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### MARK YOUR CALENDARS

**September 21-23, 2011 – Global Business Law Forum – Intercontinental London Park Lane in London, England.** This Forum is expected to be a highly educational and exciting event bringing together the brightest legal minds from across North America and Europe. For complete details, please click [here](#).

The Toronto Annual Meeting was productive and featured interesting programs and presentations on clearing systems, cross-border DIP loans and restructurings, healthcare finance, post-closing issues in secured transactions, covered bonds, and cross-border mobile payment systems. Many, many thanks to our speakers, program chairs and committee leadership for their tremendous work in making the meeting a success. Use these links to access the program materials from the **Annual Meeting** as well as from our **2011 Spring Meeting**.

For those of you who may have missed it, by popular demand our Annual Meeting program on “After the Closing Dinner: Managing Post-Closing Issues in Secured Transactions,” chaired by Paul Hodnefield and Teresa Wilton Harmon, will be re-shown as a CLE webcast on December 1, 2011, 1:00 p.m. to 2:30 p.m. ET.

We have a busy fall season planned and we hope you will join us:

First, the ABA Business Law Section is holding its Second Global Business Law Forum in London, England from September 21 through 23, 2011. The 2011 Forum will focus on cross-border issues, with a special emphasis on financial reform and its effects on our clients. The UCC Committee will be co-sponsoring a program there on “International Insolvencies: Basic Principles and Current Problems, including Lessons from *Lehman, Stanford* and Other Recent Cases.”

Second, we will be holding our Joint Uniform Commercial Code Committee and Commercial Finance Committee Fall Meeting in New York City (at the Marriot Marquis) on Wednesday, November 16, 2011. This meeting will feature a full day’s worth of CLE programming. We are still formulating program topics for that meeting; please feel free to volunteer a topic or to be a speaker. The program schedule will be distributed by email in a few weeks and will soon be available on our websites.

Our Subcommittees and Task Forces continue to remain active and are always looking for new and interested volunteers. Our Subcommittees and Task Forces provide a terrific opportunity to learn from colleagues across the country working in similar practice areas and to meet interesting and engaging new people. Please contact either of us if you are interested in joining our Revised Article 9 Enactment Task Force, which is working to ensure the enactment of the recently proposed amendments to Article 9 in the fifty states, our Task Force on Survey of the Law of Guarantees, which will produce a fifty-state summary of the law of guarantees, or our Model Intellectual Property Security Agreement Task Force, which will produce a “standard form” intellectual property security agreement. Please go to the **UCC** or **ComFin** websites for more information on these Task Forces. In addition, the UCC Committee’s International Commercial Law Subcommittee is working on a G-20 jurisdictional survey on security interests in securities, securities accounts and deposit accounts and would be delighted to have volunteers for particular

November 16, 2011 – Commercial Finance Committee and Uniform Commercial Code Committee Joint Meeting – New York Marriott Marquis in New York, New York.

November 16-18, 2011 – Commercial Finance Association Annual Convention – New York Marriott Marquis in New York, New York. More information is available [here](#) at the convention website.

November 18-19, 2011 – Business Law Section Fall Meeting – Ritz Carlton Washington in Washington, D.C. Register now; more information is available on the [website](#).

December 1, 2011 1:00 p.m. – 2:30 p.m. (EST) CLE Webcast. “After the Closing Dinner: Managing Post-closing Issues in Secured Transactions!” Check the Uniform Commercial Code Committee [website](#) for registration information.

March 22-24, 2012 – Business Law Section Spring Meeting – Caesar’s Palace in Las Vegas, Nevada. Save the date!

August 3-6, 2012 – ABA Annual Meeting – Chicago Marriott Downtown in Chicago, Illinois. Save the date!

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## VIEW CURRENT REPORTS AND DEVELOPMENTS OF THE ...

### COMFIN SUBCOMMITTEES AND TASK FORCES

- [Subcommittee on Agricultural and Agri-Business Financing](#)
- [Subcommittee on Aircraft Financing](#)
- [Subcommittee on Creditors’ Rights](#)
- [Subcommittee on Cross-Border and Trade Financing](#)
- [Subcommittee on Intellectual Property Financing](#)
- [Subcommittee on Lender Liability](#)
- [Subcommittee on Loan Documentation](#)
- [Subcommittee on Loan Workouts](#)
- [Subcommittee on Maritime Financing](#)
- [Subcommittee on Real Estate](#)

jurisdictions or to help with the editing process. We also are working on a surprise new project that may allow us all to communicate with each other more effectively. Stay tuned!

We hope to hear from you and to see you in September in London and in November in New York City.

**Penny Christophorou**  
UCC Committee Chair

**Jim Schulwolf**  
Commercial Finance Committee Chair

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## Featured Notes

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### LSTA Publishes Model Credit Agreement Provisions with New Model Tax Language

On August 10th, the LSTA published revised Model Credit Agreement Provisions which incorporate proposed revisions to the model tax language. Earlier this year, the LSTA published revised Model Credit Agreement Provisions to reflect current market practice and include defaulting lender language (the MCAPs had originally been published in 2005 and had not been revised since then). At that time, the LSTA’s Primary Market Committee was still negotiating changes to the model tax language. That work was completed in July, the Exposure Draft was published on July 11<sup>th</sup>, and the review period concluded on August 10, 2011.

To view a blackline of the July 11th Exposure Draft against the prior version of the Model Credit Agreement Provisions or to obtain the revised final form of the Model Credit Agreement Provisions, you must be logged into the LSTA website (Click [here](#) for the login screen).

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## Featured Articles

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### SECOND CIRCUIT UPHOLDS DETERMINATION THAT SAFE HARBOR IN SECTION 546(e) OF THE BANKRUPTCY CODE PROTECTS FROM AVOIDANCE PAYMENTS MADE BY A DEBTOR TO RECLAIM ITS COMMERCIAL PAPER PRIOR TO MATURITY.

by: [Seth Grosshandler and Arminda Bepko, Cleary, Gottlieb, Steen & Hamilton LLP](#)

On June 28, 2011, the Court of Appeals for the Second Circuit upheld the Southern District of New York’s determination that the safe harbor provision in § 546(e) of the Bankruptcy Code protects from the bankruptcy trustee’s avoidance powers transfers made by the Debtor, Enron Corp., to redeem commercial paper prior to maturity. *In re Enron Creditors Recovery Corp.*, Dckt. No. 09-5122-bk (L) 09-5142-bk (Con) (2d Cir. June 28, 2011). The issue before the Court was whether the payments made during the preference period constitute “settlement payments” within the meaning of § 546(e)’s safe harbor. The decision is particularly noteworthy because this is the first instance in which the Second Circuit has addressed the breadth of this section of the Bankruptcy Code. In recent years, courts have struggled to interpret the statutory language and legislative intent of the § 546(e) safe harbor in a consistent manner, leaving litigants and transaction planners without a clear understanding of what types of transactions will be protected from the trustee’s avoidance powers. Although the decision is limited to the facts of the case, the Second Circuit adopted a broad reading of § 546(e) which was consistent with the intent of a safe harbor and resisted placing any limitations on its plain meaning, in contrast to the dissent, as well as some other courts. This case is therefore important, not only for cases involving the “settlement payment” safe harbor, but also potentially for litigation involving all of the Code’s safe harbors for financial contracts. <sup>1</sup>

## Financing

- [Subcommittee on Secured Lending](#)
- [Subcommittee on Syndications and Lender Relations](#)
- [ADR Task Force](#)
- [Model Intercreditor Agreement Task Force](#)
- [Surveys of State Commercial Laws](#)

## UCC SUBCOMMITTEES

- [Subcommittee on Annual Survey](#)
- [Subcommittee on Article 7](#)
- [Subcommittee on Commercial Law Newsletter](#)
- [Subcommittee on General Provisions and Relations to Other Law](#)
- [Subcommittee on International Commercial Law](#)
- [Subcommittee on Investment Securities](#)
- [Subcommittee on Leasing](#)
- [Subcommittee on Letters of Credit](#)
- [Subcommittee on Membership](#)
- [Subcommittee on Payments](#)
- [Subcommittee on Sale of Goods](#)
- [Subcommittee on Secured Transactions](#)

## COMFIN AND UCC JOINT TASK FORCES

- [Commercial Finance Terms Joint Task Force](#)
- [Deposit Account Control Agreements Joint Task Force](#)
- [Filing Office Operations and Search Logic Joint Task Force](#)
- [Legislative Enactment of Article 9](#)
- [Model IP Security Agreement Joint Task Force](#)
- [Survey of State Guaranty Laws](#)

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## COMMITTEE LEADERSHIP ROSTERS

- [Commercial Finance Committee](#)
- [Uniform Commercial Code Committee](#)

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## EDITORIAL BOARD

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## Background

In the weeks leading up to its bankruptcy petition during the fall of 2001, Enron drew down on its revolving lines of credit and paid out more than \$1.1 billion to retire its unsecured commercial paper prior to maturity. In November 2003, two years after Enron filed for bankruptcy, the trustee brought adversary proceedings against approximately two hundred financial institutions – including the three broker-dealers that facilitated Enron’s redemption of its commercial paper – seeking to claw back the payments made in connection with its commercial paper redemption. Enron alleged that the payments were recoverable as (1) preferential transfers under 11 U.S.C. § 547 (b), because they were made on account of antecedent debt within 90 days prior to bankruptcy, and (2) constructively fraudulent transfers under 11 U.S.C. § 548(a)(1)(B), because the redemption price exceeded the commercial paper’s fair market value.

Defendants moved to dismiss, claiming that Enron’s payments to redeem its commercial paper from the market prior to its stated maturity were exempt from avoidance because they were “settlement payments” which are protected under § 546(e). The settlement payment safe harbor, as in effect at the time of Enron’s bankruptcy, limited the trustee’s power to avoid those transfers by providing that “the trustee may not avoid a transfer that is a ... settlement payment, as defined in section ... 741 of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency.”<sup>2</sup> In turn, “settlement payment” is defined to include “a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade.” 11 U.S.C. § 741(8).

The Bankruptcy Court denied both motions to dismiss and for summary judgment on this issue. In denying the motion to dismiss, the Bankruptcy Court held that the phrase “commonly used in the securities trade” in § 741(8) modifies all the terms in the section’s definition and thereby limits any protected “settlement payments” to those that are common in the industry. Accordingly, the Bankruptcy Court found that discovery was necessary to determine whether Enron’s payments to redeem its commercial paper were indeed common. *In re Enron Creditors Recovery Corp.*, 325 B.R. 671, 685-86 (Bankr. S.D.N.Y. 2005). In its denial of summary judgment, the Bankruptcy Court concluded that “the transfer of ‘ownership’ of a security is an integral element in the securities settlement process,” and held that “settlement payments” include only payments made to buy or sell securities and not payments to retire debt. *In re Enron Creditors Recovery Corp.*, 407 B.R. 17 45 (Bankr. S.D.N.Y. 2009).

While the majority of defendants had settled with Enron prior to the Bankruptcy Court’s ultimate ruling the few that remained sought and were granted interlocutory appeal of the Bankruptcy Court’s decision to deny summary judgment with respect to § 546(e). The District Court reversed the Bankruptcy Court, concluding that (1) the definition of “settlement payment” is not limited only to payments that are “commonly used” and therefore the circumstances of a particular payment do not bear on whether that payment fits within the definition; (2) that a “settlement payment” is any transfer that concludes or consummates a securities transaction; and (3) that Enron’s redemption of its commercial paper constitutes a securities transaction regardless of whether Enron acquired title to the commercial paper, because the redemption involved “the delivery and receipt of funds and securities.” *In re Enron Creditors Recovery Corp.*, 422 B.R. 423 (S.D.N.Y. 2009).

## The Second Circuit Decision

In a split two to one decision, the Second Circuit rejected all of Enron’s arguments and affirmed the decision of the District Court. The Court opted to follow courts that have endorsed a broader interpretation of the “settlement payment” definition. The Court applied the last-antecedent rule to the phrase “commonly used in the securities industry” and held that it limits only the phrase preceding it, and does not limit all the other transactions that § 741(8) defines as settlement payments. In other words, in order to be considered a settlement payment, a transfer need not necessarily be a common occurrence because the

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phrase “commonly used in the securities industry” is meant to act as a catchall intended not to act as a limitation but to underscore the breadth of the safe harbor.

With respect to the issue of whether redemption of Enron’s commercial paper would fall into the category of a “settlement payment,” the Court, contrary to the dissent, found that there was no limitation in the Bankruptcy Code that could be read to exclude transfers that retire debt and do not result in the acquisition of title to a security. The Court relied on the absence in the text of § 741(8) or in any other provision of the Bankruptcy Code of any support for an additional purchase or sale requirement. The Court also concluded that nothing in this decision contradicts case law permitting avoidance of payments made on ordinary loans.

In addition, the Court ruled that the absence of the involvement in the transaction of a financial intermediary, so as to implicate the systemic risks that motivated the Congress’s enactment of the safe harbor, was not a basis to deny the protection of the safe harbor. Congress enacted § 546(e)’s safe harbor in 1982 as a means of “minimiz[ing] the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries.” *Kaiser Steel Corp. v. Charles Schwab & Co.*, 29 Inc., 913 F.2d 846, 849 (10th Cir. 1990) (quoting H.R. Rep. 97-420, at 2 (1982), reprinted in 1982 U.S.C.C.A.N. 583, 583). If a firm was required to repay amounts received in settled securities transactions, it could have insufficient capital or liquidity to meet its current securities trading obligations, placing other market participants and the securities markets themselves at risk. The Court therefore held that the safe harbor limits this risk by prohibiting the avoidance of “settlement payments” made by, to, or on behalf of a number of participants in the financial markets. In the case before it, the Court concluded that undoing Enron’s redemption payments, which involved over a billion dollars and two hundred note holders, would necessarily have had a substantial negative effect on the financial markets.

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## 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](#).

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## STATE BUDGET WOES IMPACT FILING OFFICES

By [Paul Hodnefield](#),<sup>3</sup> Corporation Service Company

Nearly all of the state offices responsible for UCC filing, business formation and other business services (collectively “filing offices”) have business recovery and continuity plans in place to deal with catastrophic disasters, such as a storm, flood, fire, or explosion. However, there is one event these plans generally overlook – the state budget disaster.

State budget woes can and do affect filing office services to some degree. A worst-case scenario nearly occurred during the recent Minnesota state government shutdown. An extended closure of the state filing office was averted only by a last-minute court order.

This article uses the Minnesota situation to explore what might happen if budget issues forced a filing office to close for an extended period; explains how budget limitations already affect filing office operations in many states; and, finally, offers some suggestions for how to avoid filing office risk caused by budget pressures.



## **What If the Minnesota Secretary of State Had Shut Down?**

The closure of a filing office for any reason can have serious consequences for those who rely on business services. The Minnesota government shutdown offers a glimpse of what could happen if a filing office was forced to close due to budget pressures.

The Minnesota government shut down for three weeks beginning on July 1, 2011 because the governor and legislature could not agree on a budget. In advance of the shutdown, the Office of the Secretary of State published an advisory that provides insight on how a filing office closure would affect stakeholders. The effects of a filing office shutdown include:

- Interested parties would be unable to file or search UCC records;
- Business entities could not be formed or qualified to do business in Minnesota;
- Central notification lists would not be published to protect buyers of farm products; and
- Copies of UCC and business records would be unavailable until the filing office reopened.

In summary, the Minnesota filing office was prepared to shut down all functions and services. Even the filing office phones and online capabilities would have been turned off for security reasons.

The impact on business activities in Minnesota and beyond would have been dramatic. Lenders, businesses and legal professionals would all have felt the effects of even a short shutdown.

Commercial lending would have slowed significantly. Without access to the UCC systems, lenders could not conduct due diligence for commercial loans, nor could they perfect security interests. Moreover, lenders would be at further risk because they could not file continuation statements or other amendments during the shutdown.

Likewise, many attorneys would have deals impacted by the filing office shutdown. The closing of mergers, acquisitions and other commercial transactions is frequently dependent on filing office services. Many of these transactions would have to be placed on hold because the parties would be unable to conduct due diligence and file the necessary records.

The Minnesota filing office closure would have limited other business activities as well. Entrepreneurs would have been unable to form business entities. Foreign entities could not qualify to transact business in Minnesota until the filing office reopened.

The good news is that none of these events actually occurred – this time. The Office of the Minnesota Secretary of State remained open by court order throughout the shutdown. However, future budget battles in Minnesota and other states may not end as well.

While budget limitations have not forced other states to confront the possibility of extended filing office closures, they have generated noticeable effects in some cases. Filing offices around the country are feeling the consequences of budget cutbacks.

## **Current Budget Effects on State Filing Office Services**

Many state filing offices have suffered budget cuts over the past few years. Filing offices must struggle to maintain service levels when funding limitations strain their already limited resources.

State filing offices use a variety of methods for dealing with funding cuts. These include limited filing office closures, staff reductions, involuntary furloughs and strict controls on other expenses. The impact of these actions may not always be readily noticeable to filing office stakeholders.

One filing office, the Utah Department of Commerce, decided to cut costs by implementing a four-day week beginning in 2008. The filing office maintains extended hours Monday through Thursday, but is closed on Fridays. The Friday closures places a minimal burden on stakeholders, in no small part due to the filing office's online search and filing capabilities. Online services remain available on Fridays. However, anyone that has an urgent need on a Friday for copies or services that are not available online has no choice but to wait until the office reopens.

While the four-day week has been effective for reducing the Utah filing office's costs, legislation enacted earlier this year reversed the practice. The Utah Department of commerce returned to hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, beginning on September 6, 2011.

Budget limitations have forced many filing offices to reduce staff levels. These reductions are often accomplished through attrition, but some filing offices have been forced to layoff staff. While the availability of online services has partially offset the staff reductions, filing offices have fewer people to process the work that cannot be done online. The result has been increased turnaround times at several state

filing offices.

Staff reductions impact more than just turnaround time. Institutional knowledge can suffer as well. Several filing offices have reduced personnel levels through early retirement incentives. While this method does reduce staffing costs, those who take advantage of it are often directors, supervisors and senior staff. This loss of key personnel costs the filing office a wealth of experience that cannot be easily replaced and its effects remain to be seen.

Filing offices have also employed unpaid furloughs as a cost-saving measure. Under this approach, each filing office staff member must take a specified number of floating furlough days during the year. The filing office can space out the absences over a period of time without affecting office hours. However, furloughs place even greater burdens on the already short-staffed filing offices.

Budget pressures can even impact how the filing office chooses to provide services. The filing office administrator of one large state, who asked to remain anonymous, believes his office will need to mandate electronic UCC filing if it suffers the loss of even one more full time staff position.

Budget cuts have also compelled some filing offices to limit participation with the International Association of Commercial Administrators (“IACA”). IACA plays a key role in establishing uniform filing office standards, rules and best practices. Reduced participation with IACA could, in time, lead to growing inefficiencies and non-uniformity. The timing for reduced participation with IACA is especially concerning because of pending legislative initiatives that will significantly affect the filing offices. These initiatives include the 2010 Amendments to UCC Article 9 and the Harmonized Uniform Business Organizations Code.

### **Avoiding Budget Traps**

If there is any concern that budget-related filing office delays could affect a commercial transaction, attorneys can take one simple measure to minimize the risk. The most effective method of avoiding delays is to use the filing office’s online services whenever possible.

Most states offer at least some UCC and business services online through their websites or through interfaces with private service companies. The electronic systems are generally available twenty-four hours a day and are insulated from just about any budget-related problem short of a complete government shutdown.

Depending on the capabilities of a particular filing office, users may be able to file, search and retrieve copies of records online, bypassing delays that result from limited staffing resources. Conducting filing office transactions electronically has the added benefit of reduced costs. Filing offices often encourage adoption of electronic capabilities by offering lower fees than for comparable paper-based services.

Unfortunately, not all filing office services are available online, nor are all online systems designed with full functionality. When electronic services are not suitable and delays are not an option, expedited services may be necessary.

Many filing offices offer expedited services for an additional fee. With expedited service, the filing office will process the transaction much faster than regular orders. For example, the Delaware Secretary of State offers to process incorporations and other business services within one hour for an additional fee of \$1000 or within twenty-four hours for \$200. Those fees may seem high, but are often far less than the cost of a delayed closing. Moreover, the expedited services fees charged by other state filing offices are usually far lower than in Delaware.

### **Conclusion**

Budget pressures do affect filing office operations. Cost-saving measures can cause processing delays and otherwise degrade filing office efficiency. To avoid potential problems caused by budget limitations, attorneys should consider using electronic filing or expedited services, if available.

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## **PERMANENT EDITORIAL BOARD UPDATE**

**By Teresa Wilton Harmon, Sidley Austin LLP**

Recent activities of the Permanent Editorial Board for the Uniform Commercial Code may be of interest to those who practice in the area of mortgage transactions or securitization. On March 29, 2011, the PEB released a [\*\*Draft Report on UCC Rules Applicable to the Assignment of Mortgage Notes and to the Ownership and Enforcement of Those Notes and the Mortgages Securing Them\*\*](#). The PEB has been receiving comments on this Draft Report and hopes to release a finalized Report later this year. The Draft Report has already been cited in at least one decision, *In re Veal* from the 9th Circuit BAP. In a related development, earlier this year, the PEB, along with the Uniform Law Commission and the American Law Institute, hosted a stakeholders meeting on notes and mortgage

issues in order to provide for an initial discussion of legal issues relating to problems in the secondary mortgage market, with a view towards whether any changes in law may be necessary or appropriate. The meeting was attended by a broad range of parties. Separately, in other business, the PEB in conjunction with the American Law Institute and the Uniform Law Commission has recommended that the proposed 2003 revisions to Articles 2 and 2A of the UCC be removed from the official text of the UCC and hereafter included in annexes to the code as “Amendments Proposed in 2003 and withdrawn from the Official Text in 2011.” The action was deemed to be appropriate because no states have adopted the 2003 revisions. Any ABA members with questions about PEB activities are encouraged to contact the ABA liaisons to the PEB, **Teresa Wilton Harmon**, of Sidley Austin LLP, or **Carter Klein** of Jenner & Block.

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## UCC Spotlight

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By **Kristen Adams**, Professor and Associate Dean for Academics at Stetson University College of Law and Vice Chair of the ABA Business Section’s Uniform Commercial Code Committee, and **Stephen L. Sepinuck**, Professor at Gonzaga University School of Law, Co-Director of the Commercial Law Center and former Chair of the ABA Business Section of Law’s Uniform Commercial Code 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 decisions.

***Pascack Community Bank v. Universal Funding, LLP,***  
16 A.3d 1097 (N.J. Super. Ct. App. Div. 2011)

Regular readers of this column may remember the decisions in the *In re Jersey Tractor Trailer Training, Inc.*, bankruptcy case, in which three different courts accepted, in the context of a priority dispute among factors, the fanciful premise that a creditor could be a holder in due course of accounts. The decisions also included the disturbing suggestion that errors in the search process may prevent a secured party from acting in good faith. Well this case, also arising in New Jersey, makes similarly erroneous and disturbing statements, although the court did reach the correct result. Although *In re Jersey Tractor Trailer Training, Inc.* has been cited approvingly in half a dozen other cases, this is the first reported opinion that follows the Third Circuit’s flawed reasoning in connecting good faith with a secured party’s failure to search for liens against the debtor.

The facts of the case are fairly straight forward. In 2001, the debtor, D’Lusso Transport Services, Inc., entered into a factoring arrangement with Universal Funding LLP. The agreement was structured as a sale of accounts but Universal had the right to charge back to the debtor any unpaid account, suggesting that the arrangement might well be a secured loan (also covered by Article 9) rather than a sale. Universal never filed a financing statement.

In 2007, Pascack Community Bank (“Pascack”) extended a line of credit to the debtor, taking back a security interest in substantially all of the debtor’s assets. The court expressly mentioned that this included general intangibles, but there was some evidence that it also included accounts. Initially, Pascack filed a financing statement in New Jersey, where the debtor conducted business. Approximately a year later, after learning that the debtor was incorporated in Delaware, Pascack re-filed there and perfected its security interest. Two months later, the debtor defaulted. Shortly thereafter, Pascack learned of the debtor’s factoring relationship with Universal and sent Universal a letter advising Universal that Pascack had priority in the debtor’s accounts. Pascack subsequently went after Universal for amounts Universal collected. The trial court entered summary judgment for Pascack for \$144,000, the amount remaining due to Pascack. Universal appealed.

The Appellate Division began its analysis quite properly. It noted that the only evidence that Pascack had submitted in support of its position was a certified statement by Pascack’s counsel that Universal had factored over \$4.1 million worth of accounts receivable for the debtor after Pascack had issued the line of credit and perfected its security interest. This statement had no evidentiary value because it was not based on personal knowledge. Even if it had been, the court concluded, the statement “was far too general to be illuminating, and sufficiently ambiguous as to be misleading.” As the court noted, the time period in which the line of credit was issued encompassed a substantial period in which Pascack’s security interest was unperfected. Moreover, the record failed to indicate what proceeds were collected from accounts factored before and after Pascack perfected, or what proceeds, if any, were collected from accounts after Universal received Pascack’s letter.

All of this is perfectly sensible. Even though Universal had an unperfected security interest, it had priority in the factored accounts until Pascack perfected. See § 9-322(a)(3). More to the point, Universal may have obtained priority in collections received after Pascack perfected in any of three ways: (i) as a purchaser of an instrument under § 9-330(d); (ii) as a holder in due course under § 9-331(a); (iii) or as a transferee of money under § 9-332(a). See § 9-607 cmt. 5. Once Universal received Pascack’s letter (assuming it did receive it),

Universal would probably be unable to obtain priority in subsequently received instruments under § 9-330(d) because it would have had knowledge that its purchase violated Pascack's rights. For a similar reason, it could probably not qualify as a holder in due course of instruments received after receipt of Pascack's letter. See § 3-302(a)(2) (holder in due course must take without notice of a claim to the instrument). However, Pascack had not presented evidence about when Universal had collected on the accounts and thus the appellate court was correct in reversing the summary judgment for Pascack. This lack of evidence is important because holder-in-due-course status is determined based upon the information available to the holder at the time it becomes a holder and will not be defeated if the holder subsequently learns of a claim to the instrument. See, e.g., *Peoria Savings & Loan Association v. Jefferson Trust & Savings Bank*, 410 N.E.2d 845 (1980); *Lynnwood Sand & Gravel, Inc. v. Bank of Everett*, 630 P.2d 489 (1981).

Unfortunately, the court did not stop there. The court suggested that there were two other factual issues that prevented summary judgment. First, according to the court, Universal may well have had a perfected security interest. Noting that a sale of payment intangibles is automatically perfected under § 9-309(3), the court said that more information was needed about whether the debtor's transaction with Universal was a borrowing or a sale. It based this conclusion on its rather remarkable belief that "[a]ccounts receivable fall within the definition of 'payment intangible.'" This is, of course, patently not true. Payment intangibles are a type of general intangibles. § 9-102(a)(61). General intangibles are defined to exclude accounts. § 9-102(a)(42). Thus, it is axiomatic that accounts cannot be payment intangibles and a sale of accounts is not automatically perfected. Admittedly, some security interests in accounts are automatically perfected, see § 9-309(2), but there was no suggestion that this rule was applicable.

The second factual issue the court raised may be a greater source of distress. The court noted that there was a factual question about whether Universal had acted in good faith, a prerequisite to holder-in-due-course status. It was undisputed that Universal lacked any knowledge of Pascack's security interest until it received Pascack's letter and that this lack of knowledge satisfied the subjective prong of the "good faith" test. However, the court properly noted that Universal also had to satisfy the objective prong: that it had observed accepted "reasonable commercial standards of fair dealing." Citing to the Third Circuit's decision in *In re Jersey Tractor Trailer Training, Inc.*, 580 F.3d 147 (3d Cir. 2009), the court questioned whether Universal had comported with industry standards by not conducting a search for liens against the debtor.

In fairness to the court, comment 5 to section 9-331 does indicate that a failure to search may be inconsistent with reasonable commercial standards of fair dealing. Moreover, the court properly rejected the trial court's conclusion that Universal had lacked good faith, noting that the record was silent about what industry standards are. The court even expressed some skepticism about what a reasonable search would have revealed, given that Universal had not filed in the appropriate state until two months before the debtor went out of business. Nevertheless, the court expressly stated that Universal's "failure to conduct any lien searches is a significant factor in determining whether it acted in good faith." While in the abstract that statement may be true, in the context of the facts of this case, that statement is very unfortunate.

Recall that Universal had a factoring relationship with the debtor for six years before Pascack entered the scene. For the next year, Pascack's security interest was unperfected because Pascack had filed in the wrong place. The only way a search would have revealed anything to Universal is if it had conducted it after Pascack had perfected, seven years after Universal began its financial relationship with the debtor. It is one thing to say that a creditor cannot purposefully avoid notice of a competing claim and still qualify as a holder in due course, and thus must conduct a search at the outset of its relationship. It is quite another to say that the creditor must search repeatedly throughout that relationship. Comment 5 to section 9-331 expresses an anti-ostrich principle, not a pro-ferret rule. Holders in due course must not willfully put their head in the sand, but they need not dig around extensively or continuously. To the extent the decision in any way suggests the opposite, that suggestion should be buried.

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## Useful Links and Websites

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

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1. [www.lexology.com](http://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 UCCLAW-L listserv is sponsored by West Group, publisher of the "UCC Reporting Service." The listserv is an e-mail discussion group focusing on the Uniform Commercial Code. To subscribe to the UCCLAW-L listserv, go to <http://lists.washlaw.edu/mailman/listinfo/ucclaw-l>
3. The American Law Institute – [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=21](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=21)
4. U. Penn's archive of NCCUSL final acts and drafts can be accessed at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm>



5. Pace University's database of the United Nations Convention on Contracts for the Initiation Sale of Goods and International Commercial Law Database can be accessed at <http://cisgw3.law.pace.edu>
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](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. The Uniform Law Commissioners maintains information regarding legislative reports and information regarding upcoming meetings, including the Joint Review Committee for Uniform Commercial Code Article 9. You can access this information at <http://www.nccusl.org/Committee.aspx?title=Commercial Code Article 9>
9. Information on the work of The United Nations Commission on International Trade Law (UNCITRAL) (including the work of its working groups on Procurement, International Arbitration and Conciliation, Transport Law, Electronic Commerce and Insolvency Law) is available at <http://www.uncitral.org/uncitral/en/index.html>
10. The American College of Commercial Finance Lawyers – <http://www.accfl.com>
11. The Secretariat of Legal Affairs (SLA) develops, promotes, and implements the Inter-American Program for the Development of International Law. For more information, go to <http://www.oas.org/DIL/>
12. The National Law Center for Inter-American Free Trade (NLCIFT) is dedicated to developing the legal infrastructure to build trade capacity and promote economic development in the Americas. For more information, go to <http://www.natlaw.com>
13. Information on the Hague Conference on Private International Law and its current status is available at [http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php)
14. Information on the International Institute for the Unification of Private Law (UNIDROIT) project to enhance the internal adequacy and cross-border compatibility of existing national laws, including the Draft Convention on Substantive Rules Regarding Intermediated Securities, is available at <http://www.unidroit.org/english/workprogramme/study078/item1/main.htm>

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<sup>1</sup> See, e.g., 11 U.S.C. §§ 555, 556, 559, 560, 362(b)(6), (b)(7), and (b)(17), 546(e), (f), (g), and (j).

<sup>2</sup> In 2001, 11 U.S. § 546(e) provided in relevant part:

Notwithstanding sections ... 547 [and] 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a ... settlement payment, as defined in section ... 741 of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency ... that is made before the commencement of the case, except under section 548 (a)(1)(A) of this title.

In 2006, § 546(e) was amended to include transfers “made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract . . . .”  
11 U.S.C. § 546(e)(emphasis added).

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