

# CHAIR'S COLUMN

January 2009



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

## *Legislative Update*

### *Secured Transactions*

The Joint Review Committee for Article 9 of the Uniform Commercial Code will be meeting at the Hilton Portland and Executive Tower in Portland, Oregon on February 6-8, 2009. The meeting will be open to all those interested. Reservations can be made by contacting the hotel at (503) 266-1611. The Joint Review Committee will also meet March 6-8 in Chicago. For those who cannot attend these meetings, a report on the Joint Review Committee's deliberations and tentative decisions will be available on the UCC Committee's [web page](#).

The UCC Committee of the State Bar of California is in the process of completing a lengthy report on several proposed changes to Article 9. As soon as that report is completed, and assuming appropriate permission is obtained, that report too will be posted on the UCC Committee's [web page](#).

### *Permanent Editorial Board*

The PEB met in Denver on November 15, 2008 to discuss a variety of matters. [Teresa W. Harmon](#), a partner in the Chicago office of Sidley Austin LLP, serves as the ABA Liaison to the Permanent Editorial Board of the UCC and attended that meeting. A copy of the meeting agenda along with two documents prepared by Teresa – a [report](#) on the deliberations and some [reflections](#) of a PEB neophyte – appear at the end of this column.

### *Payments*

The Uniform Law Commission's new Study Committee on Regulation of Financial Institutions and Payment Systems met by phone on December 10, 2008. Fred Miller, the chair of the Committee, reports that despite the Committee's name, it has no intent to regulate either financial institutions or payment systems. At most it seeks to provide "a statutory background that will serve to the extent private rule sets and agreements do not, much like UCC Article 4 and Article 4A do." Indeed, because its name connotes more than the Committee was designed to do, the Committee

decided to recommended to the ULC's Executive Committee that its name be changed to something like the Study Committee on Payments Issues.

In connection with that more narrow scope, the Committee discussed the need to seek candid input from and build trust with various constituencies. Specifically, the Committee discussed the need to meet with:

- (i) congressional staff and Federal Reserve Board representatives to discuss matters of systemic risk, consumer protection, harmonization of rules, and the proper division of legislation and regulation;
- (ii) representatives of the banking industry to discuss a uniform law for debit transactions;  
and
- (iii) appropriate persons to discuss issues that might arise when checks are converted to electronics outside of an ECP relationship.

After the meeting, Fred Miller emphasized that “[t]his will be a cooperative effort at every stage,” which focuses on “practical problems of significance.” If there is a consensus to move on to a drafting phase, the drafting committee’s authority will be limited to issues identified.

### *People Update*

Professor Kristen Adams, the chair of the Subcommittee on General Provisions and Relations to Other Law and a co-author of the *Spotlight* column, married her long-time friend Jeff Smith shortly after the new year. Congratulations to Kristen. I am sure the whole Committee joins with me in wishing the two of you many years of happiness together.

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**Meeting of the Permanent Editorial Board for the Uniform Commercial Code  
Saturday, November 15, 2008  
9:00 a.m. to 3:00 p.m.**

**Crowne Plaza Denver  
1450 Glenarm Place  
Denver, Colorado  
Phone: 303-573-1450**

**AGENDA**  
*(as of November 3)*

Note: Action items are in **bold**, discussion items are in regular font, and informational items are in *italics*.

1. **Approval of minutes of PEB Executive Subcommittee meeting held on April 21, 2008 (Annex A) – Sebert**
2. Remembrance of Richard Speidel – Rusch
3. *Report on status of UCC enactments (Annex B) – Sebert*
4. Discussion of possibility of withdrawal of 2003 amendments to UCC Articles 2 and 2A – Cohen
5. Report on Joint Committee on UCC Article 9 and discussion of the Committee's recommendation to revise the comments to UCC §§ 3-302 and 3-303 (Annex C) – Smith
6. Consideration of PEB Commentaries:
  - (a) **UCC § 4A-502 (Annex D) – Miller**
  - (b) **Highland Capital (Annex E) – Cohen**
  - (c) *Commercial Money Center – Cohen*
  - (d) *Impact of UCC §§ 9-406 and 9-408 on anti-assignment provisions relating to interests in unincorporated business organizations – Smith*
7. *Report on PEB payments group and ULC Study Committee on Financial Institutions and Payments Systems (Annex F) – Heller, Miller, & Rusch*
8. *Report on Committee for Implementation of the UN Convention on Independent Guarantees and Stand-by Letters of Credit (Annexes G-1 and G-2) – Smith*

9. *Report on Convention on Assignment of Receivables in International Trade – Smith*
10. Report on UNCITRAL Draft Convention on the Carriage of Goods Wholly or Partly by Sea and UCC Article 7 (Annex H) – Sebert
11. Consideration of development of PEB Commentaries concerning the impact of international conventions on UCC Articles – Sebert
12. Report on proposal on security interests in manufactured housing (Annex I) – Auerbach, Cohen, & Henning
13. *Report on federal tax lien registration legislation – Henning*
14. *Report on status of project to assemble a definitive official text of the UCC – Cohen & Weise*
15. **Financial report and budget amendment (Annex J) – Dissinger**
16. Discussion of possibly creating a group to consider how the PEB might react more quickly when necessary – Boss & Rusch
17. Other business
18. *Next meeting – Sebert*

**Report on the Meeting of the  
Permanent Editorial Board for the Uniform Commercial Code  
November 15, 2008**

**Teresa Wilton Harmon, ABA Liaison**

The Permanent Editorial Board for the Uniform Commercial Code met in Denver on Saturday, November 15, 2008. Key points of discussion are summarized as follows:

1. Status of 2003 Amendments to UCC Articles 2 and 2A: Although these amendments have not been enacted in any jurisdiction, they will not at this point be withdrawn.
2. Revised Article 9 Drafting Project: Ed Smith provided an update on the recent meeting in Chicago emphasizing filing issues and timeline. Some attention was given to ensuring that the appropriate stakeholders were at the table. Attention was also paid to some possible cleanup changes to Articles 3-302 and 3-303 related to Article 9.
3. PEB Commentaries:
  - (a) § 4A-502: A proposed commentary relating to Section 4A-502 and its overlap with admiralty law – as discussed in several cases including Winter Storm – was discussed. The draft comment will undergo one more round of revisions and, after email PEB approval, will be available for public comment.
  - (b) Highland Capital: A proposed commentary rejecting the Highland Capital decision and stating that “may be recorded” means that books have been established, will go through one more round of revisions and, after email PEB approval, will be available for public comment.

Other possible comments covering Commercial Money Center and the anti-assignment provisions of § 9-406 and § 9-408 have been referred to the Revised Article 9 drafting project.
4. Payment Systems: The meeting included significant discussion of gaps/discrepancies in laws relating to payments. The decision was made to sunset an earlier PEB group studying this area in light of a separate UCC study committee’s work.
5. Letter of Credit Treaty: Ed Smith reported on the status of implementation of the UN Convention on Independent Guarantees and Standby Letters of Credit. The Convention applies, generally speaking, to standby L/Cs with at least one party outside of the U.S. It is consistent in nearly all respects with Article 5 of the UCC but its wording is different. Implementation issues – which are interconnected with State Department issues and recent Supreme Court precedent questioning practices for implementing treaties – include:
  - (a) whether to have the treaty self-executed as federal law using the words of the Convention (pre-empting Article 5 for qualifying L/Cs);

- (b) whether to pre-implement the treaty via Article 5 as adopted in the 50 states; or
- (c) some compromise.

No resolution was reached.

6. Proposal on Security Interests in Manufactured Housing: This proposal to harmonize real property and personal property laws in this area to create uniformity and predictability continues. Various interest groups are being contacted.

7. Federal Tax Lien Registration Legislation: This project, originated to respond to the *Spearing Tool* decision, now involves pending legislation making little progress on the Hill to create a federal registration system for federal tax liens or at least a pilot program.

The PEB Executive Subcommittee will meet next Spring and the full PEB will meet again next Fall. In the interim, various projects will move forward by email communication or List Serv and by conference call if necessary.

## **Reflections of a PEB Neophyte**

### **Teresa Wilton Harmon**

### **November 2008**

As I digest the events of my first PEB meeting, I'm inundated with several flashbacks – my Elements of the Law class as a first year law student; the huge portraits of Karl Llewellyn and Soia Mentschikoff that hung in the classroom wing of The Law School; the moment I was able to sit on the floor of the Illinois Senate as the legislature debated a UCC amendment; the solemn splendor of the State Capitol rotunda at night, when the reflections, shadows, deep hues and architectural details bring one closer to the best spirits of our legislative process. The law is awesome and resilient and worthy of respect.

Be it known that the PEB meeting was not glamorous. There were no paparazzi, no limos, no keynote speakers or black tie dinners. Instead, less than two dozen devoted servants and protectors of the law gathered to discuss and develop commercial law as it is adopted in our 50 states and beyond. Their work reflects a continuation of the noble goal that uniform legal principles crafted by a broad range of nationally recognized thinkers, and then further vetted and enacted by each of our state legislatures, will lead us to the best commercial law results - while giving deference to federalism, custom and history.

The following are some more focused observations, all of which transcend the specific agenda topics that were before us.

1. The “Whose Law Is It Anyway” Debate is Alive and Well. Several of the discussions at the PEB meeting were territorial in nature. Can legal issues be resolved by changes to the official comments, without further legislative action? What is the PEB's role with respect to a Federal Appeals Court decision interpreting both admiralty (federal) law and the UCC? When commenting on the Highland Capital decision, should the PEB say it agrees with the dissent or stand more strongly on its own? How should an international treaty with consistent – but different – terms than the UCC be implemented – state law versus federal law, our words versus theirs?
2. Commercial Law Is Still and Should Be a Unified Body of Law. Increased specialization has led to a wide gap among commercial lawyers – there are Article 2 lawyers, Article 4 lawyers and Article 9 lawyers for example. But time and again during the PEB meeting, I was struck by the way the various legal areas intertwined and I noticed that analogies and general trends in one area impact another. The payments debate was especially interesting in this regard – even where the focus is on private law, payments law doesn't make sense in a vacuum.
3. Interpersonal Relationships and Personal Reputations Matter. The PEB participants know each other. Their opinions and contributions are evaluated in the context of a more complete understanding of their value and perspective. They are not household names, but they are celebrities in our small universe. Action on some points will not proceed until a key (absent) member's perspective is obtained. A particular project should proceed more quickly so that its leader can continue an active role. Individuals are assigned to a broad range of projects based not solely on their area of legal specialty but on their individual strengths.

4. The Closed Nature of the PEB – While One of Its Key Strengths – Also Leads to an “Inside Baseball” Risk. Where PEB participants are intimately involved in all the delightful intricacies of the Code, there is a risk that they will either make the Code so magically precise that mere mortals cannot understand its beauty or that they will miss out on key developments and practitioner issues, thus taking the Code in the wrong direction. That risk is currently addressed by the presence of ABA liaisons, by the public comment procedure, and through individual participant efforts to expand input. At several points in the meeting, reference was made to efforts to contact interested parties (manufactured homes, revised Article 9 drafting project) and whether laws were “fair” to those who might not be at the table (payments). I hope the PEB will continue to remember to bring the outside in.

5. We Often Do Our Best Thinking When We Are Calm. Two groups were meeting the same week to determine laws relating to our financial marketplace. The contrast between contemporaneous discussions in Washington - influenced by crisis, fear, and infinite politics – and the calm reasoned mood of the PEB meeting is stark. Law must be made both ways. It is comforting to know, however, that the calmer method prevails, at least in some circles.