Boston Bar Association

Volume 5

Fall 2010

Business Law Section Newsletter

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A PUBLICATION OF THE BOSTON BAR ASSOCIATION BUSINESS LAW SECTION

Fall 2010 Volume 5

Section Co-Chairs' Corner

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A MESSAGE FROM THE CO-CHAIRS

As Fall yields to Winter, we have this opportunity – the first of three in the next nine months – to share with you some of the exciting things happening at the Boston Bar Association and in the BBA's Business Law Section. As you know, the Business Law Section is one of the largest sections of the BBA with nearly 2,000 members and over a dozen committees. We are privileged to serve as the section's co-chairs. At the BBA, a wide range of legal specialties, and associated programs and events, are flourishing under the auspices of the Business Law Section. The Business Law Section Newsletter is designed to give you a better sense of the committees, programs, events and other developments across our section.

Over the past two years, we have used the Business Law newsletter to foster a sense of community and shared interest among section members who have diverse interests and legal specialties. In reaction to the overwhelmingly positive response to the newsletter and to the pleasant surprise frequently expressed by members when they learn more about the Business Law Section and its committees, publishing a newsletter is one of our primary goals. Again this year, we will publish three editions of the newsletter – Fall 2010, Late Winter 2011 and Late Spring 2011. Each edition of the Business Law Section Newsletter will showcase selected committees and focus on the activities of those selected committees and developments within the related area of legal specialty. This initiative would not be possible without the co-chairs or our communications committee, Gregory Fryer and Peggy Tirrell, and contributing committee chairs. We want to thank Greg and Peggy for their dedication, energy and hard work and the contributing committee chairs for their cooperation and enthusiasm. The continued success of the Business Law Section Newsletter will depend on its relevance to you. Accordingly, we invite you to share your feedback about the newsletter and encourage you to contribute to upcoming editions.

In this protracted period of change in the legal profession, the members of the BBA and Business Law Section continue to confront new and unprecedented challenges. We will derive our strength to meet these challenges in large part from the support we offer to and receive from each other. Consequently, this year, we are placing even greater emphasis on inclusion and active involvement across the section. We encourage you to introduce a colleague to the Business Law Section and alert her or him to a program or event. Another of our primary goals this year is to involve lawyers in transition regardless of career stage. We ask that you join us in making a special effort to include a lawyer who finds herself or himself in the midst of a career transition (for whatever reason) in Business Law Section programs and events. Finally, please contact your committee co-chairs or either of us if you have any suggestions or if you are interested in becoming more involved in the section or any of its committees.

We look forward to seeing you over the coming months and enjoying with you some of the brown bag programs, CLEs, etc. described in this newsletter.

Be well.

Best wishes for a happy, healthy and productive 2011.

Mark T. Bettencourt and Mark L. Johnson

Editors: Gregory Fryer and Peggy Tirrell

Inside this Issue:

Featured Committee: Consumer Finance Committee

By Adam J. Ruttenberg

The genesis of the Consumer Finance Committee began in the spring of 2008 with a meeting between Professor Elizabeth Warren[1] of Harvard Law School and the co-chairs of the Bankruptcy Law Section of the BBA. Professor Warren had suggested the meeting to discuss the role in which the BBA could play in supporting state initiatives to protect consumers from certain dangers arising in consumer mortgages, automobile loans, credit cards, and other financial products.

After the meeting with Professor Warren, the chairs of the Bankruptcy Law Section sought to form a Consumer Finance Working Group on the topic of consumer finance. The Consumer Finance Working Group was comprised of members from the Business Law Section, Health Law Section, Real Estate Section, Senior Lawyers Section, Solo & Small Firm Section and the Bankruptcy Law Section. Although its first scheduled meeting was delayed because of a happy conflict with the parade for the Celtics' 17th championship, meetings of the Consumer Finance Working Group began in earnest in the summer of 2008.

The Consumer Finance Working Group heard presentations regarding such topics as the proliferation of deceptive "loan modification programs" on the radio and the Internet, the explosion in consumer medical debt and the specific issues in its collection, and the many programs and resources of the Federal Reserve Bank of Boston with respect to consumer finance. In the fall of 2008, members of the Consumer Finance Working Group met with members of the Consumer Protection Division of the office of the Massachusetts Attorney General to discuss any suggestions the BBA may have to update certain Attorney General Regulations. The suggestion led the Consumer Finance Working Group to devote considerable effort throughout 2009 to a proposal for updating the Attorney General Regulations on the collection of consumer debt. The Consumer Finance Working Group identified several areas where regulatory language not currently in either the Attorney General Regulations or any other Massachusetts regulations (the Commissioner of Banks also has issued regulations on debt collection) would provide clarification or other benefit. In January 2010, the Consumer Finance Working Group issued a report with its recommendations, and in July 2010, the BBA Council endorsed the report and the BBA President forwarded the Consumer Finance Working Group's recommendations to Attorney General Martha Coakley.

In addition to endorsing the Consumer Finance Working Group's report, a little over two years following the initial meeting with Professor Warren, the BBA determined that the Consumer Finance Working Group should have a more formal place in the BBA, and it created the Consumer Finance Committee. The Consumer Finance Committee will bring together government lawyers, policy makers, public interest groups and private lawyers representing creditors and debtors. Its goal is to identify and address emerging aspects of consumer finance that are of concern to regulators, stakeholders, private attorneys and in-house counsel. It will expand the public policy role of the Consumer Finance Working Group into educational programming, such as brown bag seminars and CLEs.

The Consumer Finance Committee began the year by jointly sponsoring with the Banking Law Committee a CLE on September 15, 2010 entitled "Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act."

For this year the co-chairs of the Consumer Finance Committee are Andrew Dennington of Conn Kavanaugh Rosenthal Peisch & Ford and Adam Ruttenberg of Looney & Grossman.

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1 Professor Warren became the chairwoman of the Congressional Oversight Panel overseeing use of TARP money and assistant to the President overseeing creation of the Consumer Financial Protection Bureau and prior to that time had written extensively about the safety of consumer financial products.

BBA Endorses Report Recommending Revisions to Massachusetts Attorney General Consumer Debt Collection Regulations

By Andrew R. Dennington

The Massachusetts Attorney General's Office ("OAG") currently is reviewing a detailed BBA report recommending a significant revision of its consumer debt collection regulations at 940 C.M.R. §§ 7.00 et seq. ("AG Regulations"). The *First Report of the BBA's Consumer Finance Working Group (the "Report")*[1] is the result of two years of internal research, drafting, review, and revisions by a Working Group that was the predecessor of the BBA's new Consumer Finance Committee, which is a joint committee of the BBA's Business Law and Bankruptcy Sections. This work was prompted by a 2008 meeting at which attorneys from the OAG's Consumer Protection Division identified unfair and deceptive practices in consumer debt collection as an area of increasing concern.

The AG Regulations regulate collection activities by "creditors" of debts incurred "for personal, family, or household purposes." 940 C.M.R. § 7.03. The definition of "creditor" in the AG Regulations encompasses creditors collecting their own debts, as well as agents and employees (including attorneys) engaged in collecting a debt on behalf of a creditor. Id. These AG Regulations are separate – and not to be confused with – state regulations respecting collection activities by "debt collectors" licensed by the Massachusetts Division of Banks at 209 C.M.R. §§ 18.00 et seq. ("Division of Banks Regulations").[2]

The AG Regulations have not been updated since enactment in the 1970s, and they show their age. The Report proposes amending the AG Regulations to largely track the more modern, federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1691 et seq. The Division of Banks already had amended its own consumer debt collection regulations in 2004 to track the FDCPA. By better conforming the AG Regulations to the FDCPA and the Division of Banks Regulations, debt collection practices that are unfair and deceptive when done by a debt collector likewise would be unfair and deceptive when done by a creditor collecting its own debt.

Without such regulatory revisions, some particular collection practices are lawful when executed by a creditor, but unlawful when executed by a licensed debt collector acting on behalf of that creditor. The Working Group was unable to identify a valid policy justification for such regulatory discrepancies.

The Report proposes amending the AG regulations to:

- Remove the current exclusion in the AG Regulations for consumer debts in excess of $25,000 (a "large debt" exemption enacted in the 1970s which has never been adjusted for inflation). 940 C.M.R. § 7.03. Under the existing cap, collection of fairly typical credit card balances and automobile loans by creditors (as opposed to licensed debt collectors) escapes regulatory scrutiny and enforcement under state law.

- Maintain the existing exclusion in the AG Regulations for debts secured by a first mortgage, but clarify that collection activities concerning deficiency balances after foreclosure are subject to the AG Regulations. 940 CMR § 7.03. Recent press accounts have identified collections activities after foreclosure as an area of concern.[3]

- Modify the existing exclusion in the AG Regulations concerning constables and process servers to clarify that such persons are exempt from the AG Regulations only for the act of serving process, but

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1 The BBA Council formally endorsed the Report in July 2010, and sent it to the OAG for its consideration.

2 Massachusetts actually is one of the few states with a regulatory scheme that applies not only to collection agencies but also to creditors collecting their own debts. See Manuel H. Newburger & Barbara M. Barron, Fair Debt Collection Practices: Federal and State Law and Regulation, ¶ 22.1 (2009).

3 Jerry Kronenberg, *Banks, Collection Firms Purse Claims After Homes Foreclosed: Nightmare Returns*, Boston Herald, Nov. 2, 2009.

not for other consumer debt collection activities. 940 CMR § 7.03.

- Clarify that the practice of repeatedly or excessively leaving messages on voice mail, answering machines, or text messages may constitute harassment and abuse. The current AG Regulations regulate “contact” rather than “communication.” The latter is the term used in the FDCPA and the Division of Banks Regulations. This change seeks to clarify ambiguity in the current AG Regulations about whether an unanswered voice mail, answering machine message, or text message constitutes “contact.” 940 CMR § 7.04.

- Require creditors to, within five business days of receipt of a request from a consumer or a consumer attorney, provide copies of documents in its possession validating the debt alleged to be owed (including identification of a creditor from whom a debt buyer purchased the account). The current AG Regulations instead require consumers to come to the creditor’s place of business to obtain copies of those documents. 940 CMR § 7.08. This outdated, inconvenient, and impractical requirement can effectively deprive parties and their attorneys of early discovery that can encourage pre-litigation settlement of claims.

By and large, the Report seeks to modify, update, and clarify aspects of the current AG Regulations, rather than work any major policy changes to existing law. A group of creditors’ attorneys from the Bankruptcy Law Section reviewed the Report and concluded that this proposed regulatory modernization would not unfairly impede their own collection activities.

Any regulatory action taken by the OAG in response to the BBA’s Report would proceed under the notice and comment provisions of the Massachusetts Administrative Procedure Act, G.L. c. 30A. This would provide further opportunity for stakeholders, industry groups, and consumer organizations to contribute to any regulatory reform in this area.

The subject matter of the BBA’s Report is timely; further regulatory and legislative scrutiny of consumer debt collection appears likely at both the federal and state level. Recently, there has been a particular focus on those collections actions that advance to litigation. In July 2010, the Federal Trade Commission released a major, comprehensive report titled *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*.[4] The FTC report recommends reforms at the state level to provide more adequate protection to consumers once debt collection actions advance into litigation or arbitration. The FTC highlighted, as a model for other states’ consideration, the 2009 amendments to the Massachusetts Trial Court’s Uniform Rules on Small Claims, which seek to avoid entry of default judgments by providing greater notice to debtor defendants. These Massachusetts reforms will be put to the test soon, as the recent statutory expansion of the Small Claims Court’s subject matter jurisdiction from claims under $2,000 to $7,000 may lead to a significant increase in debt collection litigation in that forum.

Conclusion

The BBA Report currently under consideration by the OAG aims to afford increased protection to consumers – without undue burden on creditors seeking to collect legitimate debts – at all stages of the debt collection process, including those critical stages before a claim advances to litigation.

4 Available at http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf.

Mortgage Lending Reform Provisions of the Dodd-Frank Act: Will Bring Sweeping Changes

By Richard P. Hackett and Tom Quinn

On July 21, 2010, President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act").[1] At nearly 850 pages in length, the Dodd-Frank Act is intended to address a wide variety of perceived systemic weaknesses that contributed to the current economic downturn. One of the central pieces of this legislation is the Mortgage Reform and Anti-Predatory Lending Act (the "Mortgage Reform Act").[2] The provisions of the Mortgage Reform Act, which will become effective no later than January 21, 2014,[3] establish a number of new requirements targeting certain abusive and predatory practices within the industry. While a full discussion of all the mortgage-related provisions of the Act is beyond the scope of this article, we will briefly summarize some of the more important aspects of this legislation and the impact they will have on mortgage lending activity.

New Requirements for "Mortgage Originators"

Subtitle A of the Mortgage Reform Act establishes a series of new requirements for individuals deemed to be "Mortgage Originators." A "Mortgage Originator" is defined by the Act to be an individual who takes a residential mortgage loan application, assists a consumer in obtaining or completing such an application or offers or negotiates the terms of a residential mortgage loan.[4] Although some exclusions exist for mortgage loan servicers negotiating loan modifications, real estate brokers and individuals conducting purely clerical tasks, this relatively broad definition conceivably would encompass the day-to-day activities of many bank employees.[5]

If a party is deemed to be a Mortgage Originator, a number of new requirements and restrictions will apply. Specifically:

- **Duty of Care**: Mortgage Originators will have a duty to be both (a) duly qualified and (b) either licensed or registered under applicable state and federal law, including the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the "SAFE Act"). Under this duty Mortgage Originators are also responsible for including their unique identifier issued by the Nationwide Mortgage Licensing System and Registry on all loan documents.[6]

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1 Pub. L. 111-203.The Act in its entirety can be found at e.g. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ203.111.pdf

2 The Mortgage Reform Act is found in Title XIV of the Dodd-Frank Act.

3 Section 1400(c) of the Dodd-Frank Act requires that any regulations mandated by the Mortgage Reform Act must be finalized within 18 months after the Designated Transfer Date, and that such rules shall become effective no later than 12 months after the date of issuance in final form. On September 20, 2010, Treasury Secretary Geithner established July 21, 2011, as the Designated Transfer Date. *See*: 75 Fed. Reg. 57252. If regulations required by the Mortgage Reform Act are not drafted within 18 months of the Designated Transfer Date the statute will become effective without rule. *See*: Dodd-Frank Act § 1400(c)(3) The Designated Transfer Date is the date on which a number of "enumerated consumer laws" – including a number of provisions under the Mortgage Reform Act – will be transferred to the newly formed Consumer Financial Protection Bureau ("CFPB") for exclusive rulemaking and either exclusive or shared jurisdiction for enforcement purposes. *See generally*: Dodd-Frank Act §§ 1021 to 1029A.

4 Dodd-Frank Act § 1401, adding § 103(cc)(2)(A) to the Federal Truth in Lending Act. Individuals who hold themselves out as able to conduct these types of services are also considered Mortgage Originators. *See*: Dodd-Frank § 1401, adding § 103(cc) (2)(B) to the Federal Truth in Lending Act. A "residential mortgage loan" is defined in connection with these provisions to mean a "consumer credit transaction that is secured by a mortgage, deed of trust or other equivalent consensual security interest on a dwelling or on residential real property that includes a dwelling…", exclusive of open-end credit transactions (such as a home equity line of credit) and timeshares. *See*: Dodd-Frank § 1401, adding § 103(cc)(5) to the Federal Truth in Lending Act. Note that the term includes loans secured by second or vacation homes.

5 Dodd-Frank Act § 1401, adding § 103(cc)(2)(C), (D) and (G) to the Federal Truth in Lending Act.

6 Dodd-Frank Act § 1402(a)(2), adding § 129B(b)(1) to the Federal Truth in Lending Act. This section also tasks the Federal Reserve Board with adopting regulations that will make depository institutions responsible for policing compliance with these requirements for their employees and the employees of their subsidiaries. *See*: Dodd-Frank Act § 1402, adding § 129B(b) (2) to the Federal Truth in Lending Act. The references to the "Board" will change to the "Bureau" (referring to the Consumer Financial Protection Bureau) upon the transfer of the Truth in Lending Act to the Bureau as an "enumerated consumer law" under Title X of the Dodd-Frank Act.

- **Limits on Mortgage Originator Compensation**: The Mortgage Reform Act takes specific aim at yield spread premiums by prohibiting any Mortgage Originators from directly or indirectly receiving any compensation that varies based on the terms of the residential mortgage loan (other than the amount of the principal).[7] Moreover, Mortgage Originators may not receive compensation from any party other than the consumer unless the consumer with whom the Mortgage Originator is dealing has (a) paid nothing to the Mortgage Originator and (b) paid no upfront fees or points (other than bona fide third party charges to a party that is not affiliated with the Mortgage Originator or creditor).[8] However, Mortgage Originators may be compensation based on the number of loans closed.

- **Regulatory Limits on "Steering" and Other Predatory Practices**: The Mortgage Reform Act calls for the adoption of regulations intended to prohibit:

    - **Steering and Discouragement**: Mortgage Originators will be prohibited from steering consumers toward loans that the consumer lacks a reasonable ability to repay or that have certain predatory characteristics (such as equity stripping, excessive fees or abusive terms), or away from "Qualified Mortgages" for which the consumer qualifies toward another non-qualified product.[9] Similarly, these regulations will also prohibit Mortgage Originators from discouraging consumers from seeking more affordable loans from another party if the consumer cannot be qualified by the Mortgage Originator.[10]

    - **Practices that Promote Disparities**: Mortgage Originators will be prohibited from engaging in any abusive or unfair lending practices that promote disparate treatment based on the race, ethnicity, gender or age of the consumer.[11]

    - **Mischaracterizations**: Mortgage Originators will be prohibited from mischaracterizing either the credit history of the consumer or the loans available to him/her. There will also be regulatory prohibitions against mischaracterizing (or inducing the mischaracterization of) the assessed value of collateral property.[12]

In addition to these requirements, the Dodd-Frank Act provides for discretionary authority to develop additional regulations to prohibit or condition terms, acts or practices that are "abusive, unfair, deceptive, predatory, necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers…."[13]

New Standards for Residential Mortgage Loans

The Dodd-Frank Act takes a number of steps to strengthen mortgage loan underwriting and product development standards. Among other things, the Act requires the adoption of regulations that will obligate creditors to make a "reasonable and good faith determination based on verified and documented information" that the consumer has the ability to repay not only the loan being sought, but also any other loans secured by the same collateral that are known to the creditor, including all applicable taxes, insurance and assessments.[14] When making this determination the creditor must consider the consumer's credit history, current and reasonably expected income along with his/her current obligations,

7 Dodd-Frank Act § 1403, adding § 129B(c)(1) to the Federal Truth in Lending Act. *See also*: § 129B(c)(4)(A), clearly stating that nothing in this subsection should be considered as permitting yield spread premiums or other compensation that varies with loan terms (other than principal amount). Subsequent to the passage of the Dodd-Frank Act, the Federal Reserve Board issued a final rule that establishes a number of limits on mortgage originator compensation for applications received after April 1, 2011. While these provisions are similar in some regards to the requirements of § 1403 of the Dodd-Frank Act, they are not as expansive. The Dodd-Frank Act revisions will be addressed in subsequent rulemaking. *See:* 75 Fed. Reg. 58509 (September 24, 2010).

8 Dodd-Frank Act § 1403, adding § 129B(c)(2) to the Federal Truth in Lending Act.

9 Dodd-Frank Act § 1403, adding § 129B(c)(3)(A) and (B). The rules and requirements surrounding "Qualified Mortgages" are discussed in greater detail below. The Federal Reserve Board rulemaking discussed in Footnote 8 also includes new anti-steering provisions. These provisions are unrelated to similar provisions discussed in § 1403 of the Dodd-Frank Act, which will be addressed in subsequent rulemaking.

10 Dodd-Frank Act § 1403, adding § 129B(c)(3)(D)(iii) to the Federal Truth in Lending Act.

11 Dodd-Frank Act § 1403, adding § 129B(c)(3)(C) to the Federal Truth in Lending Act.

12 Dodd-Frank Act § 1403, adding §§ 129B(c)(3)(D)(i) and (ii) to the Federal Truth in Lending Act.

13 Dodd-Frank Act § 1405(a), adding § 129B(e)(1) to the Federal Truth in Lending Act.

14 Dodd-Frank Act § 1411(a)(2), adding § 129C(a)(1) and (2) to the Federal Truth in Lending Act. When calculating the consumer's ability to repay, the creditor will be required to use a payment schedule that fully amortizes the loan over its term. *See*: § 129C (a)(3).

debt-to-income ratio, employment status and other financial resources.[15] Certain limited exceptions to these income verification requirements are made for refinance loans that are made, guaranteed or insured by specified federal government agencies and departments if certain additional requirements are fulfilled.[16]

To ease some of the compliance burden associated with those determination requirements, the Dodd-Frank Act establishes certain basic "plain vanilla" repayment terms and underwriting standards. If the loan product qualifies under those conditions, then the creditor or assignee is allowed (in the absence of information to the contrary) to presume that the loan meets "ability to repay" determination requirements. The terms associated with such a "Qualified Mortgage" product include:[17]

- No negative amortization and except as permitted by regulation no deferred principal payments or balloon payments more than twice as large as the average preceding payments;
- Verification and documentation of the income and financial assets relied upon by the creditor to qualify the consumer for the product;
- For fixed rate loans, the underwriting process must be based on a repayment schedule that will fully amortize the loan over its term, taking into account all applicable taxes, insurance and assessments;
- For variable rate loans, the underwriting process must be based on the maximum rate permitted during the first five years of the loan and a repayment schedule that fully amortizes the loan over its term, taking into account all applicable taxes, insurance and assessments;[18]
- Compliance with debt-to-income ratios that may be established by applicable regulations or guidelines;
- Points and fees must not exceed three percent of the total loan amount; and
- Maximum repayment term of thirty years.

These criteria are not set in stone, as the Act provides for the flexibility to add to, subtract from or otherwise revise these criteria if doing so would be necessary to maintain the availability of affordable mortgage credit.[19]

In addition to these steps aimed at underwriting standards and processes, the Mortgage Reform Act also establishes several prohibitions that target specific abusive practices. For one, prepayment penalties will be prohibited on all mortgage loans other than Qualified Mortgages, and will only be permitted on Qualified Mortgages if the product is fixed rate and falls within certain rate limits.[20] When permitted, prepayment penalties are capped at no more than three percent of the outstanding loan balance in the first year, and then must step down by one percentage point each successive year.[21] Any creditor offering a loan with a prepayment penalty must also offer the consumer a second product without a prepayment penalty as a term of the loan.[22] The Mortgage Reform Act also generally prohibits the financing of single-premium credit insurance products[23] and prohibits mandatory arbitration clauses in residential mort-

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15 Dodd-Frank Act § 1411(a)(2), adding § 129C(a)(3) to the Federal Truth in Lending Act. The value of the equity in the dwelling or other real estate securing the loan, however, cannot be taken into consideration. Id. The Act establishes specific requirements for verifying income and asset information provided by the consumer during the application process. To validate that information, the creditor must use tax returns, IRS Form W-2, payroll receipts, bank statements and other third-party documents that provide "reasonably reliable evidence" of the consumer's income or assets. *See*: § 129C(a)(4)

16 Dodd-Frank Act § 1411(a), adding § 129C(a)(5) to the Federal Truth in Lending Act.

17 Dodd-Frank Act § 1412, adding §§ 129C(b) to the Federal Truth in Lending Act.

18 The practical effect of these terms is to exclude most types of adjustable rate mortgage products from the rebuttable presumption safe harbor, except for very high income borrowers.

19 Dodd-Frank Act § 1412, adding § 129C(b)(3)(B)(i) to Federal Truth in Lending Act.

20 First lien residential mortgage loans must have an APR less than the "Average Prime Offer Rate" + 1.50%. Jumbo mortgages are limited to a fixed APR less than the Average Prime Offer Rate + 2.50%. Subordinate lien residential mortgages must be less than the Average Prime Offer Rate + 3.50%. *See*: Dodd-Frank § 1414(a), adding §§ 129C(c)(1) and (2) to the Federal Truth in Lending Act. The "Average Prime Offer Rate" is defined in § 129C(b)(2)(B) as the average rate published for comparable transactions as of the date on which the interest rate for the transaction in question is set. *See*: Dodd-Frank § 1412, adding § 129C(b) to the Federal Truth in Lending Act. The Average Prime Offer Rate will be published at least weekly. *See*: § 129C (c)(2), added by Dodd-Frank Act § 1414(a).

21 Dodd-Frank Act § 1414(a), adding § 129C(c)(3) to the Federal Truth in Lending Act. The practical effect here is that no prepayment penalties are permitted on Qualified Mortgages after the third year in the repayment schedule. However, see Footnote 36, infra, regarding the implications of charging a 3% prepayment penalty in the first year under the high cost mortgage rules.

22 Dodd-Frank Act § 1414(a), adding § 129C(c)(4) to the Federal Truth in Lending Act.

23 Dodd-Frank Act § 1414(a), adding § 129C(d) to the Federal Truth in Lending Act.

gage loans *and* in lines of credit secured by a principal dwelling.[24]

New Disclosure Requirements for Residential Mortgage Loans

Supplementing the changes to the underwriting standards are changes to Truth in Lending disclosures. Many of them target adjustable rate mortgages (or "ARMs"), including a new change notice to be sent six months before the initial rate change on a "hybrid ARM."[25] Creditors offering ARM products that will escrow for taxes, insurance and other charges will be required to disclose the amount of both the initial and fully indexed monthly payments of principal and interest along with the amounts due for deposit into escrow for taxes, insurance and other assessments.[26]

All residential mortgage loan transactions (regardless of whether they are ARM transactions) will also be required to include the following additional initial disclosures:[27]

- The aggregate amount of all settlement charges for all settlement services provided in connection with the loan (itemized by amounts that are financed and amounts that are paid in cash);

- The wholesale rate of funds in connection with the loan;

- The aggregate amount of other fees or required payments in connection with the loan;
- The aggregate amount of any fees paid to the Mortgage Originator in connection with the loan, including an itemization of the amount of those fees paid by the consumer and the amount paid by the creditor; and

- The total amount of interest that the consumer will pay over the life of the loan, expressed as a percentage of the principal amount of that loan.

It is unclear at this point how these new initial disclosures will interface with existing disclosure requirements under other consumer protection provisions, most notably the Real Estate Settlement Procedures Act.[28]

In addition to these new initial disclosures, the Mortgage Reform Act will also require creditors and/or servicers to provide residential mortgage customers a monthly statement setting forth (to the extent applicable): the amount of principal on the loan, the current interest rate, the date on which the interest rate may reset or adjust, the amount of any prepayment fee, a description of the late fees, contact information (phone number and email address) for the obligor to receive information regarding the mortgage, and contact information (name, address, telephone number and Internet addresses) for HUD-certified counseling agencies available to consumer. Mortgage loan customers who receive a coupon book with substantially the same information need not be sent the new form of monthly statement. A model form for this statement will be developed.[29]

Amendments to High Cost Mortgage Rules

The Mortgage Reform Act also makes a series of amendments to the "high cost mortgage" provisions found in the Home Ownership and Equity Protection Act ("HOEPA").[30] In addition to expanding the coverage of these requirements to include both purchase money and open-end credit plans,[31] it also lowers the pricing thresholds for loans to be considered "high cost," as follows:

- **Rate Trigger:** From either Treasury + 8.00% (for first lien loans) or + 10.00% (for subordinate lien loans) to a rate equal to the sum of the Average Prime Offer

24 Dodd-Frank Act § 1414(a), adding § 129C(e) to the Federal Truth in Lending Act.

25 Dodd-Frank Act § 1418(a), adding § 128A to the Federal Truth in Lending Act. For purposes of this disclosure, a "hybrid ARM" is defined to mean a product with an initial fixed rate followed by a variable rate. *See*: § 128A(a). As a practical matter, this definition encompasses the majority of ARM products offered today, unless the CFPB chooses to ignore the effect of discounted initial rates in its rules.

26 Dodd-Frank Act § 1419, adding § 128(a)(16) to the Federal Truth in Lending Act.

27 Dodd-Frank Act § 1419, adding §§ 128(a)(17) through (a)(19) to the Federal Truth in Lending Act.

28 The Real Estate Settlement Procedures Act ("RESPA") is found at 12 U.S.C. §§ 2601 et seq., with its implementing regulation (Regulation X) issued by the Department of Housing and Urban Development (24 C.F.R. Part 3500). Pursuant to § 1032(f) of the Dodd-Frank Act, the Bureau must make rules prescribing unified combined disclosures under Truth in Lending and RESPA within one (1) year of the Designated Transfer Date.

29 Dodd-Frank Act § 1420, adding § 128(f) to the Federal Truth in Lending Act.

30 HOEPA was contained in the Riegle Community Development and Regulatory Improvement Act of 1994. Pub. L. 103-325 (1994). Its requirements are currently found in Subpart E of Federal Reserve Board Regulation Z.

31 Dodd-Frank Act § 1431(a), amending § 103(aa)(1) of the Federal Truth in Lending Act.

Rate + either 6.5% (for first lien loans) or + 8.5% (for subordinate lien loans).[32]

- **Points and Fees Trigger**: From the greater of 8% of the total loan amount or $ 579 to 5% of the transaction amount for transactions of $ 20,000 or more or the lesser of either 8% of the transaction amount or $ 1,000 for transactions under $ 20,000.[33]

A third qualification is also added to draw into the high cost mortgage rules those transactions that permit the creditor to charge or collect prepayment penalties that last more than thirty-six months after closing or that charge fees exceeding two percent of the amount prepaid.[34]

For those loans that are considered high cost mortgages, the Mortgage Reform Act imposes a series of new limitations. It completely bans prepayment penalties and balloon payments[35] and prohibits creditors from recommending that consumers default on an existing loan or other debt in connection with closing a high cost mortgage loan. Late fees are generally limited to no more than four percent of the amount past due and not before fifteen days after the payment due date, and the pyramiding of late fees is prohibited. Acceleration of the obligation is limited to payment default, due on sale clauses or other material defaults. The financing of prepayment penalties to refinance a loan held by a creditor (or affiliate) of the high cost loan or of any points and/or fees is prohibited. No fees may be charged for the modification, extension or amendment of a high cost mortgage loan. The Mortgage Reform Act expands the pre-loan counseling required under HOEPA. Additionally, the borrower will be entitled to up to four payoff quotes per year and such quotes must be provided within five business days of the consumer making the request. The creditor may charge a reasonable fee for the transmission of such payoff requests via facsimile or courier, however.[36]

The HOEPA revisions do provide creditors with some relief, however. The Mortgage Reform Act includes a provision by which a creditor or assignee may cure good faith violations by modifying the terms of the high cost mortgage loan to be in compliance with the statutory requirements or otherwise ensure that the loan is in compliance with such requirements. This cure must occur within either thirty days of the closing of the high cost mortgage loan or before the consumer is notified or otherwise becomes aware of the violation. A sixty day cure period is allowed for an unintentional or bona fide error.[37]

Mortgage Servicing

Subtitle E to the Mortgage Reform Act makes a number of changes to the requirements governing the servicing of residential mortgage loans. Under these revisions escrow accounts will be mandatory for closed-end first lien mortgages on principal dwellings where the pricing exceeds certain parameters.[38] Such escrow accounts

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32 Id. The "Average Prime Offer Rate"("APOR") is defined in Truth in Lending § 129C(b)(2)(B), added by Dodd-Frank Act § 1412. It is more fully discussed in footnote 21, supra. The threshold is increased to APOR + 8.5% for first lien loans if the collateral is personal property – such as a manufactured home – in an amount less than $ 50,000. *See*: § 103(aa)(1)(A)(i)(I).

33 § 103(aa)(1)(A)(ii). The definition of points and fees has also been amended to include (a) all compensation paid (directly or indirectly) to a Mortgage Originator, (b) premiums payable at or before closing for credit insurance premiums and other charges, (c) the maximum prepayment penalties that may be assessed under the loan terms, (d) all prepayment penalties incurred by the consumer for a refinance of a loan made or held by the same creditor or its affiliate, and (e) the minimum additional fees required to draw down the total line for HELOCs. *See*: Dodd-Frank Act § 1431(c), amending § 103(aa)(4) of the Federal Truth in Lending Act. However, the creditor is also permitted to deduct up to two bona fide discount points from the calculation of points and fees limits, subject to certain conditions. *See:* Dodd-Frank Act § 1431(d), adding § 103(dd) to the Federal Truth in Lending Act. The dollar portion of the current trigger was initially set at $ 400 with an annual reset. *See*: Federal Reserve Board Regulation Z § 226.32(a)(1)(ii). The 2010 adjustment was set by the Board on August 12, 2009, and will increase to $ 592 effective January 1, 2011. *See*: 74 Fed. Reg. 40477 (August 12, 2009, setting 2010 standard) and 75 Fed. Reg. 46837 (August 4, 2010, setting 2011 standard).

34 § 103(aa)(1)(A)(iii). Note that HOEPA prohibits any prepayment penalties for "high cost" loans, so the effect of this amendment is to make the trigger of coverage also a trigger for violating HOEPA.

35 Dodd-Frank Act § 1432 repeals exceptions to HOEPA prohibitions on prepayment penalties and balloons. This creates an interesting scenario in that (a) a "Qualified Mortgage" may have a prepayment penalty of up to 3% in the first year and (b) the expanded definition of what constitutes a "high cost loan" now includes loans that permit prepayment penalties in excess of 2%. *See*: Dodd-Frank Act §§ 1414 (adding § 129C to Federal Truth in Lending) and 1431 (amending § 103(aa)(1) of Federal Truth in Lending). This results in the possibility of a "Qualified Mortgage" with the maximum permitted prepayment penalty being considered a "high cost loan" and – in light of the revisions made by § 1432 of the Dodd-Frank Act -- being prohibited from charging a prepayment penalty. As a result, it would appear that prepayment penalties on Qualified Mortgage should be limited to 2%, with 1% annual step-downs thereafter.

36 Dodd-Frank Act § 1433, making a variety of amendments to § 129 of the Federal Truth in Lending Act.

37 Dodd-Frank Act § 1433(f), adding § 129(v) to the Federal Truth in Lending Act.

38 Average Prime Offer Rate + 1.50% for conforming loans, or

must be established for a minimum of five years, with the funds held at an insured depository institution or credit union and be subject to state laws regarding interest accrual. The Act also calls for a number of pre-closing disclosures regarding the escrow account, as well as a disclosure for those instances where an escrow account is not mandatory or has been waived by the borrower.[39]

In addition to the escrow requirements, the Mortgage Reform Act also establishes a number of new servicing requirements, including:[40]

- The need to have a "reasonable basis" to believe that the borrower has failed to comply with his/her loan contract requirements (including a series of notifications to be sent to the borrower, with no evidence of insurance received) prior to force placing hazard insurance;[41]

- A ban on charging fees for error resolution services;

- A requirement to take timely action to respond to borrower's requests for error resolution;

- A requirement to promptly credit payments made on a credit transaction secured by the consumer's principal dwelling (not specifically limited to a particular lien position or product type) as of the day of receipt; and

- A requirement to respond to payoff requests for a "home loan" (a term undefined in the Act) within seven business days of receiving a written request from or on behalf of the borrower.[42]

Appraisal Activities

Finally, the Mortgage Reform Act establishes a number of substantive requirements for appraisal activities. Among other things, these revisions will result in the promulgation of a series of regulations to ensure the independence of appraisals, at which point the Home Valuation Code of Conduct established in late 2008 will sunset.[43] Additional requirements will also be established regarding the portability of appraisals once issued.[44]

Parting Thoughts

As is generally discussed above, the Mortgage Reform Act will result in a number of changes to a wide variety of mortgage practices. Precisely how these requirements will play themselves out remains to be seen. Many of the requirements call for regulatory rulemaking, and the lead time on these regulations is not insignificant. Moreover, Massachusetts is one of a handful of states that have a general exemption from many of the provisions of the Federal Truth in Lending Act sections that are amended by the Dodd-Frank Act.[45] As a result, state-chartered institutions may need to wait even longer for additional regulatory-rulemaking by the Commonwealth to conform these requirements to the federal rule.[46] In the meantime, all institutions should monitor the manner in which these requirements develop. tablished regarding the portability of appraisals once issued.

Average Prime Offer Rate + 2.50% for jumbos. *See*: Dodd-Frank Act § 1461(a), adding § 129D(b) to the Federal Truth in Lending Act.

39 Dodd-Frank Act §§ 1461 and 1462, adding § 129D to the Federal Truth in Lending Act

40 Dodd-Frank Act §§ 1463(a) and 1464(a), amending RESPA § 6(k) and adding §§ 129F and 129G to the Federal Truth in Lending Act.

41 Insurance that is force-placed must be terminated within fifteen days of receipt of evidence of the insurance, and the unearned premium (meaning any period of overlap between the force-placed and borrower supplied coverage) must be refunded. Additionally, the charges for any force-placed insurance must be reasonable. *See*: Dodd-Frank Act § 1463(a), adding §§ 6(l) and (m) to RESPA.

42 The term "home loan" is not defined in the Mortgage Reform Act. However, it is worth noting that the payment crediting requirement (found in § 129F of the Federal Truth in Lending Act, added by Dodd-Frank § 1464(a)) also uses this term, and does so in conjunction with the "consumer credit secured by a consumer's principal dwelling,"

43 Dodd-Frank Act § 1472(a), adding § 129E to the Federal Truth in Lending Act. The Federal Reserve Board published an Interim Final Rule amending Regulation Z to implement these provisions on October 28, 2010. Comments are due on this proposed rule by December 27, 2010, with a mandatory compliance date of April 1, 2011. *See*: 75 Fed. Reg. 66554 (October 28, 2010).

44 Id.

45 Reg Z Commentary § 226.29(a)-4. The Massachusetts exemption extends to Chapters 2 (Credit Transactions; §§ 121 to 139) and 4 (Credit Billing, §§ 161 to 171) of the Federal Truth in Lending Act. Connecticut, Maine, Oklahoma and Wyoming are the other states with exemptions.

46 The exemption does not apply to transactions in which a federally-chartered institution is the creditor. Id. The new federal law requirements also overlap with and in some cases conflict with Massachusetts' predatory lending rules and implementing regulations. *See*: 183C M.G.L.A. §§ 1 – 19, 209 C.M.R. Part 40. Where there is direct conflict, the federal rule will govern, but only to the extent of the inconsistency. *See*: Federal Truth in Lending Act § 111(a)(1).

Dodd-Frank: Overhauling Federal Preemption

By David J. Pellegrino

With the advent of the Dodd-Frank Wall Street Reform and Consumer Protection Act (otherwise known as the "Dodd-Frank Act")[1], financial institutions have been reviewing and amending their procedures and practices to comply with Dodd-Frank's culture change. As part of this change in culture, particularly due to Title X of the Dodd-Frank Act, which is the Consumer Financial Protection Act (the "CFPA"), nationally chartered financial institutions have to begin to examine how the CFPA's overhaul of federal preemption affects not only the nationally chartered institutions, but their subsidiaries as well.

Preemption as We Knew It

Federal preemption for federally chartered financial institutions was primarily defined by two cases: Barnett Bank, N.A. v. Nelson, 517 U.S. 25 (1996) and Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007). While Watters has been completely overridden, Barnett is specifically adopted by the CFPA.

The Barnett case has been the leading case between state and federal banking laws with regard to "charter conflicts." The Court in Barnett, was faced with deciding "whether a federal statute that permits national banks to sell insurance in small towns pre-empts a state statute that forbids them to do so." Barnett, 517 U.S. at 27. The Court found that "under ordinary pre-emption principles, the federal statute pre-empts the state statute, thereby prohibiting application of the state statute to prevent a national bank from selling insurance in a small town." Id. at 28. In coming to this conclusion, the "ordinary pre-emption principle" used by the Court was to look at those state and federal laws at issue and decide whether or not the two were in "irreconcilable conflict" whereby compliance with both laws is "a 'physical impossibility'" or "the state law may 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id. at 31 (citations omitted).

In addition and prior to the Barnett ruling, the Office of Thrift Supervision ("OTS") and the Office of the Comptroller of the Currency ("OCC") have either expressly or indirectly dictated the issue of preemption. "Congress enacted the NBA, establishing the system of national banking[.]" Watters v. Wachovia Bank, N.A., 550 US 1, 10 (2007). Furthermore, the Supreme Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." Id. at 11. To that end, "[t]hrough the [Home Owner's Loan Act] HOLA, Congress gave the OTS broad authority to issue regulations governing federal savings associations." Naulty v. Greenpoint Mortg. Funding, Inc., 2009 U.S. Dist. LEXIS 79250, *10 (N.D. Cal. Sept. 3, 2009) (citing 12 U.S.C. § 1464). To describe the breadth of the OTS's regulatory authority, 12 C.F.R. § 560.2(a) states, in pertinent part, that

> OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when deemed appropriate, . . . or to further other purposes of HOLA. . . . OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law . . . without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section or § 560.110 [.]

"Although it is generally presumed that Congress does not intend to preempt state law absent a clear manifestation of intent to the contrary, that presumption is not applicable to the field of lending regulation of federal savings associations." Naulty, supra, at *10-11 (citing Silvas v. E*Trade Mortgage Corp., 514 F.3d 1001, 1004 (9th Cir. 2008)). Furthermore, 12 C.F.R. 560.2(b)(10) specifically lists the "[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages" as an activity that expressly preempts state law. See also, Naulty, supra, at *14.

1 The Act in its entirety can be found at, e.g., http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ203.111.pdf

Similarly, "[t]he [National Banking Act] NBA authorizes national banks to engage in mortgage lending, subject to OCC regulation." Id. at *12. Specifically, the NBA provides that

> Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

Id. (quoting 12 U.S.C. § 371(a)). Although "[s]tates are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's . . . powers[,] when state prescriptions significantly impair the exercise of authority . . . the State's regulations must give way." Id. (citing Barnett, 517 U.S. at 32-34).

With the above as a back-drop, the Watters Court was confronted with the question of whether Michigan could require the licensure of a mortgage lending corporation that was an operating subsidiary of a national bank. Citing its earlier decision in Barnett, the Supreme Court concluded that the "NBA is . . . properly read by OCC to protect from state hindrance a national bank's engagement in the 'business of banking' whether conducted by the bank itself or by an operating subsidiary[.]" Watters, 550 U.S. at 21. Accordingly, state law that required licensing of mortgage lenders was preempted not just for the national bank, but also for its operating subsidiary that was performing a function permitted to national banks.

New Standards under the CFPA

The CFPA addresses state law preemption standards for national banks and their subsidiaries in new 12 U.S.C. § 25b. Section 25b provides that a "state consumer financial law" – defined as "*a State law that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction . . ., or any account related thereto, with respect to a consumer*" – is preempted if:

* "it would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State" or
* "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in [Barnett], the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers".

The Act specifically authorizes the Comptroller of the Currency to make this preemption determination, on a case-by-case basis. 12 U.S.C. § 25b(b)(B). These two preemption standards are not exclusive. The Act acknowledges that state consumer finance laws could be preempted by a provision of federal law other than the CFPA. 12 U.S.C. § 25b(b)(C). However, an entirely different standard applies to subsidiaries or other affiliates:

> Notwithstanding any provision of this title or section 24 of Federal Reserve Act (12 U.S.C. 371), a State consumer financial law shall apply to a subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank) to the same extent that the State consumer financial law applies to any person, corporation, or other entity subject to such State law.

12 U.S.C. § 25b(e). In other words, Barnett survives as to national banks themselves, but Watters has been overridden as to subsidiaries of national banks.

Going Forward

There is much to be done in response to the changes in preemption under the CFPA. While there are some federal preemption bright spots for financial institutions in the Dodd-Frank Act (for example, federal banking laws known as "most favored lender" laws authorizing national banks to charge interest rates based upon the location of the lender's headquarters are NOT preempted), financial institutions should be reviewing all consumer financial products and services to determine whether changes must be made going forward. In particular, consumer finance subsidiaries like mortgage companies, auto finance companies and other consumer lending entities should be reviewing state licensing laws and consumer financial protection laws to determine what steps must be taken for compliance under the CFPA. Review will include making decisions about whether the subsidiaries are going to apply for required licenses or whether they are going to discontinue business or transfer operations.

Lessons from General Growth

By Mary Ellen Welch Rogers

On April 16, 2009, General Growth Properties, Inc. ("GGP") and approximately 166 of its subsidiaries filed the largest commercial real estate company bankruptcy in United States history.[1] GGP was then the ultimate parent of numerous "special purpose entities" ("SPEs") which own shopping centers and various other real estate projects throughout the United States. Filed at the height of the credit market contraction, the cases triggered widespread speculation and anxiety about the future of commercial real estate finance as well as structured and securitized financing generally because GGP's considerable debt relied on SPE loan structures that underlie trillions of dollars in commercial real estate and other asset-backed indebtedness. Those structures, expressly designed to avoid bankruptcy filings and to insulate collateral assets from the claims and creditors of affiliates, were squarely in contention from the earliest days of the case. The GGP SPEs' loan structures ultimately survived, perhaps in enhanced format, but their limitations have nevertheless been exposed, and the implications of the cases on those structures are already being felt in the commercial real estate and other finance markets.

Operations and Cash Management[2]

Tracing its origins to a single Cedar Rapids, Iowa shopping center acquired in the 1950's, GGP was organized in 1986 and became a publicly traded real estate investment trust or "REIT" in 1993 (NYSE: GGP). As the ultimate parent company of approximately 750 wholly-owned subsidiaries, joint venture subsidiaries and affiliates, GGP's core business is ownership and management of over 200 shopping centers in 44 states. GGP's management, including its cash management, is centralized and operates from its Chicago headquarters.

GGP purchased utilities, supplies, and insurance centrally and utilized a central leasing program.3 GGP managed its cash through a centralized cash management system. Individual properties and subsidiaries did not have check writing capabilities or the personnel trained to manage cash. GGP acted as payment and collection agent for all of the group's properties, and directed all payments for debt service, taxes and operating expenses for the properties. Also, although certain lenders required lockbox arrangements for the collection of rents, funds were swept from lockbox receipts and co-mingled and upstreamed to GGP's main operating account. Disbursements were made from the main operating account to various disbursement accounts for debt service, operating expenses, accounts payable and payroll.

GGP Debt

At the time of its filing, GGP reported approximately $18.4 billion in outstanding debt obligations that had matured or were set to mature by the end of 2012, including past due maturities of $2.0 billion, $1.3 billion more coming due in 2009, and $6.4 billion in 2010. Consistent with market practices, GGP real estate loans

1 The case was filed in the United States Bankruptcy Court for the Southern District of New York and is jointly administered under case. No. 11977 (ALG).

2 GGP is the general partner of GGP Limited Partnership ("**GGP LP**"), which is the entity through which substantially all of the GGP group's business is conducted. GGP LP, in turn, owns or controls, directly or indirectly, GGPLP, L.L.C., The Rouse Company LP ("**TRCLP**"), and General Growth Management, Inc. ("**GGMI**"). Each of GGP LP, GGPLP, L.L.C. and TRCLP are debtors in cases. GGMI is a non-Debtor affiliate, which provides management and other services to GGP Group and others.

3 The factual discussion herein is gleaned from various filings in the cases, notably the Declaration of James A. Mesterharm Pursuant to Local Bankruptcy Rule 1007-2 in Support of First Day Motions and the "Affidavit of [GGP's chief executive officer,] Adam S. Metz," each dated April 16, 2009, as well various findings and orders of the court.

provided for low amortizing 3 to 7 year maturities and GGP's practice was to refinance its loans at maturity.

Much of GGP's debt was secured by mortgages on individual properties of the company, including significant debt that was securitized in the "Commercial Mortgaged-Backed Securities" or "CMBS" market. CMBS loans may be underwritten and initiated by a single bank or investor. The loans are thereafter sold into pools with other loans and transferred to securitization trusts which sell various interests in the pool. The rights and priorities of the various interest holders are controlled by servicing agreements. In addition, the capital stack of some of GGP's commercial real estate projects also included "mezzanine debt," consisting of loans to the owners of the real estate-owning entity and secured by the equity interests in that owner as well as unsecured loans.[4] Intercreditor and subordination agreements controlled the relationship between the senior, mezzanine and unsecured lenders.

Once robust, the market for CMBS abruptly dried up in the later part of 2008. By 2009, the approaching maturities of GGP's considerable debt collided with the unprecedented melt-down of US capital markets, and the ensuing "Great Recession." GGP was unable to refinance its maturing debt. The lack of financing for buyers impeded an alternative strategy of selling real estate assets to cover maturing debt.

Moreover, the complicated structure of CMBS financing made it extraordinarily difficult for the loan servicers to negotiate extensions or concession of any kind. As described by GGP: "Master servicers and special servicers – not a single lender or syndicate of lenders – are responsible for renegotiation of CMBS loans. Those servicers have constraints on whether and when they can agree to modification of loan terms. In light of these constraints, GGP face[d] steep logistical challenges in attempting to negotiate permanent extensions of its CMBS debt, or in many cases even to get the loan servicers to begin negotiations."[5]

GGP faced further constraints imposed by the CMBS structure. The typical structure of a CMBS loan requires that each property or project be legally owned by an SPE that must have (i) a specific and narrow purpose (i.e., the ownership and operation of a single real estate project), (ii) organizational documents that require separateness in structure and management from the business of parent and affiliate entities and sometimes prohibitions on owning or operating other assets or issuing debt except to the extent permitted, and (iii) "independent directors" whose vote is required for the commencement of any bankruptcy proceeding. This structure was widely considered to render an SPE "bankruptcy remote" and thus a less risky credit, which in turn could lower its cost of borrowing.

The conventional wisdom behind "bankruptcy remoteness" concludes that: (i) restriction of the ability of an SPE to incur other indebtedness and engage in additional activities minimizes the possibility an involuntary bankruptcy petition filed by aggrieved unsecured creditors, (ii) separateness covenants ensure that an SPE conducts itself in a manner designed to avoid a finding of "substantive consolidation" with a parent or affiliate[6], and (iii) independent directors otherwise unaffiliated with an SPE and its affiliates are more likely to weigh the merits of a bankruptcy filing impartially and less likely to initiate or approve an offensive filing to the detriment of creditors. The proliferation of structured real estate financing created new business lines for corporate servicing companies, namely the supply of "professional independent directors" whose unabashed stated purpose is to shield lenders by avoiding voluntary bankruptcy filings.[7]

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4 Although it is not clear from the filings that such debt was present in the GGP cases, many real estate development projects also have "second lien" debt which is secured by junior mortgages on the subject real estate. These too are governed by intercreditor agreements which generally restrict the ability of a junior lien holder to receive any distribution of the collateral until the senior lender is paid in full.

5 Declaration of Adam S. Metz, CEO of GGP (Apr. 15, 2009), submitted to the Southern District of New York in the GGP bankruptcy proceeding.

6 "Substantive consolidation" is an equitable remedy employed by bankruptcy courts to create a single estate of the assets and liabilities of related entities and combine the creditors of such entities into one creditor body. See In re Augie/Restivo Baking Co., Ltd., 860 F.2d 515, 518 (2d Cir. 1988). A universal prerequisite to a CMBS loan (insisted upon by lenders and ratings agencies) is the borrower's delivery of a "non-consolidation opinion," by which counsel opines that in the event of a bankruptcy filing by a borrower, its asset would not be consolidated with those of its affiliates.

7 See, e.g. http://forms.ctlegalsolutions.com/content/IndependentDirector. According to CT Corporation, "[a] n Independent Director/Manager is an appointed member of the Board of Directors to protect against a voluntary bankruptcy petition being filed by the shareholders, members, partners, directors or managers (as applicable) of an otherwise solvent Special Purpose Entity." Corporation Service Company advertises: "Many commercial real estate lenders require clients

As the prospect for refinance and out-of-court restructure grew dim, GGP decided to take no chances that its "independent directors" (hired from Corporation Services Corporation ("CSC")) would vote against the commencement of the filings, and replaced them with new independent directors and managers with extensive restructuring experience. GGP did not notify the CSC directors they had been fired until after the filings were made. The new independent directors and managers voted in favor of commencement of the GGP cases.

Motion for Continuation of Cash Management and for Use of Cash Collateral

GGP's first day motions included motions to continue existing cash management, to use cash collateral and for approval of debtor in possession ("DIP") financing. A central feature of these "typical" first day motions was the continuation of the pre-petition consolidated cash management and the use of cash generated by various SPE debtors to fund the operations of the aggregate enterprise. The debtors also sought permission to use that same cash flow, as well as to cross collateralize certain real estate to support debtor in possession financing to the debtor group.

Dozens of secured lenders filed objections to the proposed use of cash collateral and the proposed cash collateral and financing orders contending that the proposed comingling of cash effected a de-facto substantive consolidation in clear disregard of the separateness covenants upon which the lenders relied in making their loans. An amicus objection of the Mortgage Bankers Association (MBA) and Commercial Mortgage Securities Association (CMSA) contended that "[i]f a lender cannot rely on the basic corporate formality of entity separateness, especially when added to it are the express provisions of the Separateness Covenants, the structural underpinning for non-recourse asset specific financing is destroyed." Commentators joined in the speculation that the co- mingling of the SPEs' cash flow foretold the end of the CMBS world as we know it and suggested further unraveling of the fragile credit markets could soon result.

The court did not issue a written opinion, but issued findings from the bench and entered cash management, cash collateral and DIP financing orders on forms prepared by counsel with the consent of most of the prepetition secured lenders. The court observed that the cash management motion merely continued the centralized cash management of GGP and the SPE debtors that had existed pre-petition with the apparent consent of the lenders. Furthermore, even if the cash aggregation violated agreements not to commingle cash, the court disagreed that "separateness" covenants could not be overridden by bankruptcy, stating that "agreements designed to govern actions in bankruptcy are unenforceable".[8] The court emphatically rejected the suggestion that continuing the combined cash management practices effected a substantive consolidation and took "serious exception" to the MBA/CSMA argument that a decision to permit continuation of pre-petition cash management and cash collateral use would create systemic risk to the real estate finance market.[9] The court, several times expressing admiration for the debtors' resolutions of so many of the secured creditors objections and finding DIP financing in a difficult market, also found that the debtors' provision of replacement liens and going-forward interest payments constituted more than sufficiently adequate protection.

Motions to Dismiss

After the court's ruling on the cash management, cash collateral and DIP financing motions, certain lenders and servicers to some CMBS lenders, unhappy with what they perceived as a form of substantive consolidation, filed motions to dismiss the bankruptcy cases of twenty of the GGP's SPEs debtors on the basis of bad faith. These lenders argued that the bankruptcy cases of these SPEs debtors were filed prematurely in that there was no imminent threat to the financial viability of the subject SPEs debtors, which were cash-flow positive. The lenders further argued that the filings were also in bad faith since there was no possibility of confirming a plan over the objection of the lenders and, therefore, no real chance of reorganization, and because the SPEs debtors replaced their independent managers just prior to the bankruptcy filings.

In denying dismissal, the court applied the standard outlined in *C-TC 9th Ave. P'ship v. Norton Co. (In re C-TC 9th Ave. P'ship)*, 113 F.3d 1304 (2d Cir. 1997), stating that grounds for dismissal of a bankruptcy exist if it is clear on the filing date "there was no reasonable likeli-

to form Bankruptcy Remote Entities (BREs) with Independent Directors to protect their investments." https://www.cscglobal.com/global/web/csc/independent-directors.html.

8 Transcript of hearing held May 13, 2009, p. 151.

9 Transcript of hearing held May 13, 2009, p. 153.

hood that the debtor intended to reorganize and no reasonable probability that it would eventually emerge from bankruptcy proceedings."[10] The court also rearticulated the Second Circuit principle that requires analysis of the objective futility of the SPE debtors' bankruptcy filings and whether the debtors engaged in subjective bad faith for failing to engage in pre-filing negotiations and for the surreptitious dismissal of its independent directors (citing *In re Kingston Square Associates*, 214 B.R. 713, 725 (Bankr. S.D.N.Y. 1997).[11]

Ultimately, in denying the motions of the lenders to dismiss the cases, the Court noted that although the bankruptcy filings posed an inconvenience to the lenders by interrupting the cash flows of the SPEs and requiring the appointment of special servicers for the CMBS obligations, the fundamental creditor protections that the lenders negotiated and that the SPEs structure represented were in place and would remain in place during the bankruptcy cases.[12] These included "protections against the substantive consolidation of the SPEs debtors with any other entities."[13] The court also rejected the notion that notwithstanding a somewhat restrictive description of duties in the SPEs' governing documents, the SPEs' "independent directors" could consider, and may indeed have had a duty to consider, the interests of the solvent SPEs' equity holders. The court further found that, because the governing documents did not expressly preclude the SPEs from changing independent directors, there was no breach of duty in doing so.[14]

The Plans

The SPEs Joint Plan of Reorganization

GGP SPEs exited bankruptcy under a joint plan of reorganization confirmed initially on December 15, 2009 and thereafter in various stages with respect to various groups of debtors. The creditors' committee and equity committee also supported the plan. The plan provided for global settlement with secured creditors, restructuring approximately $10 billion in project-level secured debt across approximately 110 properties, a virtual 100% recovery, and reinstated equity interests. The settlement with secured lenders extended the maturities of most of the secured debt, waived default-rate interest, and provided for payment by various SPEs of restructuring fees, past due interest and certain accelerated balances.

The SPE debtors' plan also attempted to address many of the weaknesses in the SPEs' organizational documents relied upon by the court in its rejection of bad faith arguments advanced in the motions to dismiss. For example, the GGP SPEs would become Delaware limited liability companies and their organizational documents would provide (as permitted by §18-1101(c) of the Delaware Limited Liability Company Act) that their directors shall consider only the interests of the respective SPE and its creditors when considering whether to file a bankruptcy petition. The SPEs also agreed that the project lenders would receive at least 15 days' advance notice of any replacement of an independent director, and that their reasonable consent could be required as a condition to appointing a replacement director, unless a recognized corporate services provider (e.g. CSC) supplies the new director. Further, the plan provided that if a GGP SPE files for bankruptcy in the future, its lenders will have full recourse against GGP, the maturity date of the SPE's restructured mortgage loan will revert to the original non-extended date, and the lenders will have the benefit of the SPEs' advance waivers of the automatic stay.[15] Notwithstanding these changes, the plan contemplated the continuation of integrated centralized cash management.

The Parent Plan

On October 21, 2010, the court confirmed the plan of reorganization for the GGP parent entities. The plan provides for the GGP parent entities to emerge from the Chapter 11 cases on or about November 8, 2010. Under the plan, the GGP parent entities will satisfy their debts and other claims in full, provide a substantial recovery for equity holders, and implement a recapitalization of approximately $6.8 billion of new

10 *In re General Growth Properties Inc.*, 409 B.R. 43, 56, (Bankr. S.D.N.Y. 2009).

11 For a more thorough discussion of the Bankruptcy Court's decision on the motion to dismiss, see, Shea, Mackenzie, L. "*The Good, the Bad and the Ugly, General Growth's Good Corporate Governance and Ugly Financial Situation Overcomes Dismissal of its Subsidiaries Bankruptcy Filings on Bad Faith Grounds*," MCLE 2009 Bankruptcy Conference (2009).

12 *In re General Growth Properties Inc.*, 409 B.R. at 69.

13 Id.

14 Id.

15 These provisions are set forth in "Plan Debtors Joint Plan of Reorganization" first filed in the cases on December 2, 2009, and detailed in Exhibit B, Article VII.

capital. At emergence, GGP split itself into two publicly-traded companies, and equity holders will receive common stock interests in each of them. New GGP will be the owner of the SPEs and concentrate on its shopping center real estate business. A new real estate company, The Howard Hughes Corporation, will hold a diversified portfolio of properties with little debt and with near-medium and long-term development opportunities, including GGP's master planned communities segment, mall development properties and a series of mixed-use projects in premier locations.

The Aftermath

Despite the dire predictions, current CMBS and other asset-backed loans have not yet imploded, and while the market remains slow and uncertain, that weakness has not been attributed to the GGP cases.[16] In the cautious market that now exists, an SPE structure continues to be prerequisite to new as well as amended and restated commercial real estate financing as well as securitized lending against receivable and other assets. Lenders are also insisting on some of the GGP plan-type enhancements to SPE structures such as requiring advance notice of termination of independent directors and Delaware-law sanctioned restrictions on the duties of such directors to favor creditors. Some lenders are requiring more restrictive cash management and segregation of collateral proceeds. Non-consolidation opinions also continue to be required, but the latest versions note and except from the opinions the "semi- consolidation" effects of the upstreaming of SPE cash to fund the joint operation and administration of parent and affiliate cases.[17]

Conclusion

The filing of the GGP cases at the height of the credit crisis inspired widespread speculation and anxiety about the efficacy of commercial real estate and asset-backed finance markets. Two early case motions- - one an "ordinary" first-day pertaining to use of cash collateral and the other a creditor motion to dismiss for bad faith -- rattled fundamental assumptions about the true separateness of special purpose entities and assets when owned by integrated holding companies and about the role of "independent directors" in insulating SPEs from joint and consolidated bankruptcy filings. In agreeing to plan confirmation, the secured lenders to the GGP SPEs sought to strengthen some of the weaknesses in the SPE structure that may have led the court to permit the cases to proceed on an integrated, if not consolidated basis. GGP unquestionably has led borrowers and lenders to exercise more caution with respect to SPE structures, but those cases seem unlikely to spark a fundamental shift in the real estate finance market or other finance markets that rely on SPE structures. However, until those markets more fully revive it remains impossible to draw firmer conclusions about GGP's lasting effects.

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16 See Popovec, Jennifer, *New Deals Spark Interest in CMBS*, Retail Traffic Magazine (June 8, 2010), Harmon, Jennifer, "*CMBS Market will continue to evolve in 2011*" Origination News (October 5, 2010).

17 For one example: "We are familiar with the chapter 11 filing of General Growth Properties, Inc., and certain of its affiliates, Case No. 09-11977 (ALG) (Jointly Administered), in the United States Bankruptcy Court for the Southern District of New York (the "GGP Case"). In the GGP Case, although the court did not order the substantive consolidation of the assets and liabilities of the debtors, it did make certain statements during the hearings on approval of debtor in possession financing that if actually ordered by the court could have been interpreted as having the practical effect of disregarding the separateness of the single purpose entity debtors. Ultimately, the debtors and debtor in possession lender modified the terms of the financing to remove provisions that may have violated certain single purpose entity covenants. However, the court did caution mortgage lenders that because their mortgage interests were adequately protected, the court could consider the interests of parent-level creditors and equity holders even if it meant authorizing the single purpose entity debtors to take actions contrary to their organizational documents. Although the court did not make these statements as formal findings or rulings, such comments, as well as the fact that the debtors in the GGP Case included solvent, cash flow positive single purpose entities that allegedly filed for bankruptcy protection in furtherance of a portfolio-wide restructuring, should be considered by parties relying on this opinion as a cautionary example that despite an entity's compliance with single purpose entity provisions, it may not be insulated from the financial problems or weaknesses of its affiliates. Notwithstanding the foregoing, the current status of the GGP Case is that the bankruptcy court has not ordered the substantive consolidation of assets and liabilities and, accordingly, it does not alter the conclusions in this opinion regarding substantive consolidation."

Your Collateral Is in the Mail

By Gilles Benchaya and Gregory Anderson

The US imported $1.6 trillion of goods in 2009. Although this is down significantly from recent years, importing still has a significant impact on the US economy. Imports are of particular relevance to an asset-based lender, as they can provide an important source of collateral for its borrowers – namely, in-transit inventory ("In-transits"). Importing is also often associated with the use of documentary letters of credit ("LC's"). This article will review the issues associated with including In-transits and LC's on the borrowing base ("Bbase") and strategies to minimize related risks.

PART 1. IN-TRANSIT INVENTORY

In-transits are inventories that are not physically in the purchaser's possession but rather are in the process of being delivered from a vendor. For merchandise to qualify as In-transit, transfer of ownership must have occurred at the vendor's factory or at the port of shipment. As In-transits are not in the possession of the purchaser but rather held by a third party involved in the transportation process, asset-based lenders should assess the risks of including this merchandise on the Bbase.

For illustration purposes we have provided a typical in-transit process flow chart (*see Appendix Item 1*) and have highlighted key in-transits Bbase risks.

A) Shipping In-transits

An exporter will often produce goods for an importer based on purchase orders submitted. These goods can be transferred through several intermediaries before arriving at the purchaser's premises, including foreign consolidators, freight forwarders, transportation carriers, customs, and/or domestic rail. Once inventory has left the vendor's premises, several factors should be considered prior to its inclusion as collateral on the Bbase:

- Does the borrower own the collateral?

  In order to be considered eligible Bbase collateral, ownership title must have transferred to the buyer. Borrowers have been known to record all in-transit inventories as an asset for bookkeeping purposes regardless of the transfer of ownership, thus overstating of Bbase collateral.

  Title to In-transits is determined by the terms of sale which is usually defined in the purchase agreement and disclosed on the vendor invoice. "FOB shipping point" and "FOB ex-factory" are terms to indicate that ownership transfers to the purchaser when goods are shipped and/or accepted by a third party carrier engaged by the purchaser. While these are the most common terms associated with imports, other terms exist (i.e. FCA, DES, LDP, etc) which may have different implications as to the timing of ownership transfer. Borrower-specific legal advice should be obtained to determine when transfer of ownership occurs and what specific procedures are required during the field exam.

- Delivery lag

  Bbases assume that collateral could be subject to an orderly liquidation conducted in a timely manner. However, In-transits that arrive later in the liquidation process may have a reduced realizable value due to higher discount levels, smaller lot sizes, ongoing overhead costs, etc.

  Asset based lenders should ensure that inventory appraisers carefully consider the impact of In-transits on the orderly liquidation process. Field examiners should determine the average shipping lag to ensure that the appraisal assumptions are appropriate. Additionally, in order to protect lenders against inventory that is "lost at sea", a Bbase ineligible status should be considered for aged in-transits (90 days is a typical aging standard).

- What is the cost of bringing the collateral home?

  During a realization process an asset-based lender will often incur significant costs to take possession of In-transits. While these costs might be factored into the appraisal and the blended advance rate, an often more accurate approach is to establish a separate Bbase reserve based on the borrower's average landing factor (i.e. 15-20% of in-transits). This landing factor should be validated through field exam procedures.

A prudent lender should also examine if the borrower has open payment terms with the various parties providing transportation services, because goods could be held hostage in a liquidation process if there are outstanding payables at the time. Approaches to mitigating this risk include calculating Bbase reserves for accounts payable and/or obtaining unconditional release agreements from these parties (legal advice should be sought if this option is to be pursued).

- Does the lender have access?

Lender access to the collateral must be assured in the event of liquidation. The document that controls access to collateral is the Bill of Lading (the "BOL"), issued by a carrier to a shipper acknowledging that specified goods have been received for delivery to a designated party. BOL's that are written (drawn) "to the order of" a designated party, are transferable and may be endorsed to a third party, who in turn can take possession of the collateral.

Best practice is to require all in-transit BOL's to state "to the order of" the lender. In a going concern situation, the lender would retain control of in-transits and endorse the BOLs over to the borrower. Alternatively, some lenders have opted to implement written agreements with the borrower and all parties involved in delivering in-transits, to ensure lender access to the collateral.

- Insurance:

Whenever a company has a significant level of in-transits, a marine cargo insurance policy should be in effect, with the asset-based lender named as the lender loss payee. Lenders should ensure that the policies provide adequate coverage and are in force.

- Is there a reliable reporting system?

The foregoing steps will provide little comfort if the reporting systems do not provide reliable Bbase reporting and allow for proper monitoring of In-transits. In many instances, borrower reporting consists of a manual listing which is not integrated with the accounting system and is often not appropriate for an asset-based loan.

An adequate system would track in-transits by purchase order ("PO") in real time, and provide reports detailing (amongst others) the amount, date shipped, expected arrival date, country of origin, etc. and update quantities based on actual units shipped.

The field exam should address how the borrower tracks In-transits (i.e. is the company notified of the merchandise's whereabouts throughout the supply chain?) and should list the names and addresses of all parties involved with the in-transit process.

B) Paying for in-transit inventory

As indicated in the chart, the typical payment methods for in-transits include prepayment, open terms, or LC's (payment by LC is discussed in part 2 of this article). Prepaying reduces the risk of vendors attempting to repossess In-transits.

When the vendor offers payment terms, a situation arises where inventory is both unpaid and not in the possession of the borrower. The combination of a lack of payment and possession is enough to prevent some asset-based lenders from considering these in-transits as eligible Bbase collateral. In the event a buyer becomes insolvent, a vendor may attempt to stop the delivery of In-transits due to non-payment.

While a detailed discussion of legal issues is beyond the scope of this article, lenders should be aware of two possible protections against a vendor's right to stop the delivery of goods – having possession of a negotiable bill of lading or having an agreement with the vendors that waives their right of stoppage. While there are other arguments to defeat a vendor's right of stoppage in liquidation, having at least one of these protections is highly recommended.

C) Receiving in-transit inventory and double counting

In-transit inventory is ultimately received and recorded in the borrower's perpetual stock ledger, however, the goods may not be decremented in a timely manner from the In-transit listing, resulting in a double counting of inventory (both in the stock ledger and the in-transit listing). Field exam procedures should include a review of the perpetual stock ledger receiving dates of In-transits to ensure that double counting has not occurred.

PART 2. LC'S AND LC INVENTORY

A common method used by companies to finance In-transit inventory is the documentary letter of credit. A documentary letter of credit ("LC") is a commitment by a financial institution to pay an exporting company a specified amount of money upon the presentation of documents that comply with terms outlined in the LC (usually evidencing that the inventory has been shipped). The LC provides assurance to both exporter and importer, because payment will be made if, and only if, the terms of the LC are met. The financial institution that issues the LC obtains repayment from the importing company when the LC is paid, usually through an increase to the importing company's operating credit line or revolver.

For illustration purposes we have provided a typical LC process flow chart (*see Appendix Item 2*) and have highlighted key Bbase risks.

A) Opening the LC

- Impact on the Bbase

  An LC, which may be opened well before inventory is produced or shipped, represents a commitment; by the company to fund the LC and by the vendor to produce and ship specified inventory. Given their commitment nature, LC's are not recorded as an asset or a liability on the borrower's books and records.

  From an asset-based lender's perspective, LC's represent a source of collateral (future inventory) as well as a liability that should be reflected on the Bbase. A common approach to presenting LC's and the related collateral on a Bbase is reflected in the table below. The example assumes a borrower has an inventory Bbase advance rate of 60% and open merchandise LC's of $1MM. The Bbase impact is as follows:

Bbase Availability Created by LC's	
LC Inventory	1,000,000
Inventory advance rate	60%
Net LC inventory	600,000
LC Reserve	(1,000,000)
Net availability impact of LC's	**(400,000)**

The net impact on the Bbase availability is negative. While the LC commitment represents a liability to the financial institution and must be included as a Bbase reserve, it is offset by the value of the future collateral to be received.

The above approach is only warranted to the extent that the asset based lender anticipates that a realization of this inventory can occur, if warranted, at the prevailing advance rate. This may not always be the case as the following factors could result in lower recoveries.

- Delivery lag

  LC inventory that arrives at company premises later in the liquidation period could have a lower realizable value than merchandise on hand. This risk is more pronounced for LC inventory than in-transits, as the borrower is committed to purchase the inventory even if it has yet to be produced when the liquidation commences. The most important control over delivery lag is the LC expiry date, as the borrower does not necessarily have to honor LC's for shipments made after that date.

  As in the case of In-transits, appraisers must consider the impact that LC inventory could have on a liquidation plan. Lenders should consider holding Bbase ineligibles for LC's with longer expiry dates as the goods may fall outside of the assumed liquidation period and have nominal value. Although the cutoff for exclusion of LC merchandise is dependent on the nature of the inventory and the length of the liquidation period, 60 days is a common standard used by many asset-based lenders.

- What is the cost of bringing the collateral home?

  As LC inventory represents future in-transit inventory, landing costs will be incurred to deliver it to the borrower's premises. As such, the appraisal should consider landing costs for LC inventory in the advance rate. Alternatively, a separate Bbase reserve for landing costs can be established using the historical financial data of the borrower.

B) Shipping the related inventory and paying the LC

  Once the related LC inventory is produced and shipped, the vendor has a specified time period (usually 30 days) to present documents to the financial institution for immediate payment. The required documents typically include inspection certificates, bills of lading, commercial invoices, etc. Payment may be deferred if the LC has payment terms (i.e. paid 90 days after shipment, 60 days after receipt, etc.).

- Documentation risk

  Payment of the LC revolves around the production of documents as outlined in the LC terms and cannot normally be stopped due to disputes or other issues. Therefore there is always a risk that the financial institution could be forced to pay for inventory that is undesirable (i.e. out of spec, wrong color or season, etc.). A company must ensure proper inspection of the goods prior to taking possession. An inspection certificate should be included with the documents required for LC payment.

- Double counting

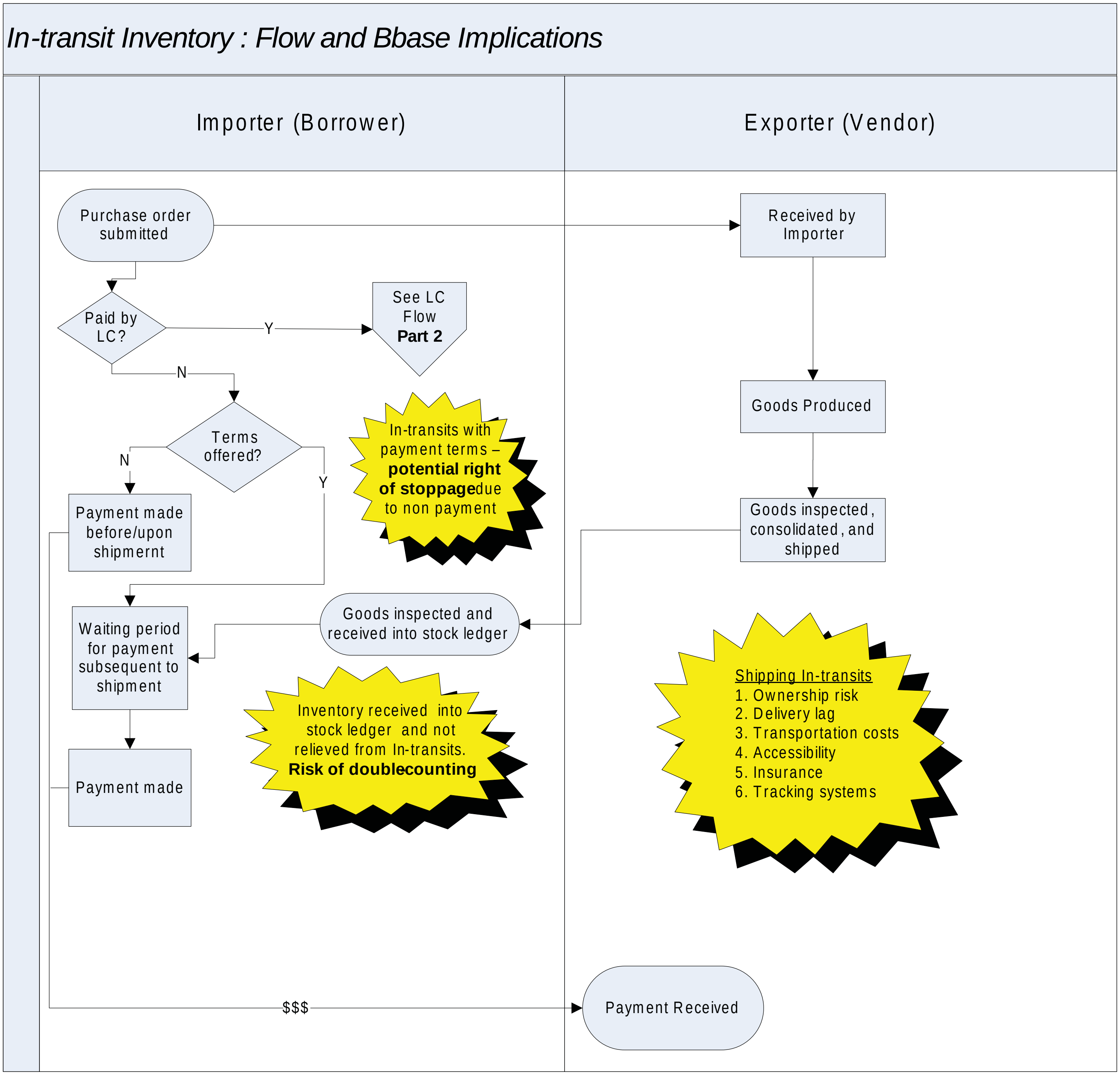
  Due to the time it takes to process the LC for payment, as well as the potential additional wait time if there are extended terms, an LC might be paid well after the related inventory has been shipped or even received at the borrower's premises. As a result, LC inventory might be double counted (i.e. included in In-transits or the stock ledger). In these circumstances, the lender would have an outstanding LC liability with no offsetting LC inventory asset.

  To minimize this risk, the borrower needs to implement a process that allows for proper monitoring of LC inventory. In this manner LC inventory shipped but not paid, can be identified and held as a Bbase ineligible. Field exam procedures should include a comparison (by PO number) of In-transits and LC inventory to ensure double counting has not occurred. Examiners should also review the shipping dates and stock ledger receiving dates for LC inventory PO's.

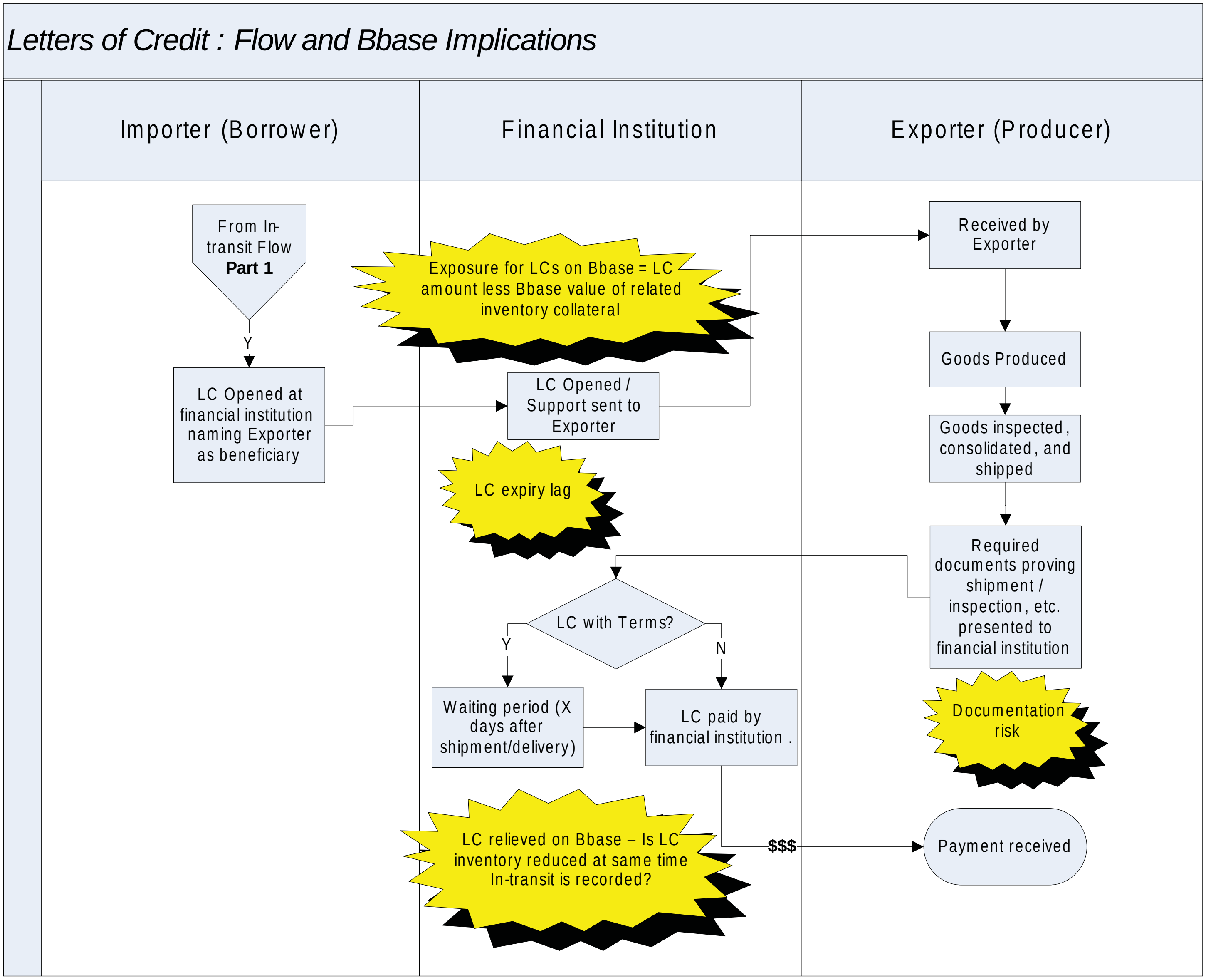
CONCLUSION

In-transit and LC inventory represent a potential source of leverage for Asset-based lenders to offer their customers. However, there are many inherent risks to leveraging this collateral that must be addressed. Many borrower's systems are not geared to properly account for in-transits and LCs and therefore proper ongoing diligence and planning is required if this collateral is to be included on the Bbase.

Appendix Item 1: In-Transit Inventory



Appendix Item 2: Letters of Credit



Featured Committee: Pro Bono Committee

The Pro Bono Committee is dedicated to providing members of the Business Law Section opportunities to get involved in public service and pro bono representation. While the words "pro bono" for many conjure up images of courtrooms and judges, they need not. There are many opportunities for business lawyers to put their special skills to use on a pro bono basis and, contrary to popular belief, they do not all involve an 501(c)(3) application.

We, at the Pro Bono Committee, would like to be a resource for each of you who want to make pro bono representation a part of your practice. This same sentiment that led to the creation of this Committee nearly a decade ago still drives us today. Through our partnership with local legal aid organizations, including Lawyer's Clearinghouse, the Belin Economic Justice Project, and Shelter Legal Services, the Pro Bono Committee seeks to provide opportunities for business lawyers to engage directly with suitable pro bono service providers and to raise awareness of the types of opportunities that are available.

The Pro Bono Committee is currently working to build its base of members and is looking forward to hosting a public service event in the spring. If you have any interest in making pro bono representation a part of your practice, we would love to have you join us. Please contact Neil Austin or Michael Weinberg, who serve as Co-Chairs of the Committee.

Corporate Lawyers as Public Servants: Making A Commitment to *Pro Bono* Representation

By Neil Austin

The old proverb is true: The smallest good deed is better than the grandest good intention. Perhaps for that reason, many of us feel a bit uncomfortable when we hear it. After all, making time to do even the smallest good deed can be difficult amidst a hectic work schedule, client demands, and the other pressures that come with being a corporate lawyer. Those good intentions can begin to pile up, and, before we know it, *we* are the ones referred to in the proverb—the ones who harbor the "grandest good intentions."

Well, there is good news. As lawyers, we possess special skills that allow us to make a significant impact with even the smallest of good deeds. The same knowledge, judgment, and experience that cause clients to turn to us for advice are powerful tools that give each of us the opportunity to make a lasting, positive effect on our community. Governor Patrick recently made this observation in proclaiming October 2010 to be *Pro Bono* Month. He stated that the legal vocation is specially situated to assist vulnerable populations, noting that "few other professions are in a position to offer this assistance and, in so doing, substantially enhance the distribution of justice and equality in their communities." [Proclamation of Gov. Deval Patrick, Aug. 3, 2010]

Best of all, we need not put our careers on hold to take advantage of this opportunity. In fact, the modest commitment of time required to start translating our grand intentions into concrete results is already built into our job description. The Massachusetts Rules of Professional Conduct contemplate that each active member of the bar will provide annually, on average, "at least 25 hours of *pro bono publico* legal services for the benefit of persons of limited means." Mass. R. Prof. C. 6.1. Although 25 hours is a goal that each of us should strive to achieve, there is nothing magic about that number. Even with a commitment of just a few hours, we can achieve results that will have a lasting effect on the larger community.

If you are one of the many business lawyers who find difficulty making time or finding opportunities to use your legal talents to do good deeds, do not despair. We at the *Pro Bono* Committee are here to help. Our mission is to be a resource for Business Law Section members who wish to affirm their commitment to public service and *pro bono* representation by taking the small steps necessary to achieve great results. We believe that within each of us is a desire to use our legal training and expertise to effect positive social change in our community, and we seek to provide opportunities throughout the year for Section members to learn about and become involved in an array of *pro bono* and public service projects—particularly those suited to the skills and experience of business lawyers.

We plan to do this though two primary means: (1) holding meetings and sponsoring events focused on specific pro bono organizations or projects and (2) keeping the co-chairs of the other Business Law Section committees apprised of pro bono opportunities or issues that may be of interest to their committee members.

With that in mind, we urge all of you to evaluate your own commitment to *pro bono* representation and public service and to make a commitment in 2011 to put your skills to good use. As explained below, corporate lawyers are no less important to the *pro bono* community than litigators, and there are some tremendous opportunities for corporate lawyers to get involved.

Corporate Lawyers as Public Servants

It is sometimes easy to forget that, as lawyers, we are public servants. Yet our profession is inextricably linked to the public good, and we are no less public servants merely because we practice business law rather than litigation.

One of our first acts as newly-minted lawyers, after all, is to recite an "oath of office" in which we vow to conduct ourselves "with all good fidelity as well to the courts as to [our] clients." *See* M.G.L. c. 221, §38. And that is just the beginning. After taking the oath, we are governed by rules of professional conduct, which leave no doubt as to our public role. The Supreme Judicial Court (SJC) has made clear through those rules that a lawyer is not only a representative of clients but also an "officer of the legal system," a "public citizen having special responsibility for the quality of justice," and someone who should "exemplify the legal profession's ideals of public service." Mass. R. Prof. Conduct, Preamble at 1 and 7.

Given our role as public servants, it is perhaps not surprising that the rules of professional conduct contain specific guidelines regarding how much time lawyers should spend on *pro bono* matters:

> A lawyer should provide annually at least 25 hours of *pro bono publico* legal services for the benefit of persons of limited means. In providing these professional services, the lawyer should:
>
> (a) provide all or most of the 25 hours of *pro bono publico* legal services without compensation or expectation of compensation to persons of limited means, or to charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means ...

Mass. R. Prof. C. 6.1.

The 25-hour rule applies to "*every* lawyer, regardless of professional prominence or professional work load." *Id.* at Comment 1 (emphasis added). In other words, the rule applies equally to business lawyers and litigators, first-year associates and thirty-year veterans, in-house counsel and government attorneys. We all have a role to play in providing *pro bono* representation.

In fact, the SJC has described a broad range of *pro bono* activities that qualify under the rule, noting that a variety of activities "should facilitate participation by government and corporate attorneys." *Id.* at Comment 7. Among those activities are many that are suitable for a business attorney, including (1) the provision of legal advice, (2) legislative lobbying, (3) administrative rule making, (4) community legal education, (5) the provision of free training or mentoring to those who represent persons of limited means, and (6) counseling and assisting an organization consisting of or serving persons of limited means while a member of its board of directors. *Id.* at Comments 3, 4.

While it may sometime seem that *pro bono* involvement is the exclusive realm of litigators, that is simply not true. There is both an expectation that business lawyers will participate in *pro bono* representation and, more importantly, a compelling need.

Opportunities for *Pro Bono* Involvement for Business Lawyers

One of the key services that the Pro Bono Committee has provided over the years (and will continue to provide in years to come) is to raise awareness about the types of *pro bono* representations specifically suited to business lawyers. The Committee has done this primarily through partnerships with legal aid organizations in and around Boston with a need for business lawyers. Now more than ever there is an abundance of opportunities for business lawyers to get involved in *pro bono* projects.

Below is a brief description of three organizations with which the Committee has worked closely over the past several years. Each of these organizations needs corporate lawyers, and we hope that you will consider volunteering your time and talent to these worthy organizations.

Lawyers Clearinghouse

Founded in 1988 by the Boston Bar Association and Massachusetts Bar Association, Lawyers Clearinghouse provides pro bono legal services to nonprofit organizations and to individuals who are homeless or at risk of becoming homeless. Lawyers Clearinghouse offers pro bono opportunities to attorneys through its three programs: (1) The Community Legal Referral Program (CLRP), (2) The Massachusetts Legal Clinic for the Homeless (MLCH), and (3) The BBA Business Law *Pro Bono* Project (BLP).

Each of these three programs is well-suited to business lawyers. Two of the programs, CLRP and BLP, match volunteer lawyers with nonprofit organizations, while the other, MLCH, relies on volunteers to provide on-site advice to residents of local homeless shelters on a variety of legal issues. In the case of BLP, which was created in 2001 in conjunction with the Business Law Section, Lawyers Clearinghouse matches volunteer lawyers with nonprofit organizations in specific need of assistance with corporate or business related legal issues.

Lawyers Clearinghouse also offers legal training and workshops for lawyers, including numerous workshops offered on topics of interest to nonprofit organizations. Leading such workshops for community based organizations will offer another great opportunity for transactional lawyers.

Those interested in volunteering for Lawyers Clearinghouse should contact Machiko Sano Hewitt at (617) 778-1954 or msanohewitt@lawyersclearinghouse.org.

The Belin Economic Justice Project

Like the Lawyers Clearinghouse, the Belin Economic Justice Project (EJP) also has its roots in the Boston Bar Association. Created in 2001 by the Lawyers Committee for Civil Rights under the BBA, the mission of the EJP is to contribute to the economic growth of communities of color throughout Massachusetts by helping individuals achieve economic self-sufficiency and develop sustainable businesses.

The EJP has a specific need for business lawyers to assist on a variety of issues facing entrepreneurs, including entity formation, intellectual property, commercial leases, zoning compliance, commercial loans, franchises, customer and supplier contracts, licenses and permits, tax, labor and employment issues. The EJP offers a unique opportunity for business lawyers to meet with entrepreneurs in a clinic setting, for 30-minute one-on-one sessions to respond to questions arising from the creation of a new business or the growth of an existing business.

Although the entrepreneurs who participate in the clinic sign waivers agreeing that an attorney client relationship is not created, attorneys can choose to enter into an attorney-client relationship if additional assistance is required. Clinics are generally staffed by one or more partners and several associates from member law firms.

Those interested in volunteering for the EJP should contact Jessica Somers at (617) 988-0605. If you wish to volunteer for EJP but are not affiliated with a member firm, please contact either co-chair of the Pro Bono Committee (whose contact information is listed below).

Shelter Legal Services

The mission of Shelter Legal Services (Shelter) is to promote self-sufficiency, stability, and financial security through comprehensive and accessible legal services. Shelter locates legal clinics at homeless shelters and service centers and thereby reaches underserved and neglected members of society who are often reluctant to seek legal help. Shelter serves over 450 clients per year at its legal clinics.

Shelter has legal clinics at four local homeless shelters and service centers: (1) Rosie's Place, (2) the Cambridge Multi-Service Center for the Homeless, (3) New England Center for Homeless Veterans, and (4) Chelsea Soldiers' Home. Shelter staffs these clinics primarily with law students, who conduct case intakes, but needs business lawyers to provide advice to clients on a range of topics, including bankruptcy, debt collection, consumer credit, breach of contract, evictions and security deposits, insurance, consumer fraud, and general small business assistance. Volunteers are also needed to provide informational seminars about areas of the law relevant to the individuals served by these homeless shelters and service centers.

In years past, the *Pro Bono* Committee has organized and presented informational seminars on issues pertinent to veterans at the New England Shelter for Homeless Veterans. The Committee looks forward to continuing its relationship with Shelter and providing much needed services to our veterans.

Those interested in volunteering for Shelter should contact Anna Schleelein at 617-552-0623.

Conclusion

As lawyers we are public citizens with a special role in ensuring the quality of justice and the preservation of society. That role is no less important for business lawyers than for litigators. There is a significant need for the skills and expertise of business lawyers in meeting the *pro bono* needs of legal aid organizations in our community. We at the Pro Bono Committee hope each of you will make a commitment in 2011 to make *pro bono* representation a part of your practice.

If you have any questions or would like further information about the *Pro Bono Committee*, please contact either of its co-chairs: Neil Austin (naustin@foleyhoag.com) or Michael Weinberg (Michael.Weinberg@leclairryan.com).

Pro Bono for Business Associates: Beyond the Form 1023

By Michelle B. Limaj

If you are a business associate who has ever requested or who plans to request *pro bono* corporate work, you have been or will likely be subjected to the pleasure of helping a new nonprofit organization complete its IRS Form 1023 application for federal tax exempt status ("Form 1023"). This process while labor intensive, with little immediate gratification, provides the savvy newcomer to *pro bono* corporate work a number of professional benefits.

The Pain

Nonprofit start-up involves three main steps: (a) filing a charter, (b) helping the organization adopt by-laws, and (c) filing Form 1023. While the first two steps quickly become routine for a business lawyer, the third step is always a major undertaking, and at times seems less like legal work and more like the proverbial trip to the dentist.

Form 1023 is twelve pages long <u>if</u> there are no schedules or exhibits. To complete it, you must interview your client, the nonprofit organization, on all of the questions therein, which includes basic information, such as the identity of the nonprofit organization as well as more substantive information, such as a description of specific activities, compensation arrangements, history and persons that receive benefits from the organization. Based on that interview, you will need to draft a set of coherent narrative explanations, which are attached to the form. You and the client then spend the next couple of months refining the form, ensuring that all items are complete and are not inconsistent, and trying to assemble a coherent story of the organization's history and intentions. In addition to the main application and the narrative, the form has to be accompanied by copies of every material agreement, policy, grant application and marketing pamphlet the organization has ever generated. To the regular business attorney, this process seems extremely intrusive, and is even worse for your client, who is hardly encouraged by the fact that the application and all supporting documentation will become a matter of public record.

By the time you have actually completed your first Form 1023, you are pretty sure you never want to see one again. Unfortunately for many business associates, the Form 1023 is the only *pro bono* corporate work on their supervising partners' radar. The next time they ask for *pro bono* work and are offered another Form 1023, they kick themselves for asking and make a mental note not to ask for any more *pro bono* assignments - ever!

The Gain

What business associates may fail to appreciate, however, is that completing the Form 1023 can result in substantial professional development benefits, including more interesting corporate *pro bono* work in the not-so-distant future. Three such benefits can be summarized as follows:

1. Counseling Skills

Part of what makes the Form 1023 such a colossal burden is that it requires the client to think hard about what its intentions are as a charity. Where will the money come from? What programming will the organization offer? Which individuals will sit on the board and what are their qualifications? Working the client through these questions is true counseling, and when you finish, you will have helped transform a couple of individuals into a "real" organization with a chance at doing something important for its community. Your involvement will force them to pull together a solid board of directors, figure out a reasonable operating plan, and answer some tough questions about goals and risks. The board members will likely rely on you and trust your judgment for future matters. After all, you will know the organization better than anyone.

2. Drafting Opportunities

Once the organization files its Form 1023 and begins to operate, it will need business counsel. When the organization is ready to hire its first employee, the founders will ask you to draft a suitable offer letter. When they get their first big grant and need to produce a sponsored research agreement to support their first program, they'll ask you to help negotiate it. And when they decide to send volunteers or computers to Rwanda and need releases and technology transfer documents and whatever else they may need, they will call you to do all the interesting, sophisticated, challenging legal work. From a typical nonprofit representation, you can gain limited expertise in deferred compensation, independent contractor law, "assumption of risk" doctrine and a multitude of other legal issues that arise for nonprofits every day. Of course, you will need to be supervised by attorneys who know what they are doing, but you will learn fast - probably faster than your colleagues who aren't doing *pro bono* corporate work.

3. Knowledge of Nonprofit Law

In addition to the client counseling skills and sophisticated drafting opportunities, a business attorney who represents nonprofit organizations ultimately learns important aspects of nonprofit law. While nonprofit law may not seem like the sexiest of subspecialties, consider that Boston's entrepreneurial community depends heavily on the intellectual property generated in its hospitals and universities, most of which are nonprofit institutions. Knowing something about nonprofit law and the way nonprofits work can give you an edge with a wide variety of clients. For example, life sciences start-ups typically have scientific founders who are or were employees of hospitals and universities, and, as a result, are subject to those nonprofits' policies (including conflicts of interest and assignment of inventions). They will also need to license technology from those institutions, enter into sponsored research agreements, and in some cases, issue stock to those institutions. Suddenly, you have some valuable expertise, and with a little research, you're able to advise clients and draft agreements that anticipate the institutional problems these clients are likely to face.

Meanwhile, your *pro bono* nonprofit clients continue to grow and become more ambitious in their programming, and need increasingly more complex legal assistance. If your firm can continue to support those organizations on a *pro bono* basis, then your drafting skills grow in parallel, making you more efficient with your paying clients, more attractive to partners looking to staff associates, and generally more confident about yourself as a lawyer.

The Takeaway

None of this is to say that business associates shouldn't seek out and take on other types of *pro bono* work. There are more opportunities than ever before to get involved in *pro bono* projects of all types. In addition to the benefits such work confers on clients, *pro bono* opportunities keep an attorney's research, organizational and diplomacy skills sharp, and ensure a strong connection to his or her role as a public servant.

But when it comes to a business associate's immediate professional development, there are few better ways to enhance one's expertise than representing ethical, dedicated, well-run nonprofit organizations. Not only do the skills learned in representing nonprofit organizations translate well to other types of representations, but the lawyer-client relationship that develops from such *pro bono* engagement can give way to greater opportunities for representation in all manner of legal issues as the organization grows and prospers.

Featured Committee: Banking and Financial Services Committee

The Banking and Financial Services Committee is committed to being an accessible and valuable resource for lawyers who advise and represent a wide range of clients in the increasingly regulated world of banking and finance. Our members' clients range from banks, bank holding companies, credit unions, trust companies and mortgage companies to insurance companies and agencies, investment advisors and securities brokers, and include state and federal regulatory agencies and government-sponsored enterprises.

The Committee holds monthly brown bag lunches during which prominent industry and government representatives are invited to share their views and perspectives on topical issues and subject matter experts present state of the art briefings and analyses of significant current developments. For example, this month, the Committee hosted a presentation by Joseph A. Leonard, Jr., the General Counsel to the Massachusetts Division of Banks, entitled "How (Not) to Represent a Financial Institution before the Division of Banks". The Committee brown bag lunches are usually held at noon at the BBA office on the 4th Thursday of the month.

In addition, the Committee hosts CLE programs on topics of current and abiding interest to member firms and practitioners. For example, this past September, the Committee hosted a CLE session on the bank regulatory and consumer financial protection provisions of the Dodd Frank Act. The Committee also acts as a sounding board and discussion forum for state and federal legislative and regulatory proposals that may affect the financial services industry. For example, this past Spring, the Committee originated a proposal, approved unanimously by the BBA Governing Council to support H.B. 1000, a bill to update the corporate law references in the Massachusetts banking laws.

The Co-chairs of the Banking and Financial Services Committee are Kevin Handly, partner at the Boston office of Pierce Atwood LLP (Tel. 617-881-8121), and Martin Lacdao, Assistant Director of the Morin Center for Banking and Financial Law at Boston University Law School (Tel. 617-353-3255).

BU Law's Morin Center for Banking and Financial Law: More than Just for Law Students

By Martin A. Lacdao

Every year, in the last week of August, law students arrive at the Boston University Law Tower. Lugging briefcases and books, they file into a classroom on the fifteenth floor of the building and take in the views of the Boston skyline. Below them, in the bright sunshine, they see sailboats lazily tracing a path through the Charles River and joggers making their way up to the Esplanade. After all, it's still summer -- except for them. They are the only students on campus and at 9:00 AM, it starts with an announcement: "Welcome to Financial Services Basics!"

This was BU Law's attempt to develop a practical knowledge base for its students. Here, students learned the ropes of the financial services industry by introducing them to the commercial side of banking, securities and insurance. They learned what commercial paper is and why it is used. Who an angel investor is and what would attract them to invest in start-up companies? What is an option and how does it work? Because law school has always focused on teaching the law (as it should), students have fallen short in learning about the business context in which legal principles and jurisprudence operate. Programs like Financial Services Basics were created to bridge the gap between the law and the real world of commerce.

When Financial Services Basics first started, the primary audience was BU Law students. However, as each edition unfolded, practicing lawyers, regulators and even some media people joined the sessions. It is our expectation that future sessions will definitely include even more members of the bar in the audience. With the events of the financial crisis, familiarity with the financial industry and the instruments being used in the capital markets will be an essential feature of any lawyers' knowledge base.

The Morin Center at BU Law was first known for its LL.M. program in Banking Law, which it began in 1984. Over the years, it has educated almost 2,000 lawyers both here and abroad. However, aside from hosting an annual conference or holding a symposium, it had no sustained program to teach to the bar or provide continuing legal education. This changed in 1998 with the introduction of Banking Law Basics, a two and a half day continuing legal education seminar to introduce the fundamentals of banking law. The program, co-sponsored with the American Bar Association and held bi-annually in Boston and San Francisco, has always been a big crowd-drawer among lawyers and continues until today. The program not only introduces participants to the history and structure of the US banking industry but it also tackles securities activities of banks and the supervision and examination of deposit-taking institutions.

In 2008, to complement Banking Law Basics, the Morin Center started Investment Management Basics, which focuses on the regulation of investment companies (mutual funds) and functionally similar entities. It is usually held in Boston every October and, this year, focused not only on the two '40 Acts (Investment Company Act and Investor Advisers Act) but also on governance issues and developments introduced by new legislation.

To round out the Basics Series (as Financial Services Basics, Banking Law Basics and Investment Management Basics have become known), Consumer Financial Services Basics was launched in September this year. It was very timely given the recent enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Participants were not only treated to new disclosure rules and updated on new rules on privacy and the credit card business but they were also brought up to speed on the new Consumer Financial Protection Bureau, which will change the consumer financial services sector. Needless to say, the event was over-subscribed with every seat in the classroom filled with lawyers – and not law students, this time. As a lawyer participating in the seminar noted: "There's nothing basic about this seminar. It's everything I needed to know about consumer financial law."

Aside from the Basics series, the Morin Center works on programs with the Boston Bar Association. Last year, as the financial system unraveled, the Morin Center hosted a bi-weekly program called "The Buck Starts Here." The purpose of the seminar was to keep lawyers abreast of the fast-moving developments in the financial services sector and highlight what was being done in order to move the economy back to recovery. Each program opened with an update on regulatory and legislative responses to the financial crisis, then moved to highlight a legal issue touching on the crisis such as, the securitization industry. The program then ended with a presentation by a local company on its efforts to ride out the financial crisis.

As a full participant in the academic life of Boston University, the Morin Center also hosts lectures delivered by distinguished participants in the financial services industry through its Edward Lane-Reticker Speaker Series and other roundtable discussions. Starting last September, the Morin Center, through the BU Institute for Finance, Law and Policy, began hosting the Workshop Series on Financial Reform, which tackled various financial reform topics as viewed from the legal and policy perspectives. Admission to these events is open to the public and all it takes is a short trip on the T to the BU campus.

As the Morin Center moves forward in its education mission, it will continuously seek to serve the needs of the profession by introducing programs and seminars that address the issues of the day. With a new banking law and new regulations which will affect the entire financial services industry, the Boston bar can expect the Morin Center to be at the forefront speaking to these issues. We welcome lawyers to join us in our classrooms. But, don't worry, since you already have a bar card, you won't be called on to speak up in class.

To learn more about the Basics Series or other programs organized by the Morin Center, please visit our website at www.bu.edu/law/morincenter or email us at banklaw@bu.edu.

General Counsel to the MA Division of Banks Offers Practice Pointers to Banking Lawyers

By Kevin Handly

On Monday, December 13, 2010, at the BBA Office, the Commonwealth's "banking lawyer in chief," Joseph A. Leonard, Jr.[1], spoke about, "How (Not) to Represent a Financial Institution before the Division of Banks" to a well attended gathering of banking lawyers. This presentation was part of the ongoing brown bag lunch series hosted by the Banking and Finance Committee of the Business Law Section of the BBA.

Mr. Leonard prefaced his remarks noting that some of his colleagues at the Division thought that the BBA flyer announcing his appearance was overly negative, in that it promised that he would be "frank and unsparing in his comments," and would "candidly share" some real life examples of practices "he finds worthy of criticism." Stressing the positive, Mr. Leonard gave banking lawyers "high marks" for accepting the challenges of a "unique and very complex area of law." Acknowledging that just staying abreast of Massachusetts banking law is challenging, he noted that in addition to state laws, bank lawyers must also master the federal banking laws and agencies that govern their clients.

Going on to fulfill his advance billing, Mr. Leonard described a number of practices that cause him to be "disappointed in his brethren of the Bar," among them –

- including narratives in a bank regulatory applications or offering circulars that refer by name to the wrong bank;

- referring to a Massachusetts savings bank as a co-operative bank or vice versa ("if you've got the wrong charter, you've got the wrong law," Mr. Leonard noted);

- discussing *federal* statutes and regulations at length in a regulatory application while failing to address or even mention the different requirements of the controlling Massachusetts law counterparts;

- including in an application a narrative that doesn't match the statements of the client bank's president to the Board of Bank Incorporation at the required hearing on the application ("have your client read what you write about it," Mr. Leonard urged); and

- failing to analyze a client's proposal sufficiently to identify "net new benefits" that will flow from the transaction and meet statutory requirements.

In response to a question, Mr. Leonard indicated that while the Division has never debarred an attorney from appearing before the Division, it reserves the right to do so. He recounted that on one occasion, application materials presented by an attorney were so defective that the then Commissioner authorized the Legal Section, should it ever happen again, to bypass that attorney and deal directly with the client bank. On another occasion, after hearing a lengthy description of the substantial defects in an application, a Commissioner authorized the Legal Section to reject the application because of unspecified "defects," and when the attorney asked what they were, to tell them to "go fish." On another occasion, a Commissioner instructed Mr. Leonard never again to "let such a weak application go to a hearing" before the Board of Bank Incorporation. Mr. Leonard said the Division has not, in fact, ever had to impose such sanctions.

Mr. Leonard said banking attorneys should "work harder to make our job easier." "Self test" your client's application before you submit it, he urged. "That's the easy part of the job" – the CAMELS rating, the CRA rating, the Hefindahl Index – "you

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1 Before joining the Division as First Deputy Commissioner of Banks under Commissioner Bulman in 1984, Mr. Leonard was Research Director for the Massachusetts Legislature's Joint Committee on Banks and Banking. Since 1987, Mr. Leonard has served as General Counsel of the Massachusetts Division of Banks and Clerk of the Board of Bank Incorporation. Mr. Leonard is a graduate of the Boston Latin School, Boston College and Suffolk Law, where he also has lectured as adjunct professor of banking law.

can see it all beforehand and self test your client's application" before you submit it. He also urged lawyers to "go back and look" at the commitments and representations their clients made to the Division in previous applications. "We do go back and look," he said. "Do you?"

"Represent your clients zealously" and "put them in the best light," Mr. Leonard urged the audience. If a client is applying to acquire another bank and absorb its branches, its lawyer should realize that there will be signage changes, branch improvements and other capital investments that expressly meet the statutory requirement of "net new benefits." He noted that it is up to the bank's counsel to identify the favorable factors in a client's proposal and highlight them in the application, rather than expect the Division's legal staff to do that analysis for them.

Mr. Leonard did acknowledge that from the Division's perspective it is a bit of, "do as I say, not as I do." He noted that on the Division's website, you can find 15 years of decisions of the Commissioner of Banks and Board of Bank Incorporation, all following the same format. He pointed out, however, that for the Division to follow the same format and discussion sequence in one decision after another is not the same as a banking lawyer using the same boilerplate in successive applications, changing only the names of the client banks. "It's not a matter of getting one application through and then using the same boilerplate again and again," he warned. "We owe the Commissioner our brains, not our paper." He said lawyers should ask their clients to read what is being said about them before it's submitted. That way, obvious errors, like referring to the wrong bank or to the wrong type of bank charter, can be avoided. He also asked young lawyers to resist instructions they may receive from clients or from non-banking lawyers to "just say what we said in the last application" without considering the specific facts of the proposal before them.

In addition to applications for regulatory approvals, Mr. Leonard also had advice for attorneys requesting opinions and interpretations from the Division's Legal Section – "be patient". He noted that it is a pleasure to get a well-reasoned and well-argued request for a legal opinion; but that it takes time and formal procedure to issue an opinion and attorneys should accordingly be patient waiting for an answer. On the other hand, Mr. Leonard warned against just submitting questions without proper supporting analysis or reasoning. He also warned against "opinion shopping." He advised that if an attorney presents a question to an officer in the Supervisory Section after being unable to reach an attorney in the Legal Section, they should make it clear that they've left a message in the Legal Section so as not to have two sections simultaneously working on the same question without knowing it.

At the conclusion of his prepared remarks, Mr. Leonard stayed and answered questions from the audience covering a wide variety of topics, ranging from the mortgage foreclosure crisis to the assertion of attorney client privilege in bank examinations.

Upcoming Programs

Energy Efficiency in Massachusetts: Issues and Opportunities

Tuesday, January 4, 2011
12:00 p.m. - 1:00 p.m.
Boston Bar Association - 16 Beacon Street

The Green Communities Act of 2008 set Massachusetts on a path to becoming a leader in renewable energy and energy efficiency. Among a variety of important and cutting-edge initiatives, the Green Communities Act mandated significant changes to the energy efficiency programs developed and administered by the Commonwealth's electric and gas distribution companies and municipal aggregators. In particular, the distribution companies and municipal aggregators are required to develop energy efficiency plans that will "provide for the acquisition of all available energy efficiency and demand reduction resources that are cost effective or less expensive than supply." Come hear Emmett Lyne, counsel to a number of Massachusetts distribution companies, discuss the issues and opportunities presented by the new energy efficiency landscape.

Investment Company Institute's Priorities and Regulatory Outlook for 2011

Wednesday, January 5, 2011
12:00 p.m. - 1:00 p.m.
Boston Bar Association - 16 Beacon Street

Rachel Graham of the Investment Company Institute will provide an update on the Institute's priorities and outlook on a range of issues affecting the mutual fund industry, including implementation of Dodd-Frank and other current developments.

For more information: To register for any of the foregoing brown bag prograns, please contact Patricia Johnson at the BBA at pjohnson@bostonbar.org.

Editors

Gregory S. Fryer

Gregory S. Fryer, a partner in the business law department of Verrill Dana, heads the firm's securities law practice. He serves as general counsel to many companies, and a substantial part of his practice focuses on M&A and venture capital. Areas of particular interest include the fiduciary duties of directors of troubled companies. Since 1993 Greg has served as chair of the Securities Law Subcommittee of the Maine State Bar Association. He also has been actively involved in Bar committees responsible for reviewing and drafting various business-related statutes, including the Maine Business Corporation Act and the Maine Uniform Securities Act. Since 2007 Greg has served as a Board member of the Maine Small Enterprise Growth Fund, a state-funded venture capital firm. He is an active member of the Business Law Section of the Boston Bar Association, and is a co-chair of its Communications Committee. Greg for many years has received recognition in Best Lawyers in America, Chambers USA and New England Super Lawyers. He is a 1976 graduate of Dartmouth College and a 1979 graduate of Cornell Law School.

Peggy Tirrell

Peggy Tirrell is Senior Corporate Counsel at EMC Corporation, the world leader in information infrastructure solutions. Peggy has extensive experience as a transactional and corporate attorney. While at EMC, she has been lead counsel in acquisitions and strategic investments totaling over $1.5 billion. Before joining EMC in 2006, Peggy was a corporate attorney with Goodwin Procter in its Boston and New York offices. Peggy received a B.A. in English Literature (with honors) and Political Science from Miami University of Ohio, a J.D. from Northeastern School of Law and a MBA/MS in Accountancy from Northeastern University, Graduate School of Professional Accounting. Peggy is the Co-Chair of the Communications Committee of the Boston Bar Association.

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Gregory Anderson is a Senior Associate at Richter Consulting, Inc. Gregory has extensive experience as an advisor to financial institutions with specific expertise in asset based lending. Gregory has consulted on field examination and lender monitoring processes as well as loan workouts. He is a Charted Accountant (CA) and Certified Fraud Examiner (CFE). He can be reached at GAnderson@Richterconsulting.com.

Neil Austin

Neil Austin is a litigation associate at Foley Hoag LLP. His practice is focused on business disputes, civil and criminal white-collar investigations, and securities litigation. In addition to his business litigation practice, Neil maintains an active pro bono practice. Neil has been recognized for his dedication to pro bono representation by the Standing Committee of Pro Bono Legal Services of the Massachusetts Supreme Judicial Court and is a former member of the BBA's Public Interest Leadership Program. As a recently-appointed co-chair to the Pro Bono Committee of the Business Law Section, Neil looks forward to working with business and transactional lawyers to spread the word about business-oriented pro bono opportunities.

Gilles Benchaya

Gilles Benchaya is a Partner at Richter Consulting Inc. who has specialized over the past twenty years in financial advisory, turn around and diligence in the retail, consumer goods, and distribution sectors. He has led a number of multidisciplinary teams in North America and Europe providing fully integrated transaction support and advisory services to clients. He is a Chartered Accountant (CA) and Graduate of HEC (University of Montreal) Business School. He can be reached at GBenchaya@Richter-consulting.com

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Andrew R. Dennington is an associate at Conn Kavanaugh Rosenthal Peisch & Ford, LLP in Boston. He is the Co-Chair of the BBA's new Consumer Finance Committee. From 2009 to 2010, Mr. Dennington was Co-Chair of the BBA's Consumer Finance Working Group. He also previously served as Co-Chair of the Public Policy Committee of the BBA's Business Law Section.

Mr. Dennington practices civil litigation with an emphasis on commercial law, employment law, and professional liability. Additionally, Mr. Dennington has experience in criminal defense in federal and state courts.

Mr. Dennington was selected as a "Rising Star" by Law and Politics and the publishers of Boston Magazine in 2008 and 2010. He also has been recognized for his active participation in Boston's pro bono legal networks, including Volunteer Lawyers Project and Health Law Advocates.

Mr. Dennington received his B.A. in History from Columbia University and his J.D. from Boston College Law School.

Richard P. Hackett

Richard P. Hackett is a partner at Pierce Atwood LLP and heads the firm's Banking & Financial Services Practice Group. He is one of New England's leading lawyers involved in consumer financial services law and retail financial services regulation. Rick has served as lead counsel for an extensive list of projects including advising national and regional financial institutions regarding the effect of Dodd-Frank on retail financial product delivery systems, the negotiation and documentation of student loan origination and purchase programs governing the creation and disposition of over $4 billion alternative student loans annually, structuring private-label business charge-card programs for business-to-business commercial finance companies; developing Internet-based loan application and origination systems; and complete redocumentation of cash management services for a top-20 national bank. Rick is an adjunct member of the faculty of the Morin Center for Banking Law at Boston University School of Law and a frequent national lecturer on consumer financial services law. Rick is a Regent of the American College of Consumer Financial Services Lawyers.

Kevin J. Handly

Kevin is a member of the Banking and Financial Services, Business, and Energy Practice Groups at Pierce Atwood LLP. Kevin has over 20 years of experience representing financial institutions in corporate M&A and investment transactions, regulatory investigatory and enforcement proceedings and commercial litigation. Previously, Kevin was a staff attorney at the Federal Reserve Board and a law clerk at the Office of the Comptroller of the Currency. Kevin also served as an Assistant District Attorney in Brooklyn, New York. While at the Federal Reserve Board, Kevin participated in the briefing and argument of numerous cases in the federal courts, including Securities Industry Associations v. Board of Governors ("Bank America/Schwab") in the U.S. Supreme Court.

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Martin Lacdao

Martin Lacdao is currently the associate director of the Morin Center and for Banking and Financial Law at Boston University School of Law. Before joining the university, he practiced banking and securities law in the Philippines.

Michelle Limaj

Michelle Limaj is a business associate at Foley Hoag LLP. Her practice focuses on the needs of early stage companies, including start-up, technology licensing, venture financing, securities compliance, corporate governance and day-to-day legal matters. Michelle also represents a number of nonprofit corporations in connection with their transactional work and their efforts to comply with state and federal nonprofit law. In addition to her corporate work, Michelle represents victims of domestic violence, asylum seekers and U Visa applicants in Massachusetts district and immigration courts. Before joining Foley Hoag, Michelle spent eight years as a communications officer with various international organizations including the United Nations, the International Organization for Migration and Physicians for Human Rights.

David Pellegrino

David J. Pellegrino, Esq., (djp@psh.com) an associate at Partridge Snow & Hahn LLP, is a member of the Firm's Creditors' Rights Group, where he concentrates his practice in representing the interests of secured lenders in litigation proceedings before Rhode Island and Massachusetts courts, specifically with regard to state consumer protection and Truth-in-Lending statutes. He received his J.D at Roger Williams School of Law. After graduating from law school, he served as a Rhode Island Superior Court Judicial Law Clerk. Prior to practicing law, Mr. Pellegrino was an assistant controller of a local not-for-profit organization. He co-authored "Mortgage Electronic Registration Systems, Inc.'s Standing to Foreclose Upheld in Rhode Island State Court Challenge", USFN Report, Legal Issues Update (Autumn 2009) and "Valid Exercises of State Authority", USFN Report, Legal Issues Update (Summer 2008).

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Thomas P. Quinn, Jr. is a partner in the Banking & Financial Services Practice Group of Pierce Atwood LLP. His practice specializes in consumer lending and deposit issues, with a focus on bank regulatory matters including expertise in the changes brought by the Dodd-Frank Act. Tom also counsels clients on state finance lender and loan broker licensing requirements. Tom is a former Financial Services Counsel for Citizens Financial Group in Providence, Rhode Island where he advised the bank on all aspects of laws and regulations affecting retail financial products and services. Tom is a member of the Consumer Financial Services Committee of the American Bar Association's Business Law Section, the Legislative and Compliance Committee of the Massachusetts Bankers Association, and the Eastern Massachusetts Compliance Network (EMCN). Tom received a B.A. in History, magna cum laude, from Fairfield University (1991) and his J.D. from Case Western Reserve University School of Law (1994), where he was the Notes Editor for the Journal of International Law.

Adam J. Ruttenberg

Adam J. Ruttenberg's principal areas of practice are bankruptcy litigation, business reorganization, and representing debtors, creditors, and bankruptcy trustees. He majored in mathematics in college and worked in an actuarial program at John Hancock Mutual Life Insurance Company prior to attending law school. Adam is a graduate of Yale University (B.A. summa cum laude, 1984) and Harvard Law School (J.D., magna cum laude, 1988). He was admitted to practice in the Commonwealth of Massachusetts in 1989, following a judicial clerkship in New Haven, Connecticut with Judge Jose A. Cabranes, then of the United States District Court for the District of Connecticut. He was associated with Bingham, Dana & Gould in Boston from 1989-1991, and from 1991-1996 he was Senior Attorney at the Federal Deposit Insurance Corporation's office in Franklin, Massachusetts. Adam joined Looney & Grossman in 1996 and became a partner in 2001. He also is admitted to practice in the United States Court of Appeals for the First Circuit, the United States District Court for the District of Massachusetts, and the United States District Court for the District of Connecticut.

Mary Ellen Welch Rogers

Mary Ellen Welch Rogers practices in the Commercial Law and Bankruptcy groups at Goulston & Storrs. Her practice focuses on complex asset-based loan documentation, intercreditor and subordination agreements, loan workouts and debtor-in-possession financing. For more than 15 years, Mary Ellen has represented secured and unsecured creditors in negotiation and preparation of out-of-court workouts and restructurings and in reorganization and liquidation cases. She also represents agent and lender interests in national and regional bankruptcy cases with a particular focus on retail.

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Fall 2010

Volume 5

A PUBLICATION OF THE BOSTON BAR ASSOCIATION BUSINESS LAW SECTION

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