, Partnerships and Unincorporated Entities, the chair of the Life Sciences Industry Task Force, chair of the Revised Prototype Limited Liability Company Act subcommittee, co-chair of the Prototype Limited Liability Partnership Agreement subcommittee, a member of the Mergers & Acquisitions Committee, Task Force on Model Joint Venture Agreement, and Taxation Committee, a member of the Editorial Board of The Business Lawyer and a member of the ABA’s Standing Committee on Publication Oversight. Scott has served the Section as its first Content Officer, a Council member, chair of the Section’s Publications Board, a member of the Ad Hoc Committee on Content Distribution, a member of the Transition Team for Business Law Today, a member of the Advance III Strategic Planning Team, a Section advisor to the National Conference of Commissions of Uniform State Laws’ Revised Uniform Limited Liability Company Act and Omnibus Business Organizations Code Study Committee. Scott is also a member of the ABA’s Section on Science and Technology (Biotechnology Committee), Section of Real Property, Trust & Estate Law (Committees: Asset Protection Planning, Business Investment Entities, Partnerships, LLCs and Corporations, Estate and Gift Tax, Organizational and Operational Issues of Exempt Organizations, Non-Tax Estate Planning Considerations Group (including being a member of the Comment Committee SEC Release No. IA- 3098; File No. S7-25-10, regarding Family Offices) and State and Local Law Concerns of Exempt Organizations), and Section of Taxation (Committees: Corporate Tax (Subcommittee: Taxable Acquisitions), Partnerships and LLCs (including being a member of the Comment Committees in response to Notice 2000-29 and Notice 2005-43), Disregarded Entities, Estate Planning, State Tax Issues, Tax-Free Distribution, and State and Local Taxes). He has spoken at the ABA regarding surveys on Limited Liability Company State Taxation and Professional Unincorporated Entities. Scott is a member of the Alabama State Bar having been the Chair of the Tax Section and the Alabama LLP Act Committee and a member of the Alabama LLC Act and Alabama LP Act Revision Committees. Scott chairs the Task Force on Bar Governance for the Huntsville-Madison County Bar Association. He has been President of the Alabama Federal Tax Clinic and President of the Huntsville Financial and Estate Planning Council. He co-authored, Second Circuit Affirms McNamee: Validity of Check- the-Box Regulations Again Confirmed, Journal of Taxation (July, 2007); and The Sixth Circuit Affirms Littriello: Check- the- Box Regulations Are Upheld, Journal of Taxation (June, 2007). Scott was a contributor to the Model Real Estate LLC Operating Agreement, The Business Lawyer (March 2008), Model Joint Venture Agreement with commentary, (ABA, 2006); and The Model LLC Membership Interest Redemption Agreement, The Business Lawyer (May, 2006). He was a co-reporter for the Prototype Partnership Agreement for a Limited Liability Partnership Formed Under the Uniform Partnership Act(1997), The Business Lawyer (February, 2003) and Prototype Limited Liability Partnership Agreement, American Bar Association (2003). He co-authored Selected Pitfalls Arising From the Use of Hybrid Entities, Part 2, Business Entities, V. 4 (November/December 2002), as well as two editions of the Alabama Limited Liability Company Handbook.
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Polley is Chair of the ABA’s Standing Committee on Technology & Information Systems. He was co-chair of the ABA Commission on Second Season of Service, and served on the Advisory Commission for the ABA World Justice Project, the Council of the ABA’s Section of Business Law, and the Standing Committee on Law & National Security. He is the past chair of the ABA’s Cyberspace Law Committee, and the co-author of the book “Employee Use of the Internet and E-Mail” (ABA Press, 2002). Since 1997 Polley has published MIRLN, a monthly e-newsletter on IT related legal news; his Twitter handle is “vpolley”.

Mr. Polley was a founding member of the Internet Law & Policy Forum, and is a Life Fellow of the American Bar Foundation, an arbitrator on the AAA’s Commercial Panel, and a member of the American Law Institute. A graduate of Harvard College (mathematics), Mr. Polley received his law degree from the University of Michigan.