

# COMMERCIAL LAW CONSIDERATIONS: ENFORCING SECURITY INTERESTS AND LIBOR TRANSITION

## DSBA HYBRID CLE

SPONSORED BY THE COMMERCIAL LAW SECTION  
OF THE DELAWARE STATE BAR ASSOCIATION

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WEDNESDAY, JUNE 15, 2022 | 9:00 A.M. – 10:30 A.M.

1.5 Hour CLE credits for Delaware and Pennsylvania Attorneys

### ABOUT THE PROGRAM

This seminar will be broken into two parts: Enforcing security interests under Article 9 of the UCC and LIBOR Transition 2.0: Adjustable Interest Rate (LIBOR) Act and SOFR Update.

### CLE SCHEDULE

#### Part 1: Enforcing Security Interests under Article 9 of the UCC

Chris Messa, Esquire  
*Berger Harris LLP*

Jake Crosetto, Esquire  
*Richards, Layton & Finger, P.A.*

#### Part 2: LIBOR Transition 2.0: Adjustable Interest Rate (LIBOR) Act and SOFR Update

Sara Toner, Esquire  
*Richards, Layton & Finger, P.A.*

Joy Barrist, Esquire  
*Potter, Anderson & Corroon LLP*

Visit <https://www.dsba.org/event/commercial-law-considerations-enforcing-security-interests-and-libor-transition/> for all the DSBA CLE seminar policies.

*Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.*

# Part 1: Enforcing Security Interests under Article 9 of the UCC

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Chris Messa, Esquire  
*Berger Harris LLP*

Jake Crosetto, Esquire  
*Richards, Layton & Finger, P.A.*

Christopher L. Messa is a graduate of Colgate University and Wake Forest Law School and received an MBA from the Wake Forest University School of Business. He is the co-managing partner of Berger Harris, where is also the head of the Corporate and Business Entity Counseling practice group. His practice focuses on corporate and commercial transactions, including structured financings, asset sales and purchases, mergers and acquisitions, cross-border transactions and secured transactions.

Chris sits on the bar association drafting committee responsible for the Delaware LLC Act, the Delaware LP Act, and the Delaware Partnership Act, and he is also a member of the UCC subcommittee of the bar association.

Jake Crosetto is an associate at Richards, Layton & Finger where he focuses his practice on a broad range of transactional matters, with an emphasis on transactions involving Delaware limited liability companies, partnerships, corporations, and business trusts. Jake routinely assists with numerous aspects of structured finance transactions and advises on secured transactions, debtor-in-possession lending, mergers and acquisitions, and venture capital investments. He also represents clients in connection with corporate bankruptcy related transactions and debt restructurings, including Section 363 asset purchases.

# Article 9 of the UCC

## Default and Enforcement Provisions



# Overview

- Secured Party's Duties re: Collateral in Possession
- Strict Foreclosures - Partial and Full Satisfaction of Debt
- Disposition of Collateral
- Rights of Other Secured Parties
- Failure to Comply with Article 9's Enforcement Provisions - Penalties
- Other Enforcement Items

## Secured Party's Duties re: Collateral in Possession



# Secured Party's Duties re: Collateral in Possession

- Obtaining the Collateral
  - 6 Del. C. § 9-609
    - Take possession;
    - Render equipment unusable and proceed with disposition under Section 9-610; and/or
    - Request debtor to assemble collateral
  - Judicial Process vs. Nonjudicial Process



# Secured Party's Duties re: Collateral in Possession

- Obtaining the Collateral – Judicial Process
  - Seek Writ of Replevin
  - Seek Specific Enforcement of Security Agreement
    - Need favorable terms in Security Agreement or Loan Documents
  - Conversion Action – Seek damages
  - Judicial Foreclosure

# Secured Party's Duties re: Collateral in Possession

- Obtaining the Collateral – Non-Judicial Process
  - Take, but don't Breach the Peace
  - Examples of Breaches of the Peace
    - Bringing a law enforcement representative
    - Breaking and Entering
    - Threats, physical contact
  - Penalties for Breach of the Peace
    - Punitive Damages
    - Vicarious liability for repo agent's actions

# Secured Party's Duties re: Collateral in Possession

- UCC and ABA Form Security Agreement:  
Secured Party Duties
  - Note that certain rights and duties may NOT be waived by agreement – see 9-602 (Waiver and variance of rights and duties).
  - 9-603 (Agreed Standards): “The parties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of the secured party under a rule stated in 9-602 [Waiver and variance of rights duties] if the standards are not manifestly unreasonable.”

# Secured Party's Duties re: Collateral in Possession

- Obtaining the Collateral – Non-Judicial Process
  - Other Pitfalls
    - Conversion claims
      - Taking property that is not the collateral
    - Claims related to breach of the peace
      - Breaking and entering

# Secured Party's Duties re: Collateral in Possession

- Secured Party has Collateral: Duties and Rights (6 Del. C. § 9-207)
  - Reasonable care to preserve collateral (§ 9-207(a))
    - Charge debtor for reasonable expenses incurred to preserve collateral (§ 9-207(b))
    - Risk of accidental loss is on debtor (§ 9-207(b))
  - Keep collateral identifiable (§ 9-207(b))
    - Exceptions – fungible collateral, commingling allowed
  - Operate collateral (§ 9-207(b))
    - (A) Allowed to preserve, (B) if permitted by court order, or (C) with consumer goods, agreed to by debtor

# Secured Party's Duties:

## UCC 9-207 and ABA Form

- 9-207 requires that “a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession.”
- ABA Security Agreement : “The Secured Party's sole duty with respect to the custody, safe keeping and physical preservation of the Collateral in its possession, under 9-207 of the UCC, shall be to deal with such Collateral in the same manner Secured Party deals with similar property for its own account.”

# Secured Party's Duties re: Collateral in Possession

- Secured Party has Collateral: Duties and Rights (6 Del. C. § 9-207)
  - Possession or control under Sections 7-106, 9-104, 9-105, 9-106 or 9-107 (§ 9-207(c))
    - Hold proceeds (other than money/funds) as additional security
    - Apply money or funds received against secured obligations or remit to debtor
    - May create security interest in collateral

# Secured Party's Duties re: Collateral in Possession

- Secured Party has Collateral:  
Exceptions to Duties and Rights  
(6 Del. C. § 9-207(d))
  - Secured party is buyer of accounts, chattel paper, payment intangibles or promissory notes, or a consignor
    - § 9-207(a) is not applicable unless agreement allows secured party (1) to charge back uncollected collateral or (2) full or limited recourse against debtor or secondary obligor
    - §§ 9-207(b) and (c) are not applicable



# Strict Foreclosures

## Full or Partial Satisfaction of Debt



# Strict Foreclosures

- Strict Foreclosures – Full Satisfaction of Debt (6 Del. C. § 9-620)
  - Notification Post Default:
    - Obtain debtor consent; or
    - Send debtor a proposal that (A) is unconditional or subject only to a condition that collateral be preserved or maintained, and (B) proposes to accept the collateral in full satisfaction of the debt it secures;
    - Notify persons required by 6 Del. C. § 9-621
  - Objection – Wait 20 days and take collateral in full satisfaction of debt if:
    - No objection received from (A) person entitled to receive notice under 6 Del. C. § 9-621 or (B) any other person holding a subordinate security interest in collateral secured

# Strict Foreclosures

- Strict Foreclosures – Partial Satisfaction of Debt (6 Del. C. § 9-620)
  - Notification Post Default:
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# Strict Foreclosures

- Strict Foreclosures – Notification Requirements
  - 6 Del. C. § 9-621 Notification Requirements
    - Send proposal to any person:
      - (A) Providing notice of claim to collateral before debtor consents;
      - (B) 10 days before the debtor consents to acceptance, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that (i) identified the collateral, (ii) was indexed under the debtor's name as of that date, and (iii) was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date;
        - » Run a lien search

# Strict Foreclosures

- Strict Foreclosures – Notification Requirements (cont'd.)

- 6 Del. C. § 9-621 – Notification Requirements

- (C) Send proposal to any person 10 days before the debtor consented to the acceptance, held a security interest in the collateral perfected by compliance with a certificate of title statute or other statute, regulation or treaty described in Section 9-311 of the Delaware UCC

- » Ask debtor for list of such persons

- (B) If accepting the collateral in partial satisfaction of the debt, send proposal to any secondary obligor

# Strict Foreclosures

- Strict Foreclosures – Effect of Acceptance
  - 6 Del. C. § 9-622
    - Discharges the obligation to the extent consented to by the debtor
    - Secured party gains all of debtor's rights in collateral
    - Discharges secured party's security interest and any other subordinate security interest/lien and terminates any other subordinate interest

# Strict Foreclosures

- Strict Foreclosures – Note on Consumer Goods
  - If collateral is consumer goods, additional requirements:
    - Collateral cannot be in possession of debtor when debtor consents (6 Del. C. § 9-620(a)(3))
    - May need to dispose of collateral taken within 90 days of taking possession
    - Partial satisfaction is not available

# Disposition of Collateral





# Disposition of Collateral

- Disposition of Collateral – 6 Del. C. § 9-610
  - Options:
    - Public or Private Sale (Sale, lease or license)
      - Credit bids allowed at public sales
      - Credit bids may be allowed at private sales
  - Conditions: Commercially reasonable
    - Every aspect – method, manner, time, place, and other terms
  - Warranties:
    - Title, possession, quiet enjoyment
    - Can be disclaimed

# Disposition of Collateral

- Commercially Reasonable Disposition of Collateral – Guidance
  - Guidance under 6 Del. C. § 9-627
    - Usual manner on any recognized market
    - At a current price in any recognized market
    - In conformity with reasonable commercial practices among dealers in the type of property being disposed
    - Approved (A) in a judicial proceeding, (B) by a creditors' committee, (C) representative of creditors, (D) by an assignee for the benefit of creditors
  - Ability to receive a greater price at different time or by different method does not make a disposition commercially unreasonable

# Disposition of Collateral

## ■ Commercially Reasonable Disposition of Collateral

### — Sample provision:

*The Grantor acknowledges and agrees that it is not commercially unreasonable for the Secured Party to:*

- fail to incur expenses reasonably deemed significant by the Secured Party to prepare the Collateral for disposition*
- fail to obtain third party consents for access to the Collateral to be disposed of*
- to dispose of assets in wholesale rather than retail markets*
- obtain the services of brokers, investment bankers, consultants and other professionals to assist the Secured Party in the collection or disposition of any of the Collateral*

# Disposition of Collateral

- Commercially Reasonable Disposition of Collateral – Notification
  - Notification required under 6 Del. C. § 9-611
    - Debtor
    - Secondary obligors
    - Other persons claiming an interest in collateral (if non-consumer goods)
    - Other secured party or lienholder (if non-consumer goods)
      - Filed a financing statement at least 10 days before “notification date” or
      - Perfected by compliance with a statute, regulation or treaty described in Section 9-311(a) of the Delaware UCC at least 10 days before “notification date.”

# Disposition of Collateral

- Commercially Reasonable Disposition of Collateral – Notification
  - “Notification Date” earlier of
    - (A) When secured party sends to the debtor and secondary obligor notice re: disposition and
    - (B) Debtor and any secondary obligor waives right to notice

# Disposition of Collateral

- Commercially Reasonable Disposition of Collateral – Notification
  - Exceptions to notice requirement
    - Perishable collateral
    - Collateral is customarily sold on a recognized market

# Disposition of Collateral

- Commercially Reasonable Disposition of Collateral – Timeliness of Notification
  - 6 Del. C. § 9-612 – Timeliness of Notification
    - Question of fact
    - 10 days - Notice sent after default and 10 days before the time of disposition is deemed reasonable for a non-consumer transaction

# Disposition of Collateral

- Commercially Reasonable Disposition of Collateral – Timeliness of Notification

- Sample provision:

*Secured Party shall give the Grantor at least 10 days' prior written notice of the date, time and place of any public sale of Collateral or of the date after which any private sale or any other intended disposition of Collateral is to be made. Grantor hereby acknowledges that 10 days' prior written notice of such sale or sales is reasonable notice.*



# Disposition of Collateral

- Sample Notice: Public Disposition Non-Consumer Goods Transaction (6 Del. C. § 9-613)

## NOTIFICATION OF DISPOSITION OF COLLATERAL (Public Sale)

To: [Name of debtor, obligor, or other person to which the notification is sent]

From: [Name, address, and telephone number of secured party]

Name of Debtor(s): [Include only if debtor(s) are not an addressee]

We will [sell][lease][license] the [describe collateral] [to the highest qualified bidder] in public as follows:

Day and Date: \_\_\_\_\_

Time: \_\_\_\_\_

Place: \_\_\_\_\_

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to [sell][lease][license] [for a charge of \$ \_\_\_\_\_]. You may request an accounting by calling us at [telephone number].

# Disposition of Collateral

- Sample Notice: Private Disposition Non-Consumer Goods Transaction (6 Del. C. § 9-613)

NOTIFICATION OF DISPOSITION OF COLLATERAL (Private Sale)

To: [Name of debtor, obligor, or other person to which the notification is sent]

From: [Name, address, and telephone number of secured party]

Name of Debtor(s): [Include only if debtor(s) are not an addressee]

We will sell [or lease or license, as applicable] the [describe collateral] privately sometime after [day and date].

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell [or lease or license, as applicable] [for a charge of \$ \_\_\_\_]. You may request an accounting by calling us at [telephone number].

# Disposition of Collateral

- Sample Notice: Consumer Goods Transaction
  - See 6 Del. C. § 9-614 for Public or Private Disposition

# Disposition of Collateral

- Effect of Disposition of Collateral – 6 Del. C. § 9-617
  - Good Faith Transferee:
    - Transferee gets all of debtor's rights in collateral
    - Transferee gets collateral free and clear of (A) security interest under which sale was made, (B) subordinate security interest and (C) subordinate lien
    - Above is true whether or not secured party complies with Article 9

# Disposition of Collateral

- Effect of Disposition of Collateral – 6 Del. C. § 9-617
  - Transferee other than a Good Faith Transferee:
    - Transferee takes collateral subject to (A) debtor's rights in collateral, (B) security interest under which sale was made and (C) subject to any other security interest or lien
  - UCC defines good faith as honesty in fact and the observance of reasonable commercial standards of fair dealing. 6 Del. C. § 1-201(b)(20).

# Disposition of Collateral

- Application of Proceeds – 6 Del. C. § 9-615
  - (1) Expenses for retaking, holding, and disposing of collateral (including reasonable attorneys fees and legal expenses if provided for by agreement)
  - (2) Satisfaction of obligations secured by the security interest under which disposition was made
  - (3) Satisfaction of obligations secured by subordinate security interest if demand for proceeds has been made
  - (4) Consignor secured party if demand made

# Disposition of Collateral

- Application of Proceeds – 6 Del. C. § 9-615
  - Sample provisions:

*...all [reasonable and documented] expenses, including, reasonable attorneys' fees and disbursements, incurred or paid by the Secured Party in protecting, preserving or enforcing the Secured Party's rights under or in respect of any of the Obligations or any of the Collateral.*

*After deducting all of said expenses, the residue of any proceeds of collection or sale of the Collateral shall, to the extent actually received in cash, be applied to the payment of the Obligations [in such order or preference as the Secured Party may determine][in such order or preference as is provided in the Credit Agreement]*

# Disposition of Collateral

- Surplus and Deficiency – 6 Del. C. § 9-615
  - Surplus – Secured party must account to and pay a debtor any surplus
  - Deficiency – Obligor remains liable
  - Exceptions:
    - No surplus to debtor / No liability for deficiency for sale of accounts, chattel paper, payment intangibles or promissory notes.



## Rights of Other Secured Parties



# Rights of Other Secured Parties

- Junior/Subordinate Lienholders
- Senior Lienholders
- Notification Rights
- Rights to Proceeds
- Status of Security Interest

# Rights of Other Secured Parties

- Junior/Subordinate Lienholders and Senior Lienholders – Notification
  - All lienholders have some notification rights for private sale, public sale and strict foreclosures
  - See 6 Del. C. §9-611 and 6 Del. C. §9-621

# Rights of Other Secured Parties

- Junior/Subordinate Lienholders – Rights to Proceeds
- 6 Del. C. §9-615
  - Public or Private Sale – 3<sup>rd</sup> in line
    - 1<sup>st</sup> in line: Enforcement costs
    - 2<sup>nd</sup> in line: satisfaction of obligations owed to senior foreclosing secured party
  - Strict Foreclosure – Not applicable because no proceeds

# Rights of Other Secured Parties

- Status of Security Interest after Public or Private Sale – 6 Del. C. §9-617
  - Junior/subordinate lienholders
    - Security interest is discharged unless transferee took in bad faith
  - Senior lienholders
    - Security interest follows collateral

# Rights of Other Secured Parties

- Status of Security Interest after Strict Foreclosure – 6 Del. C. §9-622
  - Junior/subordinate lienholders
    - Security interest is discharged and terminated
  - Senior lienholders
    - Security interest follows collateral

## Secured Parties' Penalties for Failing to Comply with Part 6 of Article 9



# Failure to Comply with Part 6 - Penalties

- 6 Del. C. §9-625
  - Secured party not complying with Article 9?
    - Court can order or restrain collection, enforcement and disposition steps
    - Liability for damages in amount of any loss caused by such failure
    - \$500 in each instance for failing to comply with Section 9-208, 9-209, 9-509(a), 9-513(a) or (c), 9-616(b)(1) or 9-616(b)(2)
    - Failing to respond to request regarding list of collateral or statement of account, security interest limited as shown on list or statement against a person reasonably misled



## Other Enforcement Items



# Other Enforcement Items

- Collection and Enforcement Generally
- Compliance with Other Laws
- Equitable Liens / Equitable Subrogation

# Other Enforcement Items

- Collection and Enforcement – 6 Del. C. §9-607
  - After Default, notify account debtors
  - Take proceeds entitled to under Section 9-315
  - Control of Deposit Account – Set-Off Rights or Instruct bank to pay balance of deposit account
  - Commercially reasonable collection

# Other Enforcement Items

- Compliance with other laws
  - Consumer protection laws
  - State and Federal securities laws

# Other Enforcement Items

- Equitable Liens / Equitable Subrogation
  - Sureties
    - If Borrower/Debtor provides goods and services to government entity, surety may exist
    - Bonded jobs and surety is performing, surety will have rights to accounts from such job

*This presentation and the material contained herein are provided as general information and should not be construed as legal advice on any specific matter or as creating an attorney-client relationship. Before relying on general legal information or deciding on legal action, request a consultation or information from a Richards, Layton & Finger attorney on specific legal needs.*



# **Part 2: LIBOR Transition 2.0: Adjustable Interest Rate (LIBOR) Act and SOFR Update**

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Sara Toner, Esquire  
*Richards, Layton & Finger, P.A.*

Joy Barrist, Esquire  
*Potter, Anderson & Corroon LLP*

**SARA TONER-WAGNER**, chair of the firm's Real Estate Services Group, is considered "THE top real estate lawyer in Delaware" (*Chambers USA*). Sara focuses her practice on complex transactions involving the finance, acquisition, sale, lease, and development of commercial real estate properties. With "technical competence" and an "impeccable skill set," she represents major real estate developers, financial institutions, significant holders of commercial real estate, and institutional clients in all types of commercial real estate transactions.

"Sara is top notch. She knows how to get a deal done" (*Chambers USA*). Sara has particular expertise in closing sophisticated commercial real estate loans, including:

- CMBS financing,
- portfolio financing, and
- mezzanine and preferred equity transactions.

Sara also regularly advises clients on joint venture formation, equity capitalization, and other real estate matters.

Sara teaches a master-level project finance class at Temple University's Fox School of Business. A contributing author of several published articles, she regularly updates "Delaware" in *State-by-State Guide to Architect, Engineer and Contractor Licensing*, Aspen Law & Business; "Delaware Construction and Design Law" in *State-by-State Guide to Construction & Design Law: Current Statutes and Practice*, American Bar Association; and "Delaware" in *State-by-State Guide to Commercial Real Estate Leases*, Law & Business.

## **LEADERSHIP**

- American College of Real Estate Lawyers, Fellow
  - Capital Markets & Real Estate Finance Committee, Chair
  - Attorneys' Opinions Committee, Vice-Chair
  - Title Insurance Committee
  - New Member Engagement Committee
- American College of Mortgage Attorneys, Fellow
  - Sponsorship Committee
- American Bar Association, Real Property, Trust & Estate Law Section
  - Legal Opinions in Real Estate Transactions Committee, Vice Chair, 2021-2022
  - Continuing Legal Education Committee, 2016-present
  - Commercial Real Estate Transactions Group, Vice Chair, 2015-2016, 2016-2017
  - Title Insurance and Surveys Committee, Chair, 2014-2015; Vice Chair, 2013-2014
  - Senior Housing Committee, Vice Chair, 2012-2013
- Temple University, Fox School of Business, Real Estate Advisory Board, Vice Chair
- Delaware State Chamber of Commerce, Economic Development Committee
- Beebe Healthcare, Real Estate Committee, 2021-present
- Mayor-Elect Purzycki Transition Team, Law Committee Chair

## **RECOGNITION**

- American Bar Foundation, Fellow
- *Chambers USA*, since 2011, currently Band 1



- *The Best Lawyers in America*, since 2017
- *Super Lawyers*, 2022
- *Delaware Today* Top Lawyer, Real Estate, since 2014; Top Vote Getter, 2021, 2018, 2017, 2015
- *Delaware Business Times*, 40 Under 40, 2017
- *Delaware Law Weekly*, Lawyers on the Fast Track, 2016

## **EDUCATION**

- Temple University School of Law, J.D., 2005
- Philadelphia University, B.S., *summa cum laude*, 2002

# Joy A. Barrist

Partner

Joy A. Barrist offers a full range of commercial real estate law services involving the finance, acquisition, sale, lease and development of complex multimillion-dollar real estate projects throughout Delaware, around the country and internationally. She regularly represents banks and lending institutions, private equity firms, investors, developers, owners, landlords, and tenants.

Joy consistently represents both lenders and borrowers in various types of commercial real estate financing transactions, including acquisition, development and construction lending. Her experience also includes CMBS and mezzanine debt transactions. She handles finance and other real estate matters for all asset classes including multifamily, hospitality, office, retail, industrial, mixed-use and medical.

Joy represents financial institutions as lead lenders and participants in syndicated loan transactions. Her practice also includes the representation of lenders in workouts, financial restructuring, loan sales and the purchase of loan pool portfolios.

In addition to real estate finance, her experience extends to asset-based finance (including equipment, inventory and receivables financing), working capital lines of credit and various other complex commercial loan facilities.

Joy's practice also includes representations with respect to other real estate and general business matters such as easements, lot purchase agreements, sale and purchase of business assets and ownership interests in business entities, the formation of Delaware entities and the rendering of legal opinions in finance and other commercial transactions.

She is a frequent speaker on topics of commercial real estate and in particular, real estate finance and construction lending.

The current edition of *Chambers USA* includes her in the top tier of Delaware real estate practitioners, highlighting positive client feedback: "She's a very fine attorney — a good technician and a good drafter." "Joy is top notch and her work is second to none."

Joy is the vice practice group leader of the firm's Transactions and Corporate Counseling Group as well as co-chair of the firm's Women's Initiative.

## REPRESENTATIVE MATTERS

- Represented the lead lender in a \$67,500,000 syndicated acquisition and construction facility for a historic building in Wilmington, Delaware.



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## EDUCATION

Villanova University School of Law,  
J.D., 2001

## BAR & COURT ADMISSIONS

Delaware

Pennsylvania

## PRACTICE AREAS

Banking & Finance

Real Estate

## PROFESSIONAL ACTIVITIES AND HONORS

Fellow, American College of  
Mortgage Attorneys, 2015 –  
present; Delaware State Chair,  
January 2017 – present

Fellow, American Bar Foundation,  
May 2019

American Bar Association: Chair,  
Mortgage Lending Committee, Real  
Property Trust & Estates Section of  
the American Bar Association,  
2018 – present; vice-chair, 2014 –  
2018

Board Member, Delaware  
Commercial Real Estate Women,  
January 2016 – present; vice-  
president January 2017 – January  
2019; president January 2019 –  
present

Board Member, MidCoast

- Represented private equity group on a \$12,000,000 renovation loan for various properties located outside of Detroit, Michigan.
- Represented a non-profit company in connection with the purchase of a conservation easement on property located in Delaware.
- Represented business owner in the sale of 21 franchised restaurant locations in various States for approximately \$24,000,000.
- Represented borrower on a \$36,000,000 permanent loan for Phase I of a 900,000 square feet retail center located in Newark, Delaware.
- Represented borrower on a \$5,505,000 construction and a \$5,450,000 construction loan purchase and development renovation of residential condominiums located in Philadelphia, Pennsylvania.
- Represented lender on a \$8,000,000 multi-purpose revolving line of credit; \$4,000,000 equipment line of credit; \$13,000,000 term loan made to 14 entities, secured by 13 properties located in various jurisdictions, including the United States Virgin Islands, various IP properties and other assets.
- Represented private equity firm in connection with the acquisition and financing of various retail, residential and hospitality projects throughout the United States, many involving CMBS financing.
- Represented lender on a \$15,400,000 commercial mortgage loan for refinance of a franchised hotel located in Rockaway, New Jersey.
- Represented Japanese company in the acquisition of 181 acre industrial site in Pasadena, Texas.
- Represented lender on a \$18,000,000 permanent loan and a \$13,500,000 construction to permanent loan related to the refinance of Phase I debt and the construction of Phase II of an apartment complex located in Wilmington, Delaware.
- Represented lender on a \$22,260,000 construction loan for the construction of a residential apartment complex located in Vero Beach, Florida.
- Represented real estate investment/development company in negotiating a lot purchase agreement with a national homebuilder valued at approximately \$17,000,000.
- Represented private equity group on a \$5,200,000 renovation loan for an apartment project located in Georgia.
- Represented lender on a \$23,653,194 construction to permanent loan and a \$1,326,000 land loan for construction of a residential apartment complex located in New Castle, Delaware.
- Represented lender on a \$39,500,000 syndicated construction to permanent loan for a residential project located in Coral Springs, Florida.

Community Bank, September 2017 – April 2020 (bank sold)

Regional Board Member, First Citizens Community Bank, April 2020 – present

Member, Committee of 100, 2005 – present; Auction Committee, May 2020 – present

Trustee, Board of Trustees of Delaware College of Art and Design, Finance & Audit Committee, Buildings & Grounds Committee, and Governance Committee, October 2019 – present

Delaware Bar Association

Pennsylvania Bar Association

Philadelphia Bar Association

Delaware Bankers Association

Loan Review Committee, West End Neighborhood House

Listed in *Chambers USA* (2014 – present)

Ranked in *The Best Lawyers in America* in Real Estate Law in Delaware, most recently in the 2022 edition

Ranked in *Delaware Business Times*, Top 40 Business Professionals Under 40 in the State of Delaware 2015

Ranked in the American Society of Legal Advocates, Top 40 Corporate Lawyers Under 40 in the State of Delaware for 2013



- Represented lender on a \$5,300,000 and a \$2,650,000 construction loan for conversion of an office building into a franchised hotel located in Wilmington, Delaware.
- Represented lender on an amendment of a \$30,700,000 construction loan for a residential apartment construction project in New Castle, Delaware.

## RECENT NEWS

Chambers USA 2022 Names 21 Potter Anderson Attorneys and 5 Practices Among the Best in Delaware  
June 1, 2022

43 Potter Anderson Lawyers Recognized in Best Lawyers in America 2022  
August 19, 2021

Chambers USA 2021 Names 19 Potter Anderson Attorneys and 5 Practices Among the Best in Delaware  
May 20, 2021

Potter Anderson Chair Kathleen Furey McDonough Re-elected to Lead Firm; Leading Delaware Firm Also Announces New Executive Committee and Practice Leadership  
March 29, 2021

41 Potter Anderson Lawyers Recognized in *Best Lawyers in America* 2021  
August 20, 2020

Chambers USA 2020 Names 20 Potter Anderson Attorneys and 5 Practices Among the Best in Delaware  
April 23, 2020

33 Potter Anderson Attorneys Named to the 2020 Best Lawyers® List  
August 15, 2019

Chambers USA 2019 Names 22 Potter Anderson Attorneys and 5 Practices Among the Best in Delaware  
April 25, 2019

Barrist Elected President of Delaware Real Estate Women  
February 9, 2019

Barrist Appointed Chair of ABA Mortgage Lending Committee  
September 4, 2018

30 Potter Anderson Attorneys Named to the 2019 Best Lawyers® List  
August 15, 2018

Potter Anderson Advises Conflicts Committee on \$850 Million Deal  
May 30, 2018

Chambers USA 2018 Names 20 Potter Anderson Attorneys and 5 Practices Among the Best in Delaware  
May 3, 2018

22 Potter Anderson Attorneys Named as "The Best Lawyers in America" for 2018  
August 15, 2017



Leading Real Estate and Finance Attorney Joy Barrist Joins Potter Anderson  
April 17, 2017

#### **RECENT EVENTS & SPEAKING ENGAGEMENTS**

Barrist Moderates Panel on North Delaware's Commercial Real Estate Market  
February 24, 2022

Barrist Moderates Discussion of Post-COVID State of Commercial Real Estate  
December 8, 2021

Barrist Moderates Panel on Delaware Land Use and Housing Shortage  
October 21, 2021

Barrist Discusses LLCs With Jumpstart Wilmington's Future Developers  
May 6, 2021

Barrist Discusses Amendments to Delaware LLC Act and CRE Transactions  
November 10, 2020

Barrist Discusses LLCs With Jumpstart Wilmington's First Cohort of Future Developers  
October 8, 2020

Barrist and O'Toole Present on Legal Opinions at Virtual Real Estate Law Conference  
May 14, 2020

Barrist and O'Toole Discuss Impact of Delaware LLC Act Amendments on Real Estate Deals  
January 15, 2020

Barrist Moderates Panel on Commercial Real Estate Market  
November 12, 2019

Barrist Participates on ACMA Panel on Delaware LLCs, LIBOR and Loan Splits  
September 7, 2019

Barrist and O'Toole Discuss Delaware LLC Act's Impact on Real Estate Transactions  
May 9, 2019

Potter Anderson Sponsors SFIG Vegas 2019, Largest Capital Markets Conference  
February 24, 2019

Barrist Speaks on Villanova Panel About Careers in Real Estate Industry  
September 25, 2018

Barrist Moderates Panel on North Delaware State of the Market  
May 17, 2018

Barrist Chairs ABA Program on Trends in Commercial Guaranty Agreements  
May 11, 2018

Barrist Presents on Loan Amendments for ABA Webinar  
November 15, 2017



Barrist Participates on Panel Discussing Issues in Construction Lending  
September 16, 2017

Barrist Moderates Panel on North Delaware State of the Market  
June 14, 2017

Barrist Speaks on Construction Lending in the New Economy  
April 21, 2017



## LIBOR & SOFR: THE BASICS ALL COMMERICAL LAWYERS SHOULD KNOW

Sara T. Toner-Wagner, Richards, Layton & Finger, P.A.<sup>1</sup>

If it feels like we have been talking about the end of LIBOR forever I have good news: the end is near. All LIBOR tenor publishing ends on June 30, 2023 and the federal government acted in March to address those contracts that lacked effective replacement language. On March 15, 2022, the federal government passed the Adjustable Interest Rate (LIBOR) Act (LIBOR Act)<sup>2</sup> to address the so-called "tough legacy" contracts that cannot be amended by the June 30<sup>th</sup> deadline. The LIBOR Act will facilitate the transition of outstanding contracts by operation of law permitting the replacement of LIBOR with the Secured Overnight Financing Rate (SOFR). The LIBOR Act permits the use of SOFR as a commercially reasonable substitute without unanimous bondholder consent. This means LIBOR deals backed by consumer loans will switch to the new benchmark at the same time as their collateral.

LIBOR has been around for a long-time; nearly forty years! The British Bankers' Association created LIBOR in 1986 as a benchmark for the pricing of floating-rate corporate loans.<sup>3</sup> Certain banks, largely global banks known as "panel banks", on a daily basis would self-report the short-term rate of interest they would offer to other banks to borrow from one another. The British Bankers' Association would then eliminate the four highest and lowest four rates. From this the LIBOR rate was determined: the average rate at which banks could, theoretically, borrow money from each other.<sup>4</sup> LIBOR became the standard benchmark rate for all types of financial contracts, including, mortgages, swaps, hedging and derivatives agreements, corporate loans, government bonds, credit cards, and student loans. As of June 2021 it was estimated that LIBOR was the benchmark rate in approximately \$400 trillion in financial contracts.<sup>5</sup>

In 2012, LIBOR was the subject of a massive scandal when it came to light that bank traders colluded to manipulate the LIBOR rate.<sup>6</sup> In November 2020, the Federal Reserve Board, Federal Deposit Insurance Corporation and Office of the Comptroller of the Currency issued a statement encouraging banks to cease entering into new contracts that used US LIBOR by December 31, 2021.<sup>7</sup> As of December 31, 2021, the 1-week and 2-month LIBOR ceased

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<sup>1</sup> Sara T. Toner-Wagner is a director of Richards, Layton & Finger, P.A. The views expressed in this article are those of the author and not necessarily those of Richards, Layton & Finger or its clients.

<sup>2</sup> H.R. 2471, Div. U.; LIBOR Act was included in the included in the Consolidated Appropriate Act, 2022.

<sup>3</sup> Kiff, John, *FINANCE & DEVELOPMENT*, December 2012, Vol. 49, No. 4, page 32.

<sup>4</sup> *Id.*

<sup>5</sup> Callahan, Elen, *Legislation is Needed to Smooth LIBOR Transition*.

<https://structuredfinance.org/legislation-is-needed-to-smooth-libor-transition/>

<sup>6</sup> Rose, Clayton S., and Aldo Sesia. *Barclays and the LIBOR Scandal*. Harvard Business School Case 313-075, January 2013. (Revised October 2014.)

<sup>7</sup> Federal Reserve Supervision and Regulation Letter 20-25 (November 6, 2020); OCC Bulletin 2020-98 (November 6, 2020); and FDIC Financial Institution Letter 104-2020 (November 6, 2020).

publication. The 3-month, 6-month, and 1-year LIBOR tenors continued to be published but will cease publication as of June 30, 2023.

In the United States, the Alternative Reference Rates Committee (ARRC) was established in 2014 to transition from U.S. dollar LIBOR to its recommended alternative, SOFR.<sup>8</sup> The ARRC developed the Paced Transition Plan to coordinate and track planning activities across the US financial markets to, *inter alia*, consider (a) transitioning to alternative reference rates, and (b) addressing risks in legacy contracts without fallback language.<sup>9</sup> In 2017, the ARRC selected SOFR as the preferred replacement rate for LIBOR. SOFR establishes the cost of borrowing based on overnight collateralized U.S. Treasury securities in the repurchase agreement market. It is produced by the New York Federal Reserve.<sup>10</sup>

SOFR is considered to be a more resilient rate than LIBOR because of how it is produced. SOFR reflects the way financial institutions fund themselves and is based on actual transactions that are regularly around \$1 trillion in daily volumes.<sup>11</sup> The volumes underlying overnight SOFR are far greater than the transactions in any other U.S. money market.<sup>12</sup> Since it is derived from the U.S. Treasury repurchase market, it is not considered to be at risk of ceasing. Further, it tends to run lower than LIBOR, as LIBOR reflects intra-bank borrowing costs, making it carry more risk than SOFR.

As an overnight rate SOFR is backward-looking, so the borrower does not know the rate at the beginning of the interest period. An advantage of LIBOR was that it was forward-looking thus allowing a borrower to know the interest cost at the commencement of an interest period. As part of the Paced Transition Plan, the ARRC accounted for the market need for a forward-looking rate. Term SOFR was developed to address this need and was endorsed by the ARRC on July 29, 2021 for 1-month, 3-month and 6-month tenors. It is published and calculated by the CME Group. Term SOFR is calculated for each day the New York Federal Reserve calculates and publishes overnight SOFR. It is available at 5:00 am CT when calculated. On September 21, 2021 the CME began to publish 12-month Term SOFR and on May 19, 2022, the ARRC announced its endorsement of it for certain uses, especially with respect to 12-month LIBOR adjustable rate mortgages. Unlike, overnight SOFR, Term SOFR is based on SOFR futures and benchmark SOFR derivatives to provide a forward rate for a given time period (e.g., 1, 3, 6 or 12 months) making it more like LIBOR in that it sets at the beginning of an interest period based on forward-looking market data.

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<sup>8</sup> ALTERNATIVE REFERENCE RATES COMMITTEE, Terms of Reference (Revised February 16, 2022), accessed at <https://www.newyorkfed.org/medialibrary/microsites/arrc/files/ARRC-TOR.PDF>

<sup>9</sup> *Id.*

<sup>10</sup> ALTERNATIVE REFERENCE RATES COMMITTEE, Transition from LIBOR, accessed at <https://www.newyorkfed.org/arrc/sofr-transition>

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*



## **Terminology**

Adjustable Interest Rate (LIBOR) Act (LIBOR Act)<sup>13</sup>— Signed by President Biden on March 15, 2022, the LIBOR Act creates a national system to replace LIBOR in contracts that do not have effective fallback provisions (i.e. either no fallback whatsoever, or ineffective fallback provisions that do not identify a determining authority with the power to determine a replacement rate).<sup>14</sup> The LIBOR Act creates a safe harbor from litigation for claims tied to the automatic replacement of LIBOR with the new benchmark (i.e. SOFR).<sup>15</sup> The LIBOR Act supersedes any provision of any state law relating to the selection or use of a benchmark replacement for LIBOR.<sup>16</sup>

Alternative Reference Rates Committee (ARRC)—Convened by the New York Fed and the Federal Reserve Board in 2014, it is a group of private-market participants tasked with transitioning the market from LIBOR to SOFR. The ARRC is comprised of an array of private-sector entities and banking and financial sector regulators.

ARRC Fallback Language— The ARRC issued recommended fallback language for use in contracts that used LIBOR. The Fallback Language included recommendations for LIBOR-based floating rate notes, bilateral business loans, syndicated loans, securitizations, residential adjustable rate mortgages, and private student loans.

ARM—Adjustable rate mortgage products.

British Bankers' Association—the British Bankers Association; the initial developer/ overseer of LIBOR in the 1980s.

CME Group Inc. (Chicago Mercantile Exchange)— The world's largest financial derivatives exchange. The CME Group publishes Term SOFR.

CME Term SOFR Reference Rates (Term SOFR)—This forward-looking measure of SOFR was endorsed by the ARRC on July 29, 2021 for 1-month, 3-month and 6-month tenors and was critical step in the Paced Transition Plan. Term SOFR is geared towards: multi-lender facilities, middle market loans, and trade finance loans. It is published and calculated by the CME Group. The commercial real estate market seems to favor Term SOFR as it is a forward-looking indication of overnight SOFR based on, among other things, the expectations of the market. This forward looking nature of Term SOFR makes it more like LIBOR. Term SOFR is calculated for each day the New York Federal Reserve calculates and publishes SOFR. It is available at 5:00 am CT when calculated. The Term SOFR benchmark is quoted for 1-month, 3-month, 6-month and 12-month tenors. The 12-month tenor is a more recent addition and was launched on September 21, 2021. On May 19, 2022, the ARRC announced its endorsement of the 12-month Term SOFR rate for certain uses, especially with respect to 12-month LIBOR adjustable rate mortgages.

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<sup>13</sup> H.R. 2471, Div. U.; LIBOR Act was included in the included in the Consolidated Appropriate Act, 2022.

<sup>14</sup> See LIBOR Act § 103(10).

<sup>15</sup> LIBOR Act, § 105(c).

<sup>16</sup> See LIBOR Act § 107. Only New York and Alabama enacted statewide LIBOR replacement Acts.

Cessation Date—June 30, 2023; the date that LIBOR will no longer be published for use.

Consolidated Appropriations Act, 2022 (H.R. 133)— Also known as the "Omnibus Spending Bill", it contained, *inter alia*, the LIBOR Act.

Intercontinental Exchange's Benchmark Administration (IBA)- a subsidiary of ICE.

Intercontinental Exchange (ICE)— An American company that owns and operates financial and commodity marketplaces and exchanges. In February 2014, ICE took over the administration and determination of LIBOR.

London Interbank Offered Rate (LIBOR)— Formerly, the globally accepted benchmark interest rate used in all types of transactions, such as corporate debt, derivatives, mortgage loans and consumer finance, among others. The rate was developed by the BBA in the 1980s. A forward-looking rate, its calculation was based on the estimated borrowing costs between banks. After the LIBOR Scandal, ICE became responsible for LIBOR's administration. It is based on a daily survey of major global lending institutions regarding how much they would, theoretically, charge other banks for short-term, unsecured loans. LIBOR is calculated for five different currencies—the U.S. dollar, the euro, the British pound sterling, the Japanese yen, and the Swiss franc. As a result of the scandal about its validity, LIBOR is being eliminated, effective June 30, 2023. As of December 31, 2021, 1-week and 2-month LIBOR stopped being published in order to shift the market to phase out its use completely by June 30, 2023.

LIBOR Scandal— Reportedly, bankers at multiple major global banks colluded to manipulate LIBOR by intentionally submitting artificially low or high interest rates in order to force LIBOR higher or lower, in an effort to support their own banks' derivative and trading businesses. The scandal was disclosed to the public in 2012, however it is thought to have gone back to 2003.<sup>17</sup> Following the news of the scandal, the administration of LIBOR was taken away from the BBA and vested in the IBA which is the U.K. subsidiary of ICE.

Paced Transition Plan— The ARRC developed the Paced Transition Plan to support the phased transition to SOFR.

Secured Overnight Financing Rate (SOFR) – SOFR is an overnight interest rate that is calculated based on actual transactions in repurchase (repo) agreements collateralized by U.S. Treasury securities. In 2017, the ARRC selected SOFR as the ARRC's preferred alternative to LIBOR. Essentially, SOFR is a backward-looking rate. SOFR is produced by the New York Fed in cooperation with the Office of Financial Research. SOFR is published each business day at 8:00 am ET on the New York Fed's website. The challenge, however, is in a lack of forward-looking rates.

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<sup>17</sup> McBride, James, *Understanding the Libor Scandal*, October 12, 2016, accessed at <https://www.cfr.org/background/understanding-libor-scandal>