

Commercial Law Developments

2012

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SECURED TRANSACTIONS

Scope Issues

1. *In re Biondo*,
[2012 WL 162285](#) (Bankr. D. Md. 2012)
Article 9 did not apply to debtor's assignment to bank of his right to termination benefits from his employer because the assignment was absolute even though the debtor retained the right to a surplus after payment of the loan.
2. *In re Wolverine Fire Apparatus Co. of Sherwood Michigan*,
[465 B.R. 808](#) (Bankr. E.D. Wis. 2012)
Truck dealer that, after abandoning sales agreement with the debtor, allowed debtor to take possession of truck but retained title, never placed the manufacturer's warranty in effect for a new buyer, continued to expose the truck to potential buyers through its listings on its inventory list and commercial trader database, kept its inventory lender informed of the truck's location, never sent a bill showing an amount due, and never listed the truck on its accounts receivable remained the owner. However, the transfer of possession was not a mere bailment but also a consignment because the truck remained for sale, and thus the truck became available to the debtor's creditors and property of the debtor's bankruptcy estate.
3. *Cox v. Community Loans of America, Inc.*,
[2012 WL 773496](#) (M.D. Ga. 2012)
Car title pawn transactions with members of the armed services were not sales with an option to repurchase but secured loan transactions that are void under the federal Military Lending Act, and consequently the arbitration clauses in the agreements were also void.
4. *Delphi Automotive Systems, LLC v. Capital Community Economic/Industrial Dev. Corp.*,
[2012 WL 967568](#) (Ky. Ct. App. 2012)
Pursuant to Kentucky's non-uniform § 9-109(d), which excludes from the scope of Article 9 "a public-finance transaction or a transfer by a government or governmental unit," a transaction in which a state agency leased equipment to a private entity for 84 months, after which the private entity was to become the owner of the equipment, was truly a sale with a retained security interest and was excluded from Article 9. Accordingly, the state agency was not required to perfect its security interest and because its security interest predated that of the private entity's secured lender, the state agency's interest had priority.
5. *In re Waltman*,
[2012 WL 5828717](#) (Bankr. S.D. Ala. 2012)
Rent-to-own transactions by which debtor leased portable storage buildings for one month, which agreements were renewable and provided that the debtor will become the owner of the units if he made 36 consecutive monthly payments, were expressly excluded from Article 9 under the Tennessee Rental-Purchase Agreement Act. As a result, and because the debtor did not make 36 payments, the units remained property of the lessor.

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6. *Brenner Financial, Inc. v. Cinemacar Leasing*,
[2012 WL 1448048](#) (N.J. Super. Ct. 2012)
Non-terminable five-year lease of limousine calling for payments of over \$160,000 with option to buy at the end for \$600 was a sale with a retained security interest because the option price was nominal.
 7. *In re Lichtin/Wade, LLC*,
[2012 WL 3260315](#) (Bankr. E.D.N.C. 2012)
Non-terminable equipment leases that required lessee to purchase the leased generators at the end of the lease term for \$1 were secured transactions.
 8. *Midwest Media Group, Inc. v. Fusion Entertainment, Inc.*
[2012 WL 5541613](#) (Iowa Ct. App. 2012)
Trial court properly determined that 30-month lease of video equipment which included an option to buy for the amount remaining due on the lease was a true lease because it was terminable at any time upon payment of 30% of the remaining balance due, and thus failed the “safe harbor” test, and lessee failed to argue that the economic realities effectively precluded it from terminating the agreement early.
 9. *In re Cherry*,
[2012 WL 3252231](#) (Bankr. N.D. Ala. 2012)
Three-year automobile lease that provided the lessee with an option to purchase at the end for \$650 was a sale and secured transaction because the option price was nominal in relation to the predicted value of the vehicle at the end of the lease term and even though the lessee had a right to terminate early for \$495.00 plus payment of “all outstanding payments due,” this right did not terminate her obligations under the lease.
 10. *In re Old Colony, LLC*,
[476 B.R. 1](#) (Bankr. D. Mass. 2012)
Hotel room revenues are rents under Wyoming law and a security interest in them is perfected by recording a mortgage, not by filing a financing statement.
 11. *Vieira Enterprises, Inc. v. City of East Palo Alto*,
[145 Cal. Rptr. 3d 722](#) (Cal. Ct. App. 2012)
Seller of manufactured home that purported to retain title despite installing the home on a foundation did not in fact have any rights in the home because the home had become a fixture and the sales agreement “did not include any security instrument.”
 12. *Calloway v. Commissioner of Internal Revenue*,
[691 F.3d 1315](#) (11th Cir. 2012)
Transaction structured as three-year nonrecourse loan of stock during which the putative borrower had no right to repay early and the putative lender was entitled to dividends, the right to vote the shares, and the right to sell the shares was for federal income tax purposes a sale with an option to repurchase at the end.

13. *American Bank v. Cornerstone Community Bank*
[2012 WL 5195804](#) (E.D. Tenn. 2012)

Transaction by which insurance premium financier wired funds to insurance broker's operating account for payment of insurance premium, which funds were then swept out of the operating account by the depository to cover the broker's unrelated debts, was not governed by Article 9 because its scope does not cover any transaction stemming from a premium financing transaction or any transaction involving collateral consisting of unearned insurance premiums. Under the common law, the premium financier's security interest had priority because it was first in time and the funds were special deposits to which no banker's lien attached.

Attachment Issues

– Existence of Security Agreement

14. *Gardner v. Montgomery County Teachers Federal Credit Union*
[864 F. Supp. 2d 410](#) (D. Md. 2012)

Credit union's argument that it did not violate the Truth in Lending Act by using depositors' accounts to set off their credit card obligations required that credit union prove the existence of a security agreement, not that the depositors prove the absence of one, and the credit union's submission of an *unsigned* application form purporting to grant the credit union a security interest in the depositor's account did not satisfy this burden, particularly given the heightened standard of what is required in the Federal Reserve Board's Official Staff Commentary on 12 C.F.R. § 226.12(d).

15. *Branch Banking & Trust Co. of Virginia v. M/Y BEOWULF*,
[2012 WL 464002](#) (S.D. Fla. 2012)
[2012 WL 2064570](#) (S.D. Fla. 2012) (subsequent decision)

Summary judgment denied on whether bank acquired a security interest in a yacht because the putative debtor signed only in his individual capacity and, while he did own the vessel at some point, it remained unproven whether he owned it at the time he signed the security agreement given that a second builder's certification and first transfer of title filed with the Coast Guard five months later described a wholly-owned corporation as the owner, as did other documents.

Subsequent decision ruled that no security interest was granted. Moreover, bank's interest, if it had one, would be equitably subordinated because: (i) bank funded the loan knowing that the owner had violated federal regulations by failing to affix a hull identification number to the vessel before the vessel was documented, paving the way for the owner's later fraud; and (ii) agreeing the defer payment for five years after the debtor defaulted without inspecting the collateral, or insisting on proof of insurance, when in fact the debtor had long since sold the vessel to a third party.

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16. *In re Bucala*,
[464 B.R. 626](#) (Bankr. S.D.N.Y. 2012)
Promissory note signed in connection with sale of manufactured home which provided that: (i) the lender could file a motor vehicle lien against the home; (ii) interest would be added to the debt “and secured by the DMV lien”; (iii) the lender was to discharge the lien when the note was fully paid; and, most important, (iv) if the borrower defaulted the home could be repossessed, was sufficient to create a security interest. It did not matter that the note misidentified the model year of the manufactured home, especially given that the sales contract properly identified the model year and the documents can be read together.
17. *In re Buttke*,
[2012 WL 529241](#) (Bankr. D.S.D. 2012)
Application for certificate of title and certificate itself, each of which identified a security interest, did not *create or provide for* a security interest, and thus did not constitute a security agreement.
18. *In re Irvine-Hedrick*,
[2012 WL 5728625](#) (Bankr. D.S.D. 2012)
Debtor’s parents, who provided funds for the purchase of a vehicle, were listed as co-owners on the certificate of title, and eleven days before the bankruptcy filing were added as lienholders on the certificate, did not have a security interest because the written agreement in which the debtor promised to repay them and which described the vehicle did not expressly grant a security interest or include any language suggesting the parties intended to create or provide for such a security interest.
19. *Bodiford v. Atlanta Fine Cars, Inc.*,
[2012 WL 5428358](#) (N.D. Ga. 2012)
Seller of used vehicle presented insufficient evidence to determine on summary judgment that it had retained a security interest in the vehicle sold. Although the certificate of title does list the seller as lienholder, the buyer claims not to have seen the certificate, the bill of sale lists the unpaid portion of the purchase price as “deferred cash pickup down payment,” as opposed to “balance to be financed or cash due,” suggesting that the transaction did not involve financing or a security interest, and while the Precomputed Retail Installment Contract states “You are giving a security interest in the vehicle being purchased,” it does not bear the buyer’s signature and he claims not to have seen the document. None of the documents bears the term “security agreement,” references collateral, or describes either how the debt is to be repaid and or what happens in the event of default.
20. *In re Westermeyer*,
[2012 WL 2952176](#) (Bankr. N.D. Ill. 2012)
Signed application for certificate of title which identified the debtor’s parents as the holders of a lien on the debtor’s mobile home qualified as a security agreement.

21. *In re Dean,*[2012 WL 4634291](#) (Bankr. M.D. Pa. 2012)

It was unnecessary to determine whether the debtor's application for certificate of title listing lender as lienholder coupled with a letter from debtor's counsel qualified as an authenticated security agreement because the debtor had voluntarily surrendered possession of the vehicle to the lender and thus the lender's security interest attached because the lender had possession pursuant to an oral security agreement.

22. *State v. Pressley,*[100 So. 3d 1058](#) (Ala. Civ. App. Ct. 2012)

Grandmother who provided funds for the purchase of truck for which the certificate of title identified her grandson as the owner did not have a security interest because there was no written security agreement. Consequently, the grandmother was not a bona fide lienholder for the purposes of Alabama statute authorizing forfeiture of vehicles used to convey a controlled substance.

23. *Union Bank Co. v. Heban,*[2012 WL 32102](#) (Ohio Ct. App. 2012)

Although each of the security agreements the debtor authenticated contained a cross-collateralization clause purporting to make the collateral secure all of the debtor's obligations to the bank, the clauses were insufficient to overcome the fact that the promissory note for one loan – entered into after one secured transaction and before several others – expressly stated that the loan was unsecured.

24. *Summit Credit Union v. Furrer,*[822 N.W.2d 737](#) (Wis. Ct. App. 2012)

Evidence was insufficient that vehicle titled solely in wife's name was collateral for credit union's loan to husband because wife did not authenticate the security agreement executed in connection with the loan and, while wife and husband did authenticate an agreement years earlier that pledged her car to secure their obligations under an open-ended credit plan, there was no evidence that the new loan was made under that plan.

25. *Burd v. Antilles Yachting Services, Inc.,*[2012 WL 3329249](#) (V.I. 2012)

Boat owner who signed promissory note and security agreement in favor of former employer was entitled to evidentiary hearing on whether he did so under duress resulting from a threat of prosecution for embezzlement. Boat owner did not necessarily ratify the agreements by making ten monthly payments because the threat of prosecution may not have ceased.

26. *Shales v. Pipe-Liners, Ltd.*,

[2012 WL 4793499](#) (N.D. Ill. 2012)

Lender whose agreement with the debtor provided that it shall have the rights of a secured party “[i]f an Event of Default occurs,” did not in fact have a security interest until default occurred. Even if default did not occur until a judgment lien was entered against the debtor, lender did not do enough to preserve its rights because it waited eleven weeks before asserting its rights to receivables, and thus the judgment lienor was entitled to the receivables.

27. *In re Food Management Group, LLC*,

[2012 WL 6644641](#) (S.D.N.Y. 2012)

Attorney who claimed a lien at law in the proceeds of his client’s donut shops had no lien because the only evidence of it was a letter drafted by the attorney and sent by the client to a closing agent and which did not purport to grant an interest in the shops themselves or any proceeds from their sale but at most granted an interest only in the proceeds of specifically contemplated closings that never occurred; instead the shops were sold by the debtor’s bankruptcy trustee.

– Description of the Collateral

28. *In re Doctors Hospital of Hyde Park, Inc.*,

[474 B.R. 576](#) (Bankr. N.D. Ill. 2012)

Other documents executed contemporaneously with security agreement would not be considered in determining scope of collateral covered. Security agreement that described the collateral to include general intangibles “relating to the Facility” encompassed general intangibles relating to the *operation* of the debtor’s medical facility, not merely the land and building, and thus covered the settlement of claims relating to the operation of the facility. However, to the extent those claims were tort claims, rather than contract claims, the security interest did not attach to the settlement proceeds because § 9-108(e) requires a more specific description than by collateral type for commercial tort claims.

29. *In re Dwek*,

[2012 WL 6011625](#) (Bankr. D.N.J. 2012)

Factual issue existed as to whether security agreement that described the collateral as “shares of stock or other securities or certificates as listed on Schedule A” was sufficient because it was unclear whether the one page printout – containing an account number, the names of specific stocks, and the quantity held – attached to a letter dated five months after the security agreement was the “Schedule A” referred to.

30. *In re Equipment Acquisition Resources Inc.*,
[692 F.3d 558](#) (7th Cir. 2012)

Even though parol evidence is not admissible to alter an unambiguous security agreement, it might be possible to reform a security agreement that erroneously purports to have the debtor grant the secured party a security interest in the secured party's own assets because such a transfer is impossible, does not make sense, and is ambiguous.

31. *In re Ferry Road Properties, LLC*,
[2012 WL 3888201](#) (Bankr. E.D. Tenn. 2012)

Mortgagee's interest in real property, including assignment of rents and leases, extended to proceeds consisting of a cause of action for damages to the property but not to a cause of action for loss of business income, which cause of action is a commercial tort claim that must be described with specificity and must exist when the security agreement is executed.

32. *In re SOL, LLC*,
[2012 WL 2673254](#) (Bankr. S.D. Fla. 2012)

Security agreement's description of collateral to include "real estate listings and listing agreements and . . . the proceeds and products therefrom" did not include the debtor's contracts, receivables, and rights to commissions from sales not generated from the debtor's listings, and thus did not include rights to commissions from sales in which the debtor represented the buyer in the transaction.

33. *In re Kuranda*,
[466 B.R. 39](#) (Bankr. E.D. Pa. 2012)

Debtor who had granted lender a security interest "in the proceeds of [a specified] lawsuit" that had already been reduced to judgment had in fact granted a security interest in the judgment itself, not merely in the monies later collected on the judgment by the debtor's bankruptcy trustee.

34. *In re TMST, Inc.*,
[2012 WL 589572](#) (Bankr. D. Md. 2012)

Security Agreement executed by debtor-loan servicer covered only the debtor's rights as "owner" under various servicing agreements, not the debtor's rights as "servicer." Because the owner had the right to terminate and replace the servicer without cause, the rights as owner were substantially more valuable than the rights as servicer. A combined sale by the debtor's bankruptcy trustee of all rights would be allocated 95% to the rights as owner and 5% to rights as servicer, with the former therefore qualifying as proceeds of the collateral.

35. *In re Ciprian Ltd.*,
[473 B.R. 669](#) (Bankr. W.D. Pa. 2012)

Liquor license is personal property under Pennsylvania law and a reference to "general intangibles" in the security agreement's description of the collateral was sufficient to cover the license.

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36. *Ford Motor Credit Co. v. Hicks*,
[2012 WL 1906419](#) (S.D.W. Va. 2012)
Security agreement that described the collateralized car by its correct vehicle identification number but by an incorrect model year was nevertheless effective.
37. *In re Madawaska Hardscape Products, Inc.*,
[476 B.R. 200](#) (Bankr. D.S.C. 2012)
Security agreement that described the collateral to include the debtor's property "wherever located" covered property in both Maine and South Carolina even though the security agreement also contained a representation by the debtor that, at the time the agreement was authenticated, all property was located in Maine.
38. *In re Salander-O'Reilly Galleries, LLC*,
[475 B.R. 9](#) (S.D.N.Y. 2012)
Because the loan agreement excluded goods consigned to the debtor from the borrowing base, those goods might also be excluded as collateral even though the collateral description covers all inventory.
39. *In re Grogan*,
[476 B.R. 270](#) (Bankr. D. Or. 2012)
Even if the word "permanent" in the phrase "[a]ll trees, bushes, vines and other permanent plantings" modified "trees," the description reasonably described Christmas trees to be harvested because permanent crops are still crops and are merely to be distinguished from annual crops, because the security agreement also granted a security interest in the debtor's trademarks, which referred to Christmas trees, and because the debtor's primary business was the production of Christmas trees and a reasonable inquirer would not think the language used excluded the primary source of income needed to repay the secured party's \$7 million loan.
40. *Harley-Davidson Credit Corp. v. Turudic*,
[2012 WL 3314919](#) (D. Or. 2012)
Security agreement covering "the airframe, engine(s), propeller(s), and spare parts, if applicable, being purchased, and any of the following that are purchased and financed in connection with the [Promissory] Note" does not necessarily extend to the ballast installed by the debtor after he had already purchased the aircraft because it was not clear that the ballast was "purchased and financed in connection with the [Promissory] Note."
41. *In re Brown*,
[479 B.R. 112](#) (Bankr. D. Kan. 2012)
Security agreement that referred to the collateral as "investment property," "securities," and "7,000 shares of preferred stock in Kansas Medical Center, LLC," was effective even though the debtor's interest in the LLC was a general intangible, not investment property, securities, or stock, because the property covered was objectively determinable from the description.

– Obligations Secured

42. *In re Duckworth*,
[2012 WL 986766](#) (Bankr. C.D. Ill. 2012)
Security agreement that described the secured obligation as a note executed on December 13, 2008 was effective even though the note was actually executed and dated December 15, 2008. The absence of a future advances clause in the security agreement prevented the collateral from also securing a second loan made in 2010 even though the second note expressly provided that “this Note is secured by Security Agreement dated December 13, 2008.” Although the loan documents included an Agreement to Provide Insurance, by which the debtor promised to purchase insurance to protect the secured party’s interest in the collateral, including crops, that was ineffective; pursuant to the Federal Crop Insurance Act, which preempts state law, the exclusive method by which a creditor may obtain a security interest in the proceeds of insurance provided by the Federal Crop Insurance Corporation is through an assignment accepted by the FCIC.
43. *Bank of America v. Ledgercare, Inc.*,
[2012 WL 1591800](#) (Conn. Super. Ct. 2012)
Security agreement executed in 2002 to secure an obligation on a promissory note also secured by mortgage did not cover indebtedness under 2007 line of credit despite language in security agreement purporting to cover “all indebtedness and obligations now or hereafter owing from the Debtor to the Bank of whatever kind or nature, whether presently existing or hereafter arising” because the security agreement predated the note and mortgage and the reference to future debt was necessary to cover that transaction, not the line of credit.
44. *In re Amerson*,
[2012 WL 3249603](#) (Bankr. E.D.N.C. 2012)
Summary judgment denied on whether security agreement’s dragnet clause, which provided that the collateral secured “any debt or obligation whatsoever incurred by any Borrower and payable to Secured Party” covered obligations not listed in the loan agreement’s outline of how proceeds of the collateral should be applied.

– Rights in the Collateral

45. *In re Tracy Broadcasting Corp.*,
[696 F.3d 1051](#) (10th Cir. 2012)
Although federal law prohibits a security interest from attaching to an FCC license itself, a security interest can attach to the right to receive proceeds of a future sale of the license. This right attaches upon acquisition of the license; because that occurred prepetition, § 552 of the Bankruptcy Code does not apply even if on the petition date there was no agreement to sell the license.

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46. *In re McKenzie*,
[2012 WL 4742708](#) (E.D. Tenn. 2012)
Creditor did not have a security interest in the debtor's LLC interest because the LLC operating agreement expressly provided that no member could transfer such an interest without the prior written consent of the board and that any attempted transfer without consent was void, and the creditor's evidence of *subsequent* consent did not prove that the requisite *prior* consent was given.
47. *Forman v. Carver Federal Savings Bank*,
[2012 WL 6150631](#) (Bankr. D.N.J. 2012)
Even if state public utility law requires the consent of the Board of Public Utilities to sanitation company's grant of a security interest in its sanitation collection vehicles – which it does not – that requirement is superceded by § 9-406(f)(1), and therefore each of three secured parties did acquire a security interest in the vehicles.
48. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Services, LLC*,
[723 S.E.2d 744](#) (N.C. 2012)
Whether security interest granted by freight bill processor attached to the funds provided to the processor by its clients was a question of fact not appropriate for summary judgment with respect to clients' claim for conversion against the secured party. Summary judgment was also not appropriate on secured party's bona fide purchaser defense because whether the secured party had constructive notice of the clients' ownership of the funds provided to the processor was a question of fact.
49. *Jorday, Inc. v. Burggraff*,
[2012 WL 1813436](#) (Minn. Ct. App. 2012)
Bank did not acquire security interest in amusement park equipment from newly formed corporation because even though the corporation later claimed depreciation allowance for the equipment on its tax return and the principals of the corporation represented that the corporation had acquired the equipment from the trust that had purchased it, and which they also controlled, there was no bill of sale or other document of conveyance from the trust to the corporation.
50. *Sportsman's Guide, Inc. v. Havana National Bank*,
[2012 WL 3028517](#) (C.D. Ill. 2012)
Bank that financed importer's inventory did not have security interest in goods that Chinese supplier sold and delivered to another U.S. buyer even though the importer had allegedly prepaid the supplier for the goods because the importer never obtained possession or constructive possession of the goods.

51. *In re WL Homes, LLC*,
[476 B.R. 830](#) (D. Del. 2011)

Parent corporation did not have sufficient rights in deposit account of wholly owned subsidiary to grant a security interest in the deposit account merely because it funded the deposit account, had access to it (five of the seven authorized signatories were officers of the debtor and the other two were officers of both the debtor and the subsidiary), and controlled access to the funds by requiring approval of the debtor's controller. However, the subsidiary consented to the use the deposit account as collateral because the person who signed the security agreement on behalf of the parent was also the president of the subsidiary.

52. *Oxford Street Properties, LLC v. Rehabilitation Associates, LLC*,
[141 Cal. Rptr. 3d 704](#) (Cal. Ct. App. 2012)

Bank did not have a security interest in deposit accounts holding some of the proceeds of its refinancing loan to the debtor because the funds were earmarked to pay off a previous partner, not as security for the loan, and the debtor did not have sufficient rights in the deposit accounts to grant a security interest in them. In addition, the security agreement covered only those "deposit accounts . . . arising out of, or relating to, the acquisition, development, ownership, management or use of" certain real property, and the deposit accounts in question were not such accounts.

53. *Odell v. Wallingford Mun. Federal Credit Union*,
[2012 WL 4466339](#) (Conn. Super. Ct. 2012)

Credit union's agreement with customer purporting to grant credit union a security interest in customer's deposit account could not, under 42 U.S.C. § 407(a), give credit union an interest in social security benefits deposited into account.

54. *Dragt v. Dragt/DeTray, LLC*,
[2012 WL 5342418](#) (Wash. Ct. App. 2012)

Law firm representing defendants involved in civil litigation had no security interest in funds the defendants had previously deposited into the court registry because the funds were held in *custodia legis*, making them subject to further direction of the court, and state law makes them immune from garnishment or a security interest. At most, the defendants had a contingent interest in the funds; the security interest could have attached to the funds only if the trial court awarded the funds to the defendants.

55. *Burk v. Teufel*,
[2012 WL 2798622](#) (Ariz. Ct. App. 2012)

Law firm did not have a security interest in funds garnished by its client and held in the law firm's trust account because the client later entered into a settlement agreement with the defendant releasing all claims to the funds.

56. *In re Mary Holder Agency, Inc.*,

[2012 WL 6021481](#) (Bankr. D.N.J. 2012)

Affidavit from debtor's principal that all funds in deposit account were proceeds of the debtor's real estate listing agreements, and therefore proceeds of lender's original collateral, was sufficient to defeat bankruptcy trustee's motion for summary judgment on issue of attachment; tracing evidence normally needed to identify proceeds in commingled deposits was not required given that the testimony indicated that there had been no commingling. However, because the principal had guaranteed the obligation to the lender, the affidavit was self-serving and therefore insufficient to support the lender's own motion for summary judgment; the court would hear live testimony from the principal in order to make an appropriate credibility determination.

57. *In re Buchanan Land & Cattle, Inc.*,

[2012 WL 1658296](#) (Bankr. N.D. Tex. 2012)

Because lender had a security interest in "all entitlements, rights to payment, and payments, . . . under any . . . program of the United States Department of Agriculture," post-petition checks were proceeds of prepetition collateral and thus the security interest was not cut off by § 552. That security interest was not waived by endorsing the checks to the trustee.

58. *In re Lake at Las Vegas Joint Venture, LLC*,

[2012 WL 5352976](#) (9th Cir. 2012)

Security agreement in payments due or to become due under or in connection with a specified acquisition agreement did not cover payments made post-petition because it was not proceeds of prepetition collateral and attachment was prevented by § 552 of the Bankruptcy Code.

59. *In re Premier Golf Properties, LP*,

[477 B.R. 767](#) (9th Cir. BAP 2012)

Prepetition security interest in accounts and revenues generated by debtor's golf courses, including membership initiation fees, green fees, and driving range fees, did not extend to post-petition receipts because they were neither rents nor proceeds of prepetition collateral.

– Other

60. *In re Delta-T Corp.*,
[475 B.R. 495](#) (Bankr. E.D. Va. 2012)
Because the steel sold by the debtor was identified when the debtor accepted the purchase orders therefor and was to be delivered to the purchasers without movement and without delivery of a document of title, title passed at the time of contracting. As a result, the sales generated accounts even though the purchasers paid shortly after taking possession of the steel. The debtor's bankruptcy trustee, who avoided and preserved for the estate a creditor's perfected security interest in accounts, therefore had priority over creditors who later obtained a writ of garnishment against the bank in which the sales proceeds had been deposited.
61. *In re Moye*,
[458 Fed. Appx. 385](#) (5th Cir. 2012)
Putative buyers of chattel paper consisting of retail installment contracts for vehicles did not in fact acquire any interest in the chattel paper because the buyers were not licensed as required by Texas law.
62. *Shellbird, Inc. v. Grossman*,
[2012 WL 208053](#) (S.D. Ind. 2012)
Seller that retained a security interest in show horse was entitled, after the horse's death and the buyer's default, to possession of and the right to foreclose upon the horse's frozen semen, Transport Semen Certificates, and the buyer's trademark. No discussion of whether the semen, certificates, or trademark were proceeds of the horse or otherwise covered by the security agreement.
63. *In re Vincent*,
[468 B.R. 802](#) (Bankr. E.D. Va. 2012)
Because windows and siding are ordinary building materials, creditor's alleged PMSI in the windows and siding did not continue after they were installed in the debtor's home.
64. *Sola Salon Studios, Inc. v. Heller*,
[2012 WL 5193201](#) (10th Cir. 2012)
Commercial tenant, whose lease authorized it to license the leased space to independent contractors who provided salon services but which prohibited the tenant from assigning the lease or any interest therein, could assign to its lender its rights in the licenses to the independent contractors because the restriction merely prohibited assignment of some or all of the real property interest the tenant held and the assignment to the lender did not transfer any interest in real property, merely personal property.

Perfection Issues**– Choice of Law**

65. *In re Diabetes America, Inc.*,
[2012 WL 6694074](#) (Bankr. S.D. Tex. 2012)
Even security agreement was governed by Texas law, because the debtor, a Delaware corporation, was located in Delaware, the proper place to file a financing statement was in Delaware. Secured party who filed only in Texas was unperfected.

– Method of Perfection

66. *In re Sherman*,
[2012 WL 2132379](#) (Bankr. D. Conn. 2012)
Bank's security interest in vessel documented with the National Vessel Documentation Center cannot be perfected by filing a financing statement; compliance with the Commercial Instruments and Maritime Liens Act is required to perfect. Identification of the bank – Commerce Bank, N.A. – by its similarly named predecessor – Commerce Bank/Shore, N.A. – on the preferred ship mortgage recorded with the NVDC substantially complied with the Act and was therefore sufficient to perfect the bank's security interest.
67. *In re Harbour East Development, Ltd.*,
[2012 WL 314188](#) (Bankr. S.D. Fla. 2012)
Lender that obtained mortgage on real property and security interest in fixtures and goods therein and thereon, and whose recorded mortgage served as a fixture filing, was perfected in (i) goods acquired with proceeds of other collateral, including rents, within the last 20 days; (ii) goods that are post-petition proceeds of pre-petition collateral; and (iii) goods that have become fixtures.
68. *In re Szerwinski*,
[467 B.R. 893](#) (6th Cir. BAP 2012)
Cottage built on leased land was a fixture even though it was sold through a bill of sale, not a deed, and the lease expressly provided that the cottage remained the property of the lessee. Bank's recorded mortgage that identified the property as "fixtures" adequately described the cottage and thus satisfied the requirements for a fixture filing, thereby perfecting the bank's security interest in the cottage.

69. *In re Value Investment Properties, LLC*,
[481 B.R. 403](#) (Bankr. E.D. Tenn. 2012)

Security interest in manufactured homes owned and held for sale or lease by manufactured home park needed to be perfected by filing a financing statement with the Secretary of State's office. Bank that so filed was perfected. Other lender that recorded a deed of trust, both to perfect its interest in the real property and as a fixture filing, was not perfected because the manufactured homes were not fixtures. Compliance with the Tennessee Motor Vehicle Title and Registration Law through surrender of the certificate of title is the only way for manufactured homes to become fixtures; even if the common law controlled, the homes would still not be fixtures because they could be removed at little cost and the debtor hoped to sell them all.

– Adequacy of Financing Statement

70. *In re Miller*,
[2012 WL 32664](#) (Bankr. C.D. Ill. 2012)
[2012 WL 3589426](#) (C.D. Ill. 2012)

Financing statement identifying the debtor as “Bennie A. Miller” – the name the debtor had used much of his life and on his driver's license, social security card, tax returns, and the deed to his residence – was ineffective to perfect because the debtor's legal name was the name on his birth certificate, “Ben Miller,” and a search under that name did not reveal the filing.

On appeal, reversed. The financing statement must contain the debtor's “correct name,” not “legal name” and for this purpose the name on the debtor's driver's license, social security card, and tax returns is the debtor's correct name. Moreover, the debtor had under the common law changed his name to the name on those documents, so that name was in fact his legal name when the financing statement was filed.

71. *In re Green*,
[2012 WL 5550767](#) (Bankr. D.N.M. 2012)

Even though the name on the debtor's driver's license was “Ron Green,” financing statements identifying the debtor by that name were ineffective because a search under the debtor's legal name, “Ronnie J. Green,” did not reveal the filings.

72. *In re Camtech Precision Manufacturing, Inc.*,
[471 B.R. 293](#) (S.D. Fla. 2011)

Bankruptcy court erred in ruling that filed financing statements listing additional debtors on separate paper exhibits but which did not indicate in the additional debtors box of the financing statement to look beyond the first page or use the official addendum to indicate additional debtors were inadequate to perfect security interests granted by additional debtors given that the filings were not indexed by or discoverable under the names of the additional debtors. Whether the financing statements had errors or the filing office failed to properly index the filings was a factual issue that precluded summary judgment.

73. *Bank of Nova Scotia v. Four Winds Plaza Corp.*,
[2012 WL 3064337](#) (V.I. Super. Ct. 2012)

Financing statement that identified the debtor by its registered corporate name, rather than its trade name, and which described the collateral to include “all equipment” was sufficient to perfect the security interest.

74. *In re Baker*,
[465 B.R. 359](#) (Bankr. N.D.N.Y. 2012)

Financing statement that identified collateralized cows by name and ear tag number was effective even though the tag numbers were incorrect because the names were referenced in a certificate of registration for each cow, each certificate included a sketch of the cow’s distinctive markings, and those markings were used to identify the cows. The fragility of the ear tag method of identifying cows is well known in the dairy industry and this is relevant to the searcher’s duty in reviewing a financing statement.

75. *In re Brown*,
[479 B.R. 112](#) (Bankr. D. Kan. 2012)

Financing statement that incorrectly described the collateral as “margin stock/securities (uncertificated)” and as “7.000 shares of preferred stock” in an LLC, when the debtor’s interest was really a general intangible, but which correctly identified the LLC’s address and the number of units the debtor owned, was effective because it was not seriously misleading.

76. *In re Coastal Plains Pork, LLC*,
[2012 WL 6571102](#) (Bankr. E.D.N.C. 2012)

Feed suppliers’ financing statement covering “[a]ll livestock located at” designated farms did not cover hogs located elsewhere and thus the suppliers’ agricultural lien in those hogs was not properly perfected and did not have priority over bank’s earlier perfected security interest. Summary judgment denied on the extent of the suppliers’ priority in the hogs located at the farms listed in the financing statement because factual issues remained about the acquisition price of the hogs, whether expenses for feed, transportation, shelter, and supervision should be considered in the acquisition price, whether the sales prices included hogs that did not ingest any of the unpaid-for feed, and what the sales price was for the hogs that did ingest the suppliers’ feed.

77. *In re Scotto Restaurant Group, LLC*,
[2012 WL 3070351](#) (Bankr. W.D.N.C. 2012)

Financing statement filed by lender’s agent was ineffective because, irrespective of the debtor’s subjective intent, the debtor never authorized the filing because the debtor never authenticated a security agreement. However, factual issue remained because prior to the loan the debtor merged with another borrower that may have executed a security agreement.

78. *Community Shores Bank v. Babbitt's Sport Center, LLC*,
[2012 WL 3139554](#) (Mich. Ct. App. 2012)

Secured party that sued buyer of collateral for conversion did not prove that its security interest was perfected because it never authenticated the uncertified copy of the financing statement it sought to admit into evidence. Because the buyer admitted evidence that it lacked knowledge of the security interest, the trial court properly concluded that the buyer took free of the security interest.

79. *1st Source Bank v. Wilson Bank & Trust*,
[2012 WL 4711989](#) (M.D. Tenn. 2012)

Bank that acquired security interest in trucking companies' accounts as well as their rigs but whose financing statement was limited to the rigs and the proceeds thereof was not perfected in the debtors' accounts because accounts were neither included in the collateral description in the financing statement nor proceeds of the rigs since mere use of equipment does not generate proceeds. No discussion of whether the debtors operated the rigs or leased them.

80. *BMW Financial Services, NA, LLC v. Rio Grande Valley Motors, Inc.*,
[2012 WL 4623198](#) (S.D. Tex. 2012)

Because floor plan financier's financing statement expressly covered general intangibles, it was broad enough to cover the debtor's rights under its franchise agreement. Because the debtor's settlement of its claim against the franchisor for terminating the franchise was proceeds of its franchise rights, the financier's security interest in the settlement proceeds was perfected even if the claims were commercial tort claims.

– Authorization or Effect of Termination Statement

81. *In re Hickory Printing Group, Inc.*,
[479 B.R. 388](#) (Bankr. W.D.N.C. 2012)

Security interest became unperfected when secured party mistakenly filed termination statement and did not become re-perfected when secured party filed correction statement. Subsequently filed new financing statement did re-perfect the security interest but on a date that allowed the security interest to be avoided as a preference.

82. *In re International Home Products, Inc.*,
[2012 WL 6708431](#) (Bankr. D.P.R. 2012)

Secured party remained perfected despite debtor's filing of termination statement because that filing was unauthorized. Thus, the secured party was entitled to proceeds of accounts on which it had "foreclosed" prepetition by instructing the account debtors to make payment to the secured party.

– Control

83. *Smith v. Powder Mountain, LLC*,
[2012 WL 5262638](#) (11th Cir. 2012)

Creditor that received court order awarding it the debtor's securities accounts and then reached agreement with securities intermediary on how to transfer the entitlements did have control under § 8-106(d)(2) sufficient to defeat the rights of intervening garnishor even though the intermediary's agreement was conditioned on receipt of additional documentation because control can exist even though subject to a condition other than the debtor's consent. As a result, the creditor was a protected purchaser with priority over the garnishor.

– Collateral Covered by a Certificate of Title

84. *In re Jackson*,
[287 P.3d 986](#) (Okla. 2012)

Bank's proper financing statement perfected its security interest in horse trailer for which a certificate of title was properly issued – but not required – and which did not note the bank's lien.

85. *In re Klein*,
[2012 WL 6680308](#) (Bankr. E.D. Mich. 2012)

Secured party whose lien was properly noted on application for corrected certificate of title but which, because of an error by the Michigan Secretary of State's office, was not noted on the certificate issued pursuant to the application was perfected even though the application was on an outdated form bearing the name of the previous Secretary of State and did not list the number of miles on the vehicle's odometer because the defects were technical and minor and thus the application substantially complied with the law.

86. *In re Godsey*,
[2012 WL 86778](#) (Bankr. E.D. Ky. 2012)

Certificate of title that misidentified the secured party's name and address was ineffective to perfect even though secured party submitted a proper title lien statement and the certificate referred to the file number of that statement.

87. *In re Pierce*,
[471 B.R. 876](#) (6th Cir. BAP 2012)

Security interest in mobile home was not perfected because the secured party failed to file the title lien statement in the county where the debtor resides, as required by Kentucky law, even though, as a result of the filing elsewhere, the security interest was noted on the certificate of title for the mobile home.

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88. *Brenner Financial, Inc. v. Cinemacar Leasing*,
2012 WL 1448048 (N.J. App. Div. 2012)
New Jersey certificate of title for limousine that identified the lessor as owner perfected the lessor's interest, which was in reality a security interest, and subsequent Michigan certificate of title that failed to list the lessor and instead listed the security interest of a different lender neither destroyed the lessor's perfection nor perfected the lender's interest because the Michigan title was void, apparently due to the debtor's fraud in procuring the Michigan title.
89. *In re Mouton*,
479 B.R. 55 (Bankr. E.D. Ark. 2012)
Security interest of lender that was properly noted on Illinois certificate of title became unperfected when, upon receiving payment that later failed to clear, lender signed the certificate to release its lien and sent the certificate to the debtor even though the debtor never submitted the certificate to any state agency to have the vehicle re-titled.
90. *In re Hoffman*,
2012 WL 3070437 (Bankr. E.D. Tex. 2012)
Even if the debtor had standing to assert the trustee's strong arm powers, the debtor could still not avoid secured party's lien on vehicle because the lien was properly noted on the vehicle's certificate of title; use of an assumed name for the secured party does not undermine perfection even though the secured party failed to file an assumed name certificate with the county clerk.
91. *In re Gannon*,
461 B.R. 869 (Bankr. D. Kan. 2012)
Pursuant to § 9-316(d), a security interest in a boat perfected by a financing statement filed in Kansas remained perfected even after Oklahoma issued a certificate of title for the boat that did not indicate the security interest. Although §§ 9-316(e) and 9-337 protect some purchasers in such a situation, a bankruptcy trustee with the status of a lien creditor is not a purchaser.
92. *In re Medcorp, Inc.*,
472 B.R. 444 (Bankr. N.D. Ohio 2012)
Bank's security interest in ambulance company's vehicles was unperfected because it was neither indicated on the certificates of title nor, for vehicles for which no written certificate was issued, noted by the clerk of a court of common pleas into the automated title processing system. The bank's replacement lien granted by the cash collateral order did not insulate the bank's interest from avoidance because it expressly provided that the replacement lien extended only "to the same extent, validity, enforceability, perfection and priority" as the prepetition security interest.

93. *In re Negus-Sons, Inc.*,

[2012 WL 1110026](#) (Bankr. D. Neb. 2012)

Lender's perfected security interest in welder attached to truck remained perfected even though lender did not get its interest noted on the certificate of title for the truck. However, the lender's security interest in a service body and crane attached to truck by seller was not perfected by the lender's subsequent amendment to its financing statement referencing accessions.

– Other

94. *Operating Engineers Local 139 Health Benefits Fund v. Huml Contractors Inc.*,

[2012 WL 664494](#) (E.D. Wis. 2012)

Perfection of insider's security interest years after it attached and when the debtor was insolvent was not a fraudulent transfer done with intent to hinder, delay or defraud a creditor because the insider credibly testified that he was previously unaware of the need to perfect and shortly after he perfected he informed the main other creditor of his security interest, thus evidencing that he was not hiding his security interest.

95. *In re Miller Brothers Lumber Co., Inc.*,

[2012 WL 1601316](#) (Bankr. M.D.N.C. 2012)

Secured party whose filing lapsed during the debtor's bankruptcy case lost perfection and therefore the debtor in possession could avoid the security interest.

96. *Signature Credit Partners, LLC v. Casaic Offset & Silkscreen, Inc.*,

[2012 WL 1999494](#) (W.D. La. 2012)

Purchase-money security interest became unperfected and lost priority to previously perfected competing security interest when continuation statement submitted by secured party's agent was improperly rejected by the filing office. Louisiana did not enact § 9-516(d) and has a non-uniform version of § 9-516(a), and thus filings are not effective upon presentation with the applicable fee.

97. *Joseph P. Galasso, Jr., Revocable Living Trust v. Surveybrain.com, LLC*,

[2012 WL 1698411](#) (Mich Ct. App. 2012)

Perfection of security interest lapsed because the secured party filed a continuation statement more than six months before the expiration of the 5-year effectiveness period of the filed financing statement. Court then erroneously concluded that secured party no longer had a security interest.

– **Bogus Filings**

98. *United States v. Reed*,
[668 F.3d 978](#) (8th Cir. 2012)
Criminal defendant who filed fraudulent financing statement against judge and prosecutor was properly convicted of violating 18 U.S.C. § 1521.
99. *United States v. Uptergrove*,
[2012 WL 639482](#) (E.D. Cal. 2012)
Taxpayer's financing statements filed against federal court clerks declared to have no legal effect and filing office ordered to expunge them. Taxpayer enjoined from filing financing statements without validity or basis in law or fact.

Priority Issues

– **Tax Liens**

100. *In re Reitter Corp.*,
[475 B.R. 314](#) (D.P.R. 2012)
IRS has priority over previously perfected security interest in any accounts generated by the debtor more than 45 days after the notice of federal tax lien was filed.
101. *United States v. Montesinos*,
[2012 WL 4054132](#) (S.D.N.Y. 2012)
Notice of federal tax lien against Israel Montesinos which misspelled his first name as "Isreal" was nevertheless valid against mortgagee because it was indexed in a real property system that permitted searching by last name, by last and partial first name, by partial last name and partial first name, or with a "sounds like" feature that captures names spelled differently but that sound similar to the name being searched, and thus a reasonably diligent searcher would have discovered the notice.

– **Buyers of Goods**

102. *State Bank of Cherry v. CGB Enterprises, Inc.*,
[964 N.E.2d 604](#) (Ill. Ct. App. 2012)
Because strict compliance with the notice rules of the Food Security Act is required for a secured party to retain a security interest in farm products sold to a buyer, a notice that failed to identify the counties in which the farm products were grown or located was ineffective even though the notice stated that it covered "farm products wherever located."

103. *CNH Capital America LLC v. Progreso Materials Ltd.*,
[2012 WL 5305697](#) (S.D. Tex. 2012)

Secured party was not entitled to summary judgment that its interest was superior to that of the buyer of a wheel loader. Of the two buyers listed on the sales agreement – an individual and a partnership – the individual may not have been acting in his individual capacity and thus may not have acquired rights in the loader. While the partnership did have rights in the loader, and did grant a security interest to the secured party, its name was misspelled on the secured party's financing statement and would not have been disclosed in response to a search under the partnership's correct name. Factual issues remained as to whether the buyer knew of the security interest.

104. *In re Printz*,
[478 B.R. 876](#) (Bankr. N.D. Ill. 2012)

Although lender perfected its security interest in the debtor's crops, the lender failed to strictly comply with the notice provisions of the Food Security Act and thus a grain elevator operator, which purchased the debtor's corn in the ordinary course of business, took free of the lender's perfected security interest in the debtor's crop. However, the buyer could not setoff against its obligation to pay for the corn unrelated obligations that the debtor owed to the buyer because the Food Security Act allows the buyer to take free of the lien on the crops, not the lien on the proceeds of the crops, and § 9-404(a) does not apply because the lender was not an "assignee" of the debtor's accounts.

105. *CIT Group/Commercial Services, Inc. v. Constellation Energy Commodities Group*,
[2012 WL 4603049](#) (E.D. Ky. 2012)

Buyer of coal from debtor/coal merchant was a buyer in ordinary course of business that took free of factor's security interest in inventory because even though the termination clause of the master sales agreement permitted the buyer to setoff the purchase price against liquidated damages for the seller's breach, termination had not occurred prior to the sales transactions and thus the buyer did not acquire the goods in satisfaction of a money debt. The buyer did not act in bad faith or know that its purchases violated the factor's rights because the buyer did not even know that the factor had a security interest in the debtor's inventory.

106. *Wells Fargo Bank v. Associated Dealers, Inc.*,
[2012 WL 666651](#) (Tex. Ct. App. 2012)

Buyer of manufactured home from dealer was a buyer in ordinary course of business under Texas Manufactured Housing Standards Act even though the dealer's distributor retained possession of the manufactured home and the manufacturer's certificate of origin and thus the buyer took free of all security interests in the manufactured home. Accordingly, the buyer's secured party was the only secured party and had priority over the rights of the distributor and the distributor's secured party.

107. *Hockensmith v. Fifth Third Bank*,
[2012 WL 5309146](#) (S.D. Ohio 2012)
[2012 WL 5969654](#) (S.D. Ohio 2012)

Magistrate recommended summary judgment in favor of buyer of classic automobiles, concluding that the buyer qualified as a buyer in ordinary course of business, and therefore took free of the security interest in the seller's inventory financier, because even though the seller retained possession and there were no sales agreements or bills of sale, the buyer was listed on the certificates of title, had paid for the vehicles, and had the right to possession.

District court rejected the recommendation, concluding that a reasonable jury could conclude that: (i) the secured party's security interest was perfected by its filed financing statement, (ii) the buyer did not take free as a buyer in ordinary course because the buyer did not give value, the buyer did not have possession or the right to possession because the goods had been left with the seller for resale, or the buyer purchased the goods not from the dealer but from third parties with the dealer acting as the buyer's purchasing agent, and thus the security interest was not created by the buyer's seller; or (iii) the transfer of title to the buyer was done with intent to hinder, delay, or defraud the secured party.

108. *Arthur Glick Truck Sales, Inc. v. Stuphen East Corp.*
[2012 WL 6592343](#) (S.D.N.Y. 2012)

Although buyers of fire trucks did not receive delivery until after the supplier that had consigned the chasses to the seller had perfected its security interest – and thus they did not take free under § 9-317 – they were buyers in ordinary course of business and took free under § 9-320(a). The fact that the supplier retained the certificates of title to the chasses was immaterial. The buyers did not lack good faith because of their failure to research title to the chassis because, even had they done so and discovered the supplier possessed the certificates, that discovery would not have suggested that the seller lacked authority to validly sell the chasses.

109. *In re Taylor*,
[2012 WL 2320898](#) (Bankr. E.D. Ky. 2012)
[2012 WL 2325659](#) (Bankr. E.D. Ky. 2012)

Buyer of heavy equipment from landscaper was not a buyer in ordinary course of business and took the equipment subject to a perfected security interest regardless of whether the buyer was aware of the security interest and despite the seller's promise to use the sale proceeds to pay the secured obligation.

110. *Burnett v. Sullivan*,
[2012 WL 4226404](#) (S.D. Fla. 2012)

A buyer in ordinary course of business can take free of a properly documented preferred ship mortgage because federal law does not preempt Article 9's protections for buyers but factual issue remained about whether purchaser qualified as a buyer in ordinary course of business given that the prior owner was not himself a retailer but had sold the vessel through a dealer.

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111. *Dawson v. Fifth Third Bank*,
[965 N.E.2d 730](#) (Ind. Ct. App. 2012)
Buyers of motorcycle did not take free of security interest that was noted on missing certificate of title even though they were presented with earlier issued duplicate certificate that did not indicate the security interest.
112. *La Gar Marketing, Inc. v. W. Finance & Lease, Inc.*,
[2012 WL 4898785](#) (Ohio Ct. App. 2012)
Buyer of vehicle – even if qualifying as a buyer in ordinary course of business – had no standing to pursue claim against the seller’s secured party for repossessing and selling the vehicle because the buyer was not identified as an owner of the certificate of title.
113. *Hilty Family Ltd. Partnership, LP v. Scott*,
[379 S.W.3d 883](#) (Mo. Ct. App. 2012)
Above-ground irrigation system situated on farmland was a fixture, and thus the buyer of the real estate acquired an interest in the irrigation system. The buyer’s interest was superior to the rights of the assignee of the lender that provided purchase-money financing for the irrigation system because the lender did not make a fixture filing and the financing statement the lender filed with the Secretary of State’s office incorrectly identified the debtor as “Deepwater Seed Farm, LLC” instead of “Deepwater Seed Farms, LLC,” and a search under the debtor’s correct name did not disclose the financing statement.
114. *Great Plains National Bank v. Mount*,
[280 P.3d 670](#) (Colo. Ct. App. 2012)
Cattle that Oklahoman debtor purchased from supplier in Missouri and resold the day after receipt to a buyer in Colorado were “produced in” Oklahoma within the meaning of the Food Security Act and therefore the buyer that did not register in Oklahoma took subject to the security interest of a bank that had an effective financing statement in Oklahoma. The statutory reference to where the farm products were “produced” deals with the location from which they were sold, not their geographic origin.
115. *In re Eastern Livestock Co.*,
[2012 WL 4933294](#) (Bankr. S.D. Ind. 2012)
Bank that held a security interest in seller’s cattle but which did not comply with the notification provisions of the Food Security Act was not entitled to summary judgment awarding it the proceeds paid by the buyer’s resale buyer because the original buyer might have qualified as a buyer in ordinary course of business under the FSA despite that fact that the original buyer was engaged in a massive check kiting scheme and paid the seller with a check that was later dishonored. It is unclear whether the FSA requires a buyer to act in good faith to qualify as a buyer in ordinary course of business.

116. *Madison Capital Co., LLC v. S & S Salvage, LLC*,
[2012 WL 6051843](#) (6th Cir. 2012)

Secured party with security interest in mining company's metal shields had no claim for conversion against scrap metal buyer or subsequent purchaser because the secured party did not bring its claim within two years of when the cause of action accrued. For this purpose, a cause of action accrued when the sale occurred, not when the secured party demanded return of the collateral. Even if the cause of action did not accrue until the secured party discovered or should have discovered the sale – and that rule did not apply in this case because there was no fraudulent concealment – the secured party was aware of the need to investigate a possible conversion of the shields more than two years before bringing suit.

– Competing Security Interests

117. *In re Brooke Capital Corp.*,
[2012 WL 4793010](#) (Bankr. D. Kan. 2012)

Agreement between two secured parties by which the senior lienor agreed to pay the proceeds of the collateralized stock to the junior lienor was an enforceable subordination agreement even though the economic assumptions underlying the agreement proved not to be correct because those assumptions were not made conditions to the subordination. Whether the subordination was binding on the three entities that acquired participations in the senior lienor's loan was moot because those interests were really loans to the senior lienor – given that the senior retained the risk of loss – and therefore those entities could not rely on the senior lienor's perfection. Because those entities had taken no action to perfect their interests, their interests were subordinate to the junior lienor's rights. In contrast, the fourth participant was a true buyer of a portion of the senior lienor's loan and thus its interest was perfected. Moreover, the subordination agreement was not binding on the fourth participant even though the senior lienor remained the servicer of the entire loan because the participation agreement required the participant's consent to any substitution of collateral outside the normal course of dealing with the borrower.

118. *First Financial Bank v. GE Commercial Distribution Finance Corp.*,
[2012 WL 1340312](#) (S.D. Ohio 2012)

Secured party with a PMSI in inventory watercraft had priority over a lender with a previously perfected security interest because the lender received the secured party's notification of planned PMSI inventory financing, that notification, though unsigned, was authenticated because it was on the secured party's letterhead, and the notification sufficiently described the collateral as including "new and used boats."

119. *Great Plains National Bank v. Mount*,
[280 P.3d 670](#) (Colo. Ct. App. 2012)

Bank that had a perfected security interest in Oklahoman debtor's cattle had priority under § 9-322 over PMSI granted by the debtor's Colorado buyer because the bank's security interest attached prior to the debtor's sale and the bank re-filed in Colorado against the original debtor shortly after the sale. The buyer's secured party did not have priority under § 9-324(d) because the buyer did not take free of the bank's security interest under § 9-320 and because the secured party neither perfected before the buyer acquired possession nor gave notification to the bank.

120. *Peoples Trust & Savings Bank v. Security Savings Bank*,
[815 N.W.2d 744](#) (Iowa 2012)

Bank with the earlier perfected security interest in debtor's cattle had priority over lender with subsequently perfected security interest granted by the debtor and a co-borrower because the co-borrower was merely a commission agent, not a joint venturer, and did not have an ownership interest in the cattle, and thus the bank's interest attached to the cattle and its proceeds. Even if the bank, by its conduct, authorized the debtor to sell the cattle free of its security interest, that conduct would not waive the bank's security interest in the proceeds of the cattle.

121. *Union Bank Co. v. Heban*,
[2012 WL 32102](#) (Ohio Ct. App. 2012)

Trial court erred in ruling that a financing statement must relate to a specific note or indebtedness of the debtor; bank's filed financing statement was effective to perfect subsequent secured transactions and to give bank priority over intervening secured party.

122. *Commercial Capital Bank v. House*,
[2012 WL 220214](#) (W.D. La. 2012)

Secured party who perfected security interest in equipment in 1997 and twice filed timely continuation statements – as well as new financing statements for additional secured loans – had priority over subsequent creditor with security interest perfected in 2003 because, even though the original secured party's first loan was paid off, that security agreement covered future advances.

123. *In re Gage's Long Creek Marina, Inc.*,

[2012 WL 6138489](#) (Bankr. W.D. Mo. 2012)

Secured party with security interest in promissory note to secure a line of credit, and which perfected its security interest both by taking possession of the note and filing a financing statement, had priority in the debtor's bankruptcy claim against the maker of the note over two purchasers of that claim because the claim was based on the note. The secured party's priority extended to attorney's fees incurred after the purchases of the claim because the security agreement expressly covered all modifications to the line of credit note and the secured party and debtor modified that note to cover those attorney's fees. The first purchaser of the claim had priority over the second purchaser because, after the first purchase, the debtor no longer had any rights in the claim to assign.

124. *Pair A Dice Farms, Inc. v. InSouth Bank of Covington*,

[2012 WL 6119847](#) (Miss. Ct. App. 2012)

Bank that had a perfected a security interest in the borrower's rights to future payments under governmental agricultural assistance programs had priority over lessors of farm land who had an unperfected agricultural lien. The bank did not hold the government payments in constructive trust for the lessors because there was no evidence that the bank had a confidential relationship with the lessors or that it abused the lessor's confidence. The bank was not unjustly enriched by receipt of the payments.

125. *Dayka & Hackett, LLC v. Del Monte Fresh Produce N.A., Inc.*,

[269 P.3d 709](#) (Ariz. Ct. App. 2012)

Prior to amendments in 2009, Mexican law did not generally require a filing as a condition to a security interest obtaining priority over the rights of a lien creditor – something to be assessed in general, not on a collateral-specific basis – and thus secured party that filed in the District of Columbia against Mexican debtors' grape crop had priority over secured party that recorded in Mexico. Junior secured party, which had sold the crop, was liable for conversion because a senior secured party is entitled to possession even if it does not demand possession, although such a demand was in fact made. The fact that the junior secured party also acted as the debtor's distributor, and therefore had recoupment rights with the respect to the sale proceeds was irrelevant.

126. *Banner Bank v. First Community Bank*,

[854 F. Supp. 2d 846](#) (D. Mont. 2012)

Bank with a perfected security interest in all of the debtor's assets was entitled to the proceeds of some tanks that the debtor had sold and which proceeds the debtor had paid to another lender that had provided bridge financing to help reduce the loan to the bank. The bank had priority in the tanks sold, even if the other lender had a security interest in them at all, and the other lender did not take free under § 9-332 because it colluded with the debtor in violating the bank's rights.

127. *Metropolitan Bank & Trust Co. v. Desert Valley Financial LLC*,
[2012 WL 6082400](#) (9th Cir. 2012)

Trial court did not err in ruling that secured party with a security interest in chattel paper perfected by filing had priority under the pre-revision version of Article 9 over a subsequent purchaser that took possession because the purchaser, which had the burden of proof on whether it acquired the chattel paper with knowledge of the prior security interest, failed to prove that it acted without knowledge given that it admitted that it acquired knowledge at some time but failed to state when and, in conducting due diligence, it might have seen the security agreements that identified the encumbered chattel paper.

128. *Caterpillar Financial Services Corp. v. Peoples National Bank*,
[2012 WL 2520922](#) (S.D. Ill. 2012)

Although the debtor may have retained some rights in equipment previously transferred to a special purpose entity that pledged it as collateral, the bank claiming a later security interest from the debtor failed to produce an authenticated security agreement, merely a financing statement. Accordingly, the bank was liable to the secured party of the special purpose entity for converting the collateral by selling it after the secured party demanded possession.

129. *In re Wilkinson*,
[2012 WL 1192780](#) (Bankr. N.D.N.Y. 2012)

Creditor's security interest that was perfected by a filing that lapsed during the debtor's bankruptcy proceeding retained priority over the perfected security interest of another creditor because bankruptcy law fixes priority as of the petition date.

130. *In re Salander-O'Reilly Galleries, LLC*,
[475 B.R. 9](#) (S.D.N.Y. 2012)

The law of the jurisdiction in which the consignee is located, not the law chosen in the consignment agreement, governs the priority between the consignor and the consignee's inventory lender and the priority between the consignor and the consignee's bankruptcy trustee.

– Other

131. *RDLF Financial Services, LLC v. Esquire Capital Corp.*,
[950 N.Y.S.2d 610](#) (N.Y. Sup. Ct. 2012)

Junior secured party that received payment from debtor out of cash proceeds of the collateral that had been deposited into a commingled deposit account took free under § 9-332(a) of any claim of the senior secured party because there was no allegation that the junior secured party had colluded with the debtor to violate the rights of the senior secured party. Court also suggested that the commingling rendered the proceeds unidentifiable.

132. *American Bank v. Cornerstone Community Bank*

[2012 WL 5195804](#) (E.D. Tenn. 2012)

Under the common law, security interest of insurance premium financier in funds wired to broker for payment of premium was superior to the banker's lien of the depository, which swept the funds out of the deposit account to cover the broker's debts because the premium financier's lien was first in time and the funds were special deposits to which no banker's lien attached.

133. *Leesburg Federal Savings Bank v. McMurray,*

[2012 WL 5897608](#) (Ohio Ct. App. 2012)

Garage that began storing classic car was not entitled to a common-law artisan's lien on the car for the storage expense because such a lien applies only if garage imparts or confers value on the vehicle and while the garage's storage may have helped preserve the car's value, it did not impart or confer value. The garage was entitled to a lien for the improvements it made after a lender acquired and perfected a security interest in the car, but that lien was junior to the security interest under § 9-317. No discussion of § 9-333.

134. *M & I Marshall & Ilsley Bank v. Kinder Morgan Operating L.P.,*

[368 S.W.3d 160](#) (Mo. Ct. App. 2012)

Perfected security interest in warehoused coal was junior to earlier warehouse lien, even though some or all of the originally warehoused coal had been replaced with new coal after the security interest was perfected. However, perfected security interest had priority over subsequent warehouse lien; the fact that the secured party may have benefitted by the warehouseman's storage of the goods did not give the warehouseman priority and storage of the goods was not an entrustment.

135. *In re Naknek Electric Association, Inc.,*

[471 B.R. 225](#) (Bankr. D. Alaska 2012)

Statutory mining lien on rig for work performed in connection with exploratory geothermal well has priority over previously perfected security interest because the secured party did not, prior to the work being performed, record its interest in the recording district where the property is located.

136. *Mill Creek Lumber & Supply Co. v. First United Bank and Trust Co.,*

[278 P.3d 12](#) (Okla. Ct. Civ. App. 2012)

Because Article 9 does not apply to a lien on ordinary building materials incorporated into an improvement on land, it did not govern relative priority of materialman's statutory lien and mortgage lien.

137. *RMB Fasteners, Ltd. v. Heads & Threads Intern., LLC*,
[2012 WL 401490](#) (N.D. Ill. 2012)

Seller of goods that sent § 2-702 reclamation demand within ten days after the buyer received them was entitled to the goods over the objection of the buyer's secured creditor because the secured party waived its rights by failing to object at the hearing when all parties agreed that the goods were properly subject to reclamation.

138. *Bank of Beaver City v. Barrett's Livestock, Inc.*,
[2012 WL 5334761](#) (Okla. 2012)

Bank with security interest in all of debtor's existing and after-acquired cattle had priority over rights of unpaid cattle seller because the bank's decision to terminate funding and dishonor the debtor's checks to the seller, knowing that the debtor owed the seller for the cattle, did not prevent the bank from being a good faith purchaser under § 2-403.

139. *Bode v. State*,
[2012 WL 759203](#) (Alaska Ct. App. 2012)

Secured party's security interest in airplane could be forfeited to the state as a result of the debtor's criminal activity because the secured party was aware of the debtor's history of using the airplane to violate the law in ways that might lead to forfeiture and thus did not qualify for the innocent owner/creditor defense, even if the secured party did not have reason to believe that the debtor, her son, would re-offend.

140. *U.S. v. 2008 Ford Expedition SUV*,
[2012 WL 6115655](#) (S.D. Tex. 2012)

Seller that might have retained an unperfected security interest in the vehicle sold when outside financing fell through could qualify as an innocent owner and therefore have a defense against forfeiture arising from the buyer's use of the vehicle to transport a controlled substance.

141. *United States v. Huntington National Bank*,
[682 F.3d 429](#) (6th Cir. 2012)

Bank with a security interest in a deposit account it maintained was a bona fide purchaser of the deposit account under federal forfeiture statute, 21 U.S.C. § 853(n)(6)(B), even though a deposit account is an intangible asset.

142. *United States v. \$463,497.72*,

[853 F. Supp. 2d 675](#) (E.D. Mich. 2012)

Pharmaceutical supplier that had a security interest in the bank accounts of its customer pharmacy that had diverted controlled substances for unlawful purposes was entitled to the innocent owner defense to forfeiture because, even if the supplier was negligent in monitoring its customer, the supplier's employees had no knowledge of the illegal activity, had reported suspicious orders of controlled substances, and had credible explanations why the spike in the orders for some controlled substances did not provoke additional suspicious order reports or suspension of shipments, and thus the supplier was not willfully blind to the illegal diversions.

143. *In re Willis Enterprises, Inc.*,

[478 B.R. 388](#) (Bankr. D. Id. 2012)

Bank waived its banker's lien on deposited funds by voluntarily releasing them to the depositor's bankruptcy trustee and then failing to claim a right to them for five months. While the deposited funds might have been proceeds of the bank's consensual security interest in accounts receivable, the bank offered no evidence to trace the funds to its collateral in order to identify them as proceeds.

144. *Walmart Stores, Inc. v. First American Corp.*,

[2012 WL 3957184](#) (S.D.N.Y. 2012)

Buyer of accounts that filed proper financing statement against the debtor/seller had priority over a judgment creditor who subsequently served writ of garnishment on an account debtor even though the judgment creditor was a holder in due course of a check drawn by the debtor because the check gave the judgment creditor no rights in the debtor's accounts.

145. *Trustees of Iron Workers' Local No. 25 Pension Fund v. Municipal & Indus. Storage, Inc.*,

[2012 WL 4368367](#) (E.D. Mich. 2012)

Lender with a perfected security interest in corporation's accounts had priority in the proceeds of those accounts over the rights of union that obtained writs of garnishment against the account debtors in an effort to collect unpaid fringe benefits because the accounts became subject to the security interest as soon as the account debtors became obligated to the debtor, which occurred before the debtor failed to pay fringe benefits and the debtor's assets allegedly became subject to a trust in favor of the union.

146. *Pacific Tomato Growers, Ltd. v. Tanimura Distributing, Inc.*,
[2012 WL 5899417](#) (C.D. Cal. 2012)

In the Ninth Circuit, a factor that engages in a commercially reasonable purchase of accounts from a produce wholesaler takes free of a PACA trust on the wholesaler's assets regardless of whether the purchase is a true sale or a secured loan. Because the factor paid 80% of the face amount of the accounts purchased and the transaction allowed the wholesaler to convert into cash accounts that were not payable for 30 days and which might be uncollectible, cash that could have been used to immediately pay the PACA beneficiaries, the transaction did not violate the PACA trust imposed on the purchased accounts. Accordingly, the factor had no liability to the PACA beneficiaries.

147. *In re Yarnell's Ice Cream Co., Inc.*,
[469 B.R. 823](#) (Bankr. E.D. Ark. 2012)

Seller of frozen strawberries did not comply with PACA because its invoices, although stating that the seller retains a trust claim "over the commodities sold" until full payment is received, did not state that the seller retains a trust claim over "all inventories of food or other products derived from these commodities," as required by § 4. As a result, the seller was not protected by PACA against the buyer's secured party with respect to the proceeds of the strawberries.

148. *In re Superior Tomato-Avocado, Ltd.*,
[481 B.R. 866](#) (Bankr. W.D. Tex. 2012)

Seller of produce who did not become a PACA licensee, and therefore could not rely on § 4 of PACA, nevertheless was entitled to included priority under PACA because it substantially complied with § 3 by including on each invoice to the debtor a statement that the commodities listed on the invoice were sold subject to a PACA trust and substantial compliance is all that is needed.

149. *Baginski Potato Co. Ltd. v. Custom Cuts Fresh LLC*,
[2012 WL 2370437](#) (E.D. Wis. 2012)

Putative secured party did not have priority in collateral acquired by the debtor before the PACA claimant entered into a PACA transaction with the debtor because all assets of a produce buyer such as the debtor buyer are presumed to be part of a PACA trust unless it is shown that: (1) no PACA trust existed when the asset in question was purchased; (2) the asset was not purchased with PACA trust assets; or (3) subsequent to purchasing the asset, the produce buyer paid all suppliers in full, thereby terminating the PACA trust. In this case, the assets were purchased with funds derived from the sale of produce and there was never a time when all PACA creditors were paid in full.

150. *First National Bank v. Profit Pork, LLC*,
[820 N.W.2d 592](#) (Minn. Ct. App. 2012)
Because the supplier of feed to the debtor pig farmer had a production input lien on the pigs, not a feeder's lien, under the applicable state statute the supplier's lien was inferior to the security interest of the farmer's secured lender. Because the supplier acknowledged that the fair market value of the pigs was insufficient to satisfy the bank's security interest, the supplier had no cause of action against the bank for disposing of the pigs in an allegedly commercially unreasonable manner.
151. *Westlake Styrene, LLC v. United States*,
[2012 WL 2133550](#) (S.D. Tex. 2012)
Bank that acquired security interest in corporate debtor's accounts and filed a financing statement in Texas, where the debtor was incorporated, before judgment creditor sought to garnish the account debtor, had priority.
152. *Attorney's Title Guaranty Fund, Inc. v. Town Bank*,
[2012 WL 6028247](#) (Was. Ct. App. 2012)
Judgment creditor that obtained and served on the debtor an order for supplemental proceedings had priority under Wisconsin law over a lender's subsequently acquired interest in the judgment debtor's interest in the proceeds of the debtor's legal malpractice case, even though the supplemental commissioner never filed the order with the town clerk, and thus the judgment creditor's lien was a secret one.
153. *Granite Commercial Industries, LLC v. Landmark American Insurance Co.*,
[2012 WL 6622683](#) (E.D.N.Y. 2012)\
Secured party with a perfected security interest in the debtor's equipment had priority over the debtor's attorney in the proceeds of the debtor's insurance claim for damage to the equipment even though the attorney brought the action against the insurer and was entitled to a charging lien on the proceeds. The secured party's security interest was first in time and the attorney had constructive and actual knowledge of that interest.

Enforcement Issues

– Default

154. *GMAC v. Everett Chevrolet, Inc.*,
[2012 WL 3939863](#) (Wash. Ct. App. 2012)
Secured party whose security agreement provided that the secured obligation was due on demand had no duty of good faith to avoid exercising the right to demand payment.

155. *CGI Finance, Inc. v. C and V Sportfishing, LLC*,
[2012 WL 5077139](#) (S.D. Fla. 2012)

Lender with security interest in boat had shown that it had probable cause to believe that the prospect of payment was significantly impaired, giving rise to a default, because the debtor had a long history of late payments, his credit score was below 600, he failed to comply with offer to cure, and in the hours prior to the repossession, he told the lender that he had been forced to sell some of his real estate holdings, had lost \$1 million in various investments, and was unwilling to take on any additional obligations. Lender had not proven default based on alleged unauthorized use of the boat, failure to pay storage charges for the boat, refusal to allow inspection of the boat, or failure to maintain the condition of the boat.

156. *Goia v. CitiFinancial Auto*,
[2012 WL 6013206](#) (11th Cir. 2012)

Even if the debtor on auto loan had insured the vehicle for its full value, the debtor nevertheless defaulted by failing to provide proof that the secured party was listed as the loss payee. Accordingly, the secured party had the contractual right to procure insurance and to charge the debtor for the cost thereof.

157. *WestLB AG v. BAC Florida Bank*,
[2012 WL 4473445](#) (S.D.N.Y. 2012)

Lender with a security interest in mortgage loans did not state a claim for breach of contract against borrower or loan servicer in connection with their renting, rather than selling, foreclosed real estate. The servicing agreement, which gave the borrower authority to direct how dispositions were conducted, subject to the lender's consent, spoke only to sales of the foreclosed properties and thus did not require the lender's consent in connection with leases of the properties.

– Waiver, Estoppel & Other Defenses

158. *Zorin Properties, LLC v. Denney*,
[2012 WL 751978](#) (Ky. Ct. App. 2012)

Secured party that sent to the debtor notification of his intention to repossess the collateral on a specified date did not thereby waive the right to repossess earlier. Neither the security agreement nor the law required notification of repossession and the security agreement expressly provided that no notice to the debtor would entitle the debtor to further notice in the future. The notification was a courtesy and did not create a course of dealing that overrode the express terms of the security agreement.

159. *JPMorgan Chase Bank v. Jeffco Cinnaminson Corp.*,
[2012 WL 996617](#) (N.J. Super. Ct. App. Div. 2012)

Summary judgment in favor of secured party reversed because debtor and co-borrower may have an impairment of collateral defense based on secured party's release of its lien on two vehicles upon receipt of subsequently dishonored payoff checks from consignee.

160. *Paladin Shipping Co. Ltd. v. Star Capital Fund, LLC*,
[2012 WL 4465209](#) (11th Cir. 2012)

Secured party that sued on promissory note after the debtor surrendered the collateral – his 50% interest in a vessel in which the secured party owned the other half – was entitled to summary judgment for the full amount of the debt because the debtor bore but failed to satisfy the burden of proving the value of the collateral surrendered as part of his affirmative defense of payment.

– Replevin & Repossession

161. *Harley-Davidson Credit Corp. v. Monterey Motorcycles, Inc.*,
[2012 WL 1309151](#) (N.D. Cal. 2012)

Lender with purchase-money security interest in motorcycle dealer's inventory was entitled, *ex parte*, to temporary restraining order enjoining the dealer from selling any collateral due to evidence that, after selling some inventory out of trust and agreeing not to do so further, the debtor continued to surreptitiously sell inventory out of trust and use the funds to pay other creditors.

162. *All Points Capital Corp. v. B.C.A. Leasing Ltd.*,
[950 N.Y.S.2d 490](#) (N.Y. Sup. Ct. 2012)

Lender with security interest in auto dealer's inventory, as well as a mortgage on real property, was not entitled to a preliminary injunction awarding it possession of the inventory because even though the lender had established a likelihood of success on the merits based on the auto dealer's admitted default on the loan, the lender had not shown that it will suffer irreparable injury without injunctive relief. Moreover, such an injunction would interfere with the auto dealer's ability to sell inventory, which would enhance its ability to repay the debt.

163. *De Lage Landen Financial Services, Inc. v. Tri State Crane Rental Corp.*,
[2012 WL 484244](#) (D. Me. 2012)

Secured party with perfected security interest in crane was not entitled to *ex parte* pre-judgment writ of attachment even though the debtor had sold and delivered the crane to a buyer in another state. The secured party had not shown that there was an immediate danger that the defendants will damage or destroy any property to be attached, if notified in advance of the request for an attachment, particularly given that the crane was already gone, there was no evidence the proceeds were still on hand, and no evidence that the corporate guarantors were linked to the debtor's improper conduct.

164. *Wells Fargo Bank v. Architectural Door Systems, Inc.*,
[2012 WL 6608567](#) (D. Utah 2012)

Secured party was entitled to default judgment – including writ of replevin entitling it to possession of the collateral – against debtor that failed to pay the secured obligation.

165. *Gati v. Americredit Financial*,
[2012 WL 345916](#) (Ohio Ct. App. 2012)

Assignee of security interest in automobile that was perfected by notation of original lender's interest on the certificate of title was entitled to repossess the vehicle even though assignee's interest was not noted on the certificate. Unclear if the court concluded that assignee's interest was perfected or that perfection was not necessary to enforcement.

166. *Wecker v. Crossland Group, Inc.*,
[939 N.Y.S.2d 481](#) (N.Y. App. Div. 2012)

Repossession company that contracted with independent contractor to effectuate repossession commissioned by secured party was not responsible for torts committed by independent contractor during repossession; although the secured party's duty not to breach the peace is nondelegable, the repossession company was not the secured party.

167. *Smith v. AFS Acceptance, LLC*,
[2012 WL 1969415](#) (N.D. Ill. 2012)

Debtor stated claim for breach of the peace – and, therefore, for violation of the Fair Debt Collection Practices Act – against secured party by alleging that, after the debtor and the debtor's daughter jumped into the car, the repossession agent continued to hook the car up to the tow truck, raised the rear of the car, and towed the car from the driveway with the door open, all while the debtor's family members and neighbors yelled at the agents to stop. Alleged facts also stated a claim for intentional infliction of emotional distress against the repossession agent.

168. *Thompson v. Gateway Financial Services, Inc.*,
[2012 WL 5989240](#) (N.D. Ill. 2012)

Debtor stated a claim against both the secured party and the repossession agents for breach of the peace during an effort to repossess a vehicle, as well for violation of the Fair Debt Collection Practices Act. The debtor's children, who witnessed the repossession effort but who had no interest in the vehicle, had no claim for the breach of the peace but did have a claim under the Fair Debt Collection Practices Act. The debtor had no evidence to support her claim against the secured party and the repossession company for negligent hire and supervision of the individual repossession agents. The defendants were entitled to summary judgment on the plaintiffs' claims for emotional distress because the only evidence was their own testimony; they offered no medical records because none of them consulted a physician and while a severely degrading event may lead to an inference of emotional distress, the incident was not so degrading as to excuse the plaintiffs' failure to explain their emotional distress with more specificity.

169. *Mkhitaryan v. U.S. Bancorp*,
[2012 WL 6204840](#) (D. Nev. 2012)

Although enforcement of a security interest does not normally qualify as debt collection under the Fair Debt Collection Practices Act, an effort to collect repossess collateral in a manner that breaches the peace – and thus in a manner not authorized by law – is actionable under the FDPCA. Because the facts were in dispute about the nature of the debtor’s protest to the repossession effort and the role police played upon arriving to the scene after being called by the debtor, summary judgment was inappropriate.

170. *Reinhart v. PNC Bank*,
[2012 WL 1104685](#) (E.D. Pa. 2012)

Police officers that allegedly assisted in repossession by ordering the debtor’s son away from the collateralized boat and opening the enclosure where the boat was stored could be liable under § 1983. However, borough that employed police officers was not liable for failure to properly train its employees based on this one incident.

171. *Brown v. City of Philadelphia*,
[2012 WL 1758172](#) (E.D. Pa. 2012)

City was not liable under § 1983 for the assistance its police officers allegedly provided during repossession of debtor’s car by demanding that the debtor exit the vehicle because by the time the officers arrived on the scene, the car was attached to the tow truck and had been driven down the street, and thus the repossession had already occurred, even though the debtor entered the car while it was still in his driveway.

172. *Marcum v. Eastman Credit Union*,
[2012 WL 1795058](#) (E.D. Tenn. 2012)

Because the towing company had already attached the vehicle to the tow truck and towed the vehicle from its parking spot into the flow of traffic before the debtor exited the vehicle, made her presence known to the agent, and objected to the repossession, the repossession had been completed before the objection was made. Because there were no other facts bearing on the issue, the repossession was not a breach of the peace and the debtor’s claim under the Fair Debt Collection Practices Act for taking property to which the creditor had no present right to possession failed.

173. *Emigrant Mortgage Co. v. Greenberg*,
[950 N.Y.S.2d 608](#) (N.Y. Dist. Ct. 2012)

Secured party that purchased at a public sale the debtor’s shares in a condominium was entitled to use summary eviction proceedings to remove the debtor. Even though the shares were personal property and the summary proceeding is for real estate, ownership of the shares carries with it ownership of a proprietary lease, and therefore an interest in a chattel real.

– Notification of Disposition

174. *Zwicker v. Emigrant Mortgage Co.*,
[936 N.Y.S.2d 158](#) (N.Y. Super. Ct. 2012)

Notification of disposition sent by certified mail, return receipt requested, was reasonable despite use of an incorrect zip code because the address itself was otherwise correct and because the debtor acknowledged receipt of at least one notification and her counsel acknowledged receipt of notification.

175. *In re MarMc Transportation, Inc.*,
[469 B.R. 84](#) (Bankr. D. Wyo. 2012)

Secured party's notification of disposition provided on January 21 and which indicated the collateralized airplane would be sold no later than January 31 gave only seven [sic] days notice of the pending sale and was therefore inadequate, particularly since the buyer had previously paid for the aircraft. It did not matter that secured party did not actually transfer title by providing a bill of sale until May 23.

176. *VFS Leasing v. Bric Constructors, LLC*,
[2012 WL 2499518](#) (Tenn. Ct. App. 2012)

Secured party was not entitled to summary judgment on the reasonableness of the disposition notification it provided because the notification merely indicated the date after which the collateral would be sold at a private sale when in fact the collateral was sold via a public online auction, pursuant to the secured party's normal practice whenever its efforts to sell through a private online offering are unsuccessful.

177. *In re Boone*,
[2012 WL 1118988](#) (Bankr. E.D. N.C. 2012)

Secured party in consumer transaction that on August 30 sent notification of a private sale to be held no earlier than September 9 gave reasonable notification even though the interval included a national holiday and the debtors claimed that they lacked the time to withdraw money from their retirement account to redeem the collateral.

178. *Limtiaco v. Auction Cars.com, LLC*,
[2012 WL 4911726](#) (D. Nev. 2012)

Secured party failed to give proper notification of a disposition of collateral in a consumer-goods transaction because the notification failed to state that the debtor was entitled to an accounting of the unpaid indebtedness. The secured party was therefore liable for statutory damages equal to 10% of the principal amount of the obligation *at the time of the notification*.

179. *Bank of America v. Sea-Ya Enterprises, LLC*,
[872 F. Supp. 2d 359](#) (D. Del. 2012)

Bank provided commercially reasonable notification to debtor and guarantor by informing them of the date after which aircraft would be sold by private sale. Although the security agreement indicated that “Bank will advise Debtor in its Notice of Resale . . . what kind of repair, maintenance or make ready service it will perform prior to offering the Aircraft for resale,” no such work was done to the aircraft and thus there was nothing to notify the debtor about and, even if a statement to that effect was required, it was a harmless error. Bank’s failure to address notification to the guarantor’s spouse, who also guaranteed the secured obligation, freed her of personal liability even though she resides at the same address and likely had actual notice of Bank’s disposition plans.

180. *Epps v. JP Morgan Chase Bank*,
[675 F.3d 315](#) (4th Cir. 2012)

The National Bank Act and the OCC regulations promulgated thereunder preempt, with respect to national banks, state laws requiring disclosures relating to an extension of credit, not notices relating to debt collection, and thus do not preempt Maryland law requiring secured parties to provide certain detailed information to the debtor after repossession of tangible personal property.

181. *White v. Wells Fargo Bank*,
[2012 WL 4958516](#) (N.D. Ohio 2012)

The National Bank Act and the regulations promulgated thereunder do not preempt state law, specifically Article 9 of the Ohio Commercial Code, with respect to disposition of personal property collateral. Therefore, debtors stated a claim against bank that received assignment of the debtors’ secured obligation and which admittedly did not comply with Article 9 by selling the collateral at a public sale on a date other than the one specified in the notification and for a price below the minimum stated in the notification.

– Conducting a Commercially Reasonable Disposition

182. *Tex Star Motors, Inc. v. Regal Finance Co.*,
[2012 WL 58945](#) (Tex. Ct. App. 2012)

Evidence was sufficient to support jury’s determination that chattel paper financier acted in a commercially reasonable manner in selling 906 repossessed automobiles at wholesale, by having dealers make sealed bids. Pursuant to § 9-601(g), the financier, as a buyer of chattel paper, had no duty to provide notification to its debtor, the car dealer, before selling the cars of the account debtors.

183. *Bank of America v. Sea-Ya Enterprises, LLC*,
[2012 WL 2580317](#) (D. Del. 2012)

Secured party conducted commercially reasonable disposition of aircraft because its expert marketing firm inspected the aircraft, determined that expensive repairs would be needed to make the aircraft airworthy, marketed the aircraft over four months, and accepted the highest of three offers.

184. *Regions Bank v. Hyman*,
[2012 WL 4479080](#) (M.D. Fla. 2012)

Secured party had a duty to conduct its disposition of aircraft in a commercially reasonable manner even though the debtor had abandoned the aircraft to the secured party in connection with its assignment for the benefit of creditors. The deficiency owing must be based on the actual sales price, not the value of the aircraft on the date it was abandoned to the secured party. The secured party's disposition was commercially reasonable because it was conducted through a reputable, experienced broker who sold the aircraft in a manner consistent with standard industry practice. Specifically, the broker marketed the aircraft, obtained offers from various entities, rejected a low bid, and ultimately sold the aircraft for the best offer it could get at that time.

185. *Universal Truck & Equipment Co., Inc. v. Caterpillar, Inc.*,
[2012 WL 5398929](#) (D.R.I. 2012)

Secured party, one of the leading sellers of construction equipment, was entitled to summary judgment on claims that it failed to conduct sale of construction equipment in a commercially reasonable manner. Three of the four items were listed on the secured party's own web site to generate a world-wide audience of potential buyers. Two were sold at an auction, one to a private buyer, and the one to a buyer on whose lot the item was held. All four items sold at prices comparable to that of other used equipment at the time, as well as the values assigned by the Green Book.

186. *VFS Leasing v. Bric Constructors, LLC*,
[2012 WL 2499518](#) (Tenn Ct. App. 2012)

Secured party was not entitled to summary judgment on the commercial reasonableness of its disposition of dump trucks via a public online auction because its only evidence was an affidavit by the auction house manager stating that such a sale "typically commands fair market value and therefore a commercially reasonable price" whereas an affidavit by the debtor's principal owner indicated, among other things, that she was familiar with industry standards for the sale of construction equipment, that such standards require that the purchaser inspect the equipment, and that no prospective purchaser was permitted to view or test any of the equipment in person.

187. *In re MarMc Transportation, Inc.*,

[469 B.R. 84](#) (Bankr. D. Wyo. 2012)

Secured party did not prove that its private sale of an airplane was commercially reasonable even though the secured party claimed the sale price exceeded the appraised value of the collateral because the secured party did not provide any evidence that the sale was conducted in the usual manner on any recognized market, that the price was current in any recognized market at the time of disposition, or that the sale was in conformity with the reasonable commercial practices among dealers of aircraft.

188. *M & T Bank v. Bolden*,

[2012 WL 6628947](#) (Del. Ct. Com. Pl. 2012)

Secured party that sought to collect a deficiency after selling Mercedes-Benz at dealer's-only auction at of the world's largest sales facilities for automobiles failed to demonstrate that it had acted in a commercially reasonable manner because it offered no evidence about how the sale was advertised or conducted, how many bidders were present, how many bids were made, or whether the sale was done in accordance with the accepted practices of reputable finance companies for, or dealers of, automobiles. Debtor was therefore presumptively entitled to statutory damages under § 9-625(c).

189. *Foley v. Capital One Bank*,

[2012 WL 3860445](#) (Tex. Ct. App. 2012)

In a consumer transaction, a secured party seeking a deficiency judgment has the burden of pleading that its disposition of the collateral was commercially reasonable, a burden that it can satisfy by pleading that disposition was reasonable or that "all conditions precedent have been performed or have occurred." Because the debtor responded by denying commercial reasonableness of the disposition, the burden shifted back to the secured party to prove commercial reasonableness. Because the only evidence of commercial reasonableness presented at trial were business records indicating the collateral sold for \$4,700 sometime between December 26, 2009 and February 16, 2010, and no documents or testimony indicated how the collateral was sold, the evidence was legally and factually insufficient to support a deficiency judgment for the secured party.

190. *Prinsburg State Bank v. Abundo*,

[2012 WL 6721075](#) (Utah 2012)

Secured party that, in an apparent effort to advance appellate review of its action against guarantors, stipulated to the only unresolved issue – that it had held a commercially unreasonable disposition of collateral – was bound by the stipulation and estopped from challenging that issue on appeal.

– Collecting on Collateral

191. *Bank of America v. Illumination Station, Inc.*,
[2012 WL 1030321](#) (N.D. Ill. 2012)

Although creditor with a security interest in accounts that, after default, bought the accounts at a public auction, may have acquired the accounts pursuant to § 9-617 free of any right of the account debtor normally preserved by § 9-404, factual questions about whether the creditor really had a security interest, whether the sale was conducted in a commercially reasonable manner, and whether proper notification was provided, prevented a determination of whether the creditor qualified as a good faith transferee. The account debtor's claims under § 9-404 are limited to those that reduce the obligation (no affirmative recovery is available against an assignee) and to those that either arose out of the same contract as the account or prior to notification of the assignment.

192. *Riviera Finance of Texas, Inc. v. Capgemini U.S., LLC*,
[855 F. Supp. 2d 179](#) (S.D.N.Y. 2012)

Account debtor that, after receiving notification of the assignment of the account, received reports that the debtor was not paying subcontractors and entered into a second agreement with the debtor regarding payment to subcontractors could not use the debtor's breach of that agreement to offset its liability to the factor that received the assignment of the account. The debtor's breach of the original agreement did not cause any damage to the account debtor; instead all of the account debtor's expenses incurred in paying contractors directly arose from the debtor's failure to abide by the second agreement and its statements to contractors.

193. *Puritan Finance Corp. v. Bechstein Construction Corp.*,
[2012 WL 2020970](#) (Ill. Ct. App. 2012)

Account debtor could not set off against its \$22,000 obligation on assigned accounts the amounts that the debtor owed to the account debtor on unrelated cartage contracts because setoff is limited to claims that "accrue" before the account debtor receives notification of the assignment and, although the account debtor had fully performed its duties under the cartage contracts before it received such notification, its claim had not "accrued" because no cause of action yet existed, presumably because no invoice had yet been issued and payment was not yet due.

– Retaining Collateral

194. *Tex Star Motors, Inc. v. Regal Finance Co.*,
[2012 WL 58945](#) (Tex. Ct. App. 2012)

Chattel paper financier's acceptance of cars from some account debtors in satisfaction of their debts did not release the debtor-car dealer of its liability for a deficiency based on its obligation to repurchase nonperforming loans.

– Statute of Limitations

195. *Hassler v. Account Brokers of Larimer County, Inc.*,
[274 P.3d 547](#) (Colo. 2012)
Limitations period on secured debt began running on either the day the creditor was first entitled to accelerate the debt or the day, shortly after repossession, that it did in fact accelerate, not the day when the disposition occurred and the resulting deficiency became liquidated.
196. *Complete Credit Solutions, Inc. v. Cianciolo*,
[2012 WL 5504875](#) (D. Mass. 2012)
Limitations period on deficiency claim of secured party that was assignee of a PMSI seller was the four-year period under Article 2, not the six-year period under Article 9.
197. *Rashaw v. United Consumers Credit Union*,
[685 F.3d 739](#) (8th Cir. 2012)
Five-year Missouri statute of limitations applies to claims against the secured party for conducting a disposition after sending deficient notification.

– Other

198. *PNC Equipment Finance, LLC v. California Fairs Financing Authority*,
[2012 WL 5465841](#) (E.D. Cal. 2012)
Secured party was not entitled to pre-judgment writ of attachment against debtor's bank accounts because it failed to show that the collateral was of insufficient value to satisfy its claim.
199. *In re Crossover Financial I, LLC*,
[477 B.R. 196](#) (Bankr. D. Colo. 2012)
Clause in security agreement providing that, upon default, the debtor's rights as the sole member of limited liability company to vote and give consents, waiver or ratifications shall cease and that the secured party vote any or all of the pledged interest did not operate automatically; Colorado law requires a secured party to enforce the security agreement and become admitted as a member before the secured party may exercise voting rights associated with a membership interest pledged as collateral.
200. *Cole v. Erwin*,
[729 S.E.2d 128](#) (N.C. Ct. App. 2012)
Trial court did not err in issuing judgment allowing the secured party to assume ownership and control of debtor's pledged ownership interests in closely-held entities by sending notification thereof to the entities.

201. *Lombard v. Station Square Inn Apartments Corp.*,
[942 N.Y.S.2d 116](#) (N.Y. App. Div. 2012)

Trial court erred in enjoining cooperative association that had security interest in shares to cooperative apartments from foreclosing on the shares. The debtor did not attempt to cure the default until almost 3 months after the expiration of the 10-day cure period in the notice of default and thus failed to show a likelihood of success on the merits; the debtor also failed to show that he would sustain irreparable harm absent a preliminary injunction.

202. *Secure US, Inc. v. Security Alarm Financing Enterprises, Inc.*,
[2012 WL 1253002](#) (N.D.W. Va. 2012)

Secured party with prior perfected security interest in the debtor's accounts was not entitled to prevent junior judgment lienor from selling the debtor's accounts even though such a sale may not generate any proceeds for the judgment creditor.

203. *Arrowhead Capital Finance, Ltd. v. Seven Arts Pictures PLC*,
[2012 WL 2478306](#) (N.Y. Sup. Ct. 2012)

Lender with subordinated debt and junior security interest was, despite standstill agreement, entitled to judgment against the debtor and to foreclose on the collateral after the senior lender assigned the note to one of the borrowers because the assignment was without the required consent of the junior and effectively meant that nothing remained due on the senior note.

204. *Canyon Development Co., Inc. v. Holcomb Storage*,
[2012 WL 3242076](#) (Ala. Ct. Civ. App. 2012)

Storage company that had a contractual lien on personal property in storage unit did not, upon tenant's default, have to comply with sale procedures under the Alabama Self-Service Storage Act but could instead enforce its contractual lien. No discussion of whether the storage company complied with Article 9 in selling, without taking an inventory of the property or advertizing the sale, property allegedly worth more than \$350,000 for only \$500.

205. *Spencer v. Public Storage*,
[2012 WL 4479002](#) (N.D. Ala. 2012)

Storage company had a contractual lien on personal property in storage unit because the storage agreement stated that "if no payment has been received for [a] continuous 30-day period," the occupant may be denied access to the storage area and the property "will be sold." Accordingly, the storage company did not have to comply with sale procedures under the Alabama Self-Service Storage Act and its sale of the unit's contents was not conversion.

206. *Newton v. Bank of McKenney*,
[2012 WL 1752407](#) (E.D. Va. 2012)

Servicemembers' Civil Relief Act, which forbids secured parties from foreclosing on collateral owned by an active military member and pledged before activation, unless the creditor obtains court permission to do so, does not apply to collateral owned by a corporation that the service member in turn owns and controls.

207. *Fifth Third Bank v. Rivera*,

[2012 WL 1831460](#) (M.D. Fla. 2012)

Secured party's action against the debtor was not subject to arbitration even though the collateralized brokerage account – for which an affiliate of the secured party was the broker – contained an arbitration clause because the secured party itself neither signed nor benefitted from the brokerage account agreement and there was no allegation that it even knew of the arbitration clause.

208. *Clay v. New Mexico Title Loans, Inc.*,

[288 P.3d 888](#) (N.M. Ct. App. 2012)

Arbitration clause in security agreement covering “any claim, dispute or controversy . . . that in any way arises from or relates to this Agreement or the [collateral],” and which defined “claim” to include actions based in tort did not cover the debtor's action against the secured party for injuries suffered when shot by a repossession agent because the action did not relate to the agreement.

209. *Johannsen v. Morgan Stanley Credit Corp.*,

[2012 WL 90408](#) (E.D. Cal. 2012)

Debtor's claims that secured party mismanaged investment property serving as collateral and that it was unconscionable for the secured party to acquire a security interest in both the investment property and real property to secure a residential real property loan were both subject to arbitration.

210. *FDIC v. Katzowitz*,

[2012 WL 368672](#) (E.D. Mich. 2012)

Nominal borrower who signed promissory note waiving any defense relating to the lender's failure “to realize upon the Collateral” had no defense based on the lender's release of collateral to the person who received the loan proceeds. Even if the release violated the duty to dispose of the collateral in a commercially reasonable manner, it would not bar a deficiency action but merely result in a reduction of the deficiency.

211. *FDIC v. Cashion*,

[2012 WL 1098619](#) (W.D.N.C. 2012)

Promissory note that expressly provides that the lender may “fail to realize upon . . . the collateral” does not require the lender's assignee to seek recovery from the collateral before obtaining a judgment on the note.

212. *Chuhar v. AMCO Insurance Co.*,
[2012 WL 589369](#) (N.D. Ind. 2011)

Bank with a mortgage and security interest in motel and related personal property, and which was a loss payee and additional insured under the debtor's insurance policy, could be substituted for the debtor in his pending action against the insurer for breach of the property damage coverage and the claim for bad faith relating thereto but not for breach of the policy provision covering lost business revenue or the claim for bad faith relating thereto because the bank had not been assigned an interest in the loss of business policy provision.

Liability Issues

– of the Secured Party

213. *Sadowski v. Commissioner of Revenue*,
[2012 WL 1414924](#) (Minn. Tax. Ct. 2012)

Secured party who, after the debtor's default, exercised his rights in the debtor's pledged corporate stock to become the sole director of the corporation, was personally liable for the corporation's unpaid sales tax liability incurred prior to when the secured party took control because, after he took control, he was the person responsible for filing the returns and paying the taxes, there were corporate funds available to pay the taxes, but the funds were used for other purposes. The secured party's lack of knowledge about the tax liability and lack of access to the corporation's records was not material.

214. *WP Devon Associates, L.P. v. Hartstrings, LLC*,
[2012 WL 3060513](#) (Del. Super. Ct. 2012)

Landlord stated claim for tortious interference with contract against tenant's parent company for selling substantially all the tenant's assets so that the tenant could pay a secured obligation to the parent company.

215. *LFG Nat. Capital, LLC v. Gary, Williams, Finney, Lewis, Watson, and Sperando P.L.*,
[2012 WL 2856106](#) (N.D.N.Y. 2012)

Secured party's letters to account debtors instructing them to pay the secured party were authorized under Article 9 and the loan agreement and thus did not violate the duty of good faith and fair dealing, constitute interference with contractual relations, or constitute an unfair business practice.

216. *Kendall State Bank v. Archway Insurance Services*,
[2012 WL 3758647](#) (D. Kan. 2012)

Debtor stated a cause of action against secured party for tortious interference with existing business relationships by alleging that secured party had released the debtor from personal liability on the secured obligation, falsely informed account debtors that the debtor had defaulted, and attempted to collect from companies that were not current clients of the debtor and did not owe money to the debtor.

217. *IP of A West 86th Street 1, LLC v. Morgan Stanley Mortgage Capital Holdings, LLC*,
[686 F.3d 361](#) (7th Cir. 2012)

Secured party did not breach its agreements with the debtor or its principals by selling the loan and permitting the buyer to use reserve funds – which comprised part of the security – to pay part of the purchase price, even though the buyer later failed to replenish the reserve.

218. *Platte Valley Bank v. Tetra Financial Group, LLC*,
[682 F.3d 1078](#) (8th Cir. 2012)

Secured party with a perfected security interest in debtor's equipment had no cause of action for conversion against the bank (or its assignee) with which the debtor entered into a sale-leaseback of some equipment because the bank did not interfere with the secured party's repossession and sale of the equipment and the funds provided by the bank were held in a deposit account in which the bank's assignee had control, and therefore priority over the secured party, even if the funds were proceeds of the equipment.

219. *Jones v. West Plains Bank and Trust Co.*,
[2012 WL 4458154](#) (E.D. Ark. 2012)

Alleged owner of recording equipment and master recordings, which had been in the possession of the debtor, stated cause of action for conversion and copyright infringement against bank that repossessed and sold the equipment and recordings. The debtor was not a necessary party to either cause of action.

220. *United States v. Boardwalk Motor Sports, Ltd.*,
[692 F.3d 378](#) (5th Cir. 2012)

Bank with a security interest in debtor's automobile which was junior to IRS tax lien was not liable for conversion for receiving and failing to remit proceeds of the vehicle but was liable for failure to honor a levy issued after it received the proceeds and applied them to the secured obligation because the funds could be traced, were still in the bank's "possession," and no dissipation of them occurred.

221. *Harley-Davidson Credit Corp. v. Turudic*,
[2012 WL 3314919](#) (D. Or. 2012)

Secured party was not required to provide the debtor with a valuation for the collateralized aircraft, assist him in selling the aircraft, or otherwise protect his financial interest.

222. *Lamka v. KeyBank*,
[281 P.3d 639](#) (Or. Ct. App. 2012)

Neither economic loss doctrine nor intervening criminal act of boat dealer barred negligence action by debtor – who had purchased a boat from the dealer and stored it with the dealer – against his own secured party for financing the dealer's sale of the boat to a different buyer.

– of the Debtor

223. *Wells Fargo Equipment Finance, Inc. v. Titan Leasing, Inc.*,
[2012 WL 6184896](#) (N.D. Ill. 2012)

Equipment lessor that, in connection with its grant to lender of a security interest in an equipment lease, warranted that the lessee had accepted the goods and had not defaulted on its payment obligations was not liable for breach of those warranties. Even though the lessee did not receive the goods until after the warranty was given and never used the goods because they were damaged in transit, the lessee had in fact accepted the goods because the lease agreement gave the lessee a right to inspect before shipment, expressly provided that shipment constituted acceptance, and the goods had in fact been shipped before the warranty was given. There was no payment default because no payment was yet due under the lease when the warranty was given.

224. *BrooksGreenblatt, L.L.C. v. C. Martin Co., Inc.*,
[2012 WL 911882](#) (M.D. La. 2012)

Account debtor who improperly paid the debtor after receiving an instruction to pay the secured party, and who later paid the secured party and received in return an assignment of rights against the debtor and guarantors, had a valid action against the debtor for the sums the debtor received from the account debtor and failed to remit to the secured party.

225. *Klinker v. First Merchants Bank*,
[964 N.E.2d 190](#) (Ind. 2012)

Although summary judgment on contract claim was appropriate against car dealer that had sold vehicles out of trust and lied about it, summary judgment was not appropriate on fraud claim – which gives rise to treble damages – because the requisite fraudulent intent was still a disputed factual issue.

226. *Exchange Bank of Missouri v. Gerlt*,
[367 S.W.3d 132](#) (Mo. Ct. App. 2012)

Bank that sold collateralized logging truck without notification to the debtor failed to rebut presumption that no deficiency was owing because the only evidence it provided was the buyer's testimony of what he was willing to pay, not what the truck was worth, and even if the testimony did relate to the truck's value, it did not deal with what a complying disposition would have brought and the trial court was free to find that the testimony lacked credibility.

227. *Home Savings & Loan Co. v. Midway Marine, Inc.*,
[2012 WL 2522565](#) (Ohio Ct. App. 2012)

Debtor who not only failed to produce the collateral pursuant to a court order but also refused to disclose during his deposition the information he did possess concerning the location of the collateral could not avoid a contempt citation for failing to turn over the collateral by claiming it was no longer available to him.

228. *Thomison v. State*,
[2012 WL 5989193](#) (Tex. Ct. App. 2012)
Debtor who was unable to account for more than 500 head of cattle subject to security interest was guilty of a first degree felony and sentenced to fifteen years in prison.
229. *In re Estate of Afrank*,
[2012 WL 6586452](#) (Mont. 2012)
Estate of co-debtor was not obligated to pay half of secured obligation owing on motor home that other co-debtor acquired all title to by right of survivorship.

– of Others

230. *Volvo Const. Equipment Rents, Inc. v. NRL Rentals, LLC*,
[2012 WL 10893](#) (D. Nev. 2012)
[2012 WL 27658](#) (D. Nev. 2012)
Secured party with security interest in deposit account had no cause of action for conversion or unjust enrichment against entity to whom the debtor sent a wire transfer from the deposit account because the secured party made no effort to exercise its rights while the funds were in the debtor's deposit account.
231. *BancorpSouth Bank v. 51 Concrete, LLC*,
[2012 WL 1269180](#) (Tenn. Ct. App. 2012)
Secured party that brought a conversion claim against the buyers of the debtor's equipment for failing to turn over the proceeds they received upon resale has a right to attorney's fees under § 9-607(d) and under the security agreement with the original debtor, which became effective against the buyers under § 9-201(a).
232. *Los Angeles Federal Credit Union v. Madatyan*,
[147 Cal. Rptr. 3d 768](#) (Cal. Ct. App. 2012)
Owner of auto repair shop who endorsed check from insurer made payable jointly to the debtor and the shop, but whose shop did not perform any work on the vehicle, was liable in conversion to the credit union with a security interest in the vehicle, which was never repaired, because the credit union had an equitable lien on the check. It did not matter that the owner was unaware of the credit union's interest in the vehicle or the check.

233. *Bank of Nova Scotia v. Four Winds Plaza Corp.*,
[2012 WL 3064337](#) (V.I. Super. Ct. 2012)

Bank with a perfected security interest in debtor's equipment was entitled to the proceeds received by the debtor's landlord when the landlord sold the equipment because the bank's security interest attached to the proceeds. The landlord was not entitled to deduct rent for the time that the collateral remained in the leased premises after the debtor defaulted on the loan or on the lease because the bank was not responsible for storage costs given that it was merely a secured party, not an owner or possessor of the collateral, and that the landlord had asserted a lien and refused to release the collateral. However, the bank had no claim against the landlord for conversion because, in resisting the landlord's claim for rent, the bank had conceded that it did not have actual or constructive ownership of the collateral.

234. *Former TCHR, LLC v. First Hand Management LLC*,
[2012 WL 3127336](#) (Colo. Ct. App. 2012)

Landlord that had an unperfected security interest in tenant's inventory and equipment had a conversion claim against buyer that, with knowledge of the security interest, purchased and subsequently resold the collateral.

235. *Citizens Bank v. Merrill, Lynch, Pierce, Fenner and Smith, Inc.*,
[2012 WL 5828623](#) (E.D. Mich. 2012)

Statute of limitations on secured party's claims against brokerage for breaching the parties' control agreement and conversion in allowing the debtor to conduct trades and dissipate the account began running on the date of each improper trade and each failure to send to the secured party the required account statement.

236. *In re Fish & Fisher, Inc.*,
[2012 WL 1027230](#) (Bankr. S.D. Miss. 2012)

Secured party's claim against the debtor's law firm for negligently disbursing proceeds of an arbitrated claim – which the secured party claimed were proceeds of an account and imbued with a constructive trust – was dismissed because conversion requires an intentional act, not negligence, and the secured party's notification of its rights did not indicate how much it was owed or demonstrate the priority of its security interest.

237. *Malbec, Inc. v. M & D III, Inc.*,
[2012 WL 2989222](#) (Wash. Ct. App. 2012)

Substantial evidence supported trial court judgment against escrow agent and in favor of buyer for failing to perform in accordance with the escrow instructions and breaching his fiduciary duties by failing to conduct UCC search that would have identified a security interest in the purchased assets.

238. *Israel Discount Bank of New York v. First State Depository Co., LLC*,
[2012 WL 4459802](#) (Del. Ch. Ct. 2012)

Secured party stated cause of action against collateral bailee that, despite having entered into agreement directly with secured party to honor the secured party's instructions, refused to release the collateral to the secured party and in fact released the collateral to the debtor. Even though the bailee's agreements with the debtor contained exculpatory clauses shielding the bailee from liability, those clauses did not apply to intentional misconduct and in any event provided no defense to the secured party's claims based on its own agreement with the bailee. Secured party was not subject to the arbitration clause in the debtor's agreements with the bailee even though the secured party was a third-party beneficiary of those agreements because the secured party's claim rested on breach of its direct agreement with the bailee, not on breach of the debtor's agreements with the bailee.

239. *Valley Community Bank v. Progressive Casualty Insurance Co.*,
[854 F. Supp. 2d 697](#) (N.D. Cal. 2012)

Insurer that provided Bond and Safe Depository Coverage to bank that issued loan purportedly secured by securities account maintained at brokerage firm was not liable for losses the bank incurred because even if the control agreement was forged, the proximate cause of the loss was the fact that there were no securities.

240. *Insursource, Inc. v. Phoenix Ins. Co.*,
[2012 WL 6044880](#) (S.D. Miss. 2012)

Insurance premium financier had no cause of action against insurer for failure to return unearned premiums for insurance policy that was never issued because the broker who embezzled the funds had neither actual nor apparent authority to act as agent for the insurer.

241. *North Shore Bank v. Progressive Casualty Insurance Co.*,
[674 F.3d 884](#) (7th Cir. 2012)

Lender defrauded by borrower's fake certificate of origin for motor home that was to collateralize loan did not have action against its insurer because although the insurer agreed to indemnify the bank for losses resulting from "counterfeit" documents, the fake certificate of origin did not qualify as a counterfeit because it was a complete fabrication and there was no original certificate for a motor home with the vehicle identification number listed.

242. *Repossession Specialists v. Geico Insurance Co.*,
[33 A.3d 1242](#) (N.J. Super. Ct. 2012)

Repossession company is not covered by debtor's automobile insurance policy as someone using the vehicle with the debtor's possession and thus insurer was not responsible for injuries the debtor suffered when attempting to retrieve items from her vehicle as repossession company was towing the vehicle away.

243. *Rawlinson v. Law Office of William M. Rudow, LLC*,
[460 Fed. Appx. 254](#) (4th Cir. 2012)
Aunt of debtor stated cause of action under the Fair Debt Collection Practices Act against law firm that brought replevin action against her, as well as the debtor, on the theory that she lived with the debtor and therefore might be in possession of the collateral.
244. *Clark v. Harmon*,
[2012 WL 6675008](#) (Ohio Ct. App. 2012)
Trial court improperly granted summary judgment in legal malpractice case in favor of defendant who failed to: (i) inquire about getting security from the buyer of the clients' assets; (ii) inform the clients of the refusal to provide security; and (iii) inform the clients of the risk of accepting an unsecured note for a substantial portion of the purchase price.
245. *Burling v. Windsor Equity Group, Inc.*,
[2012 WL 5330916](#) (C.D. Cal. 2012)
Debtor had not shown that company that helps its clients locate collateral in which they have a security interest, and to do so made phone calls to the debtor and the debtor's family, was a "debt collector" under the Fair Debt Collection Practices Act because enforcement of a security interest is not debt collection. However, the debtor was entitled to further discovery to determine if the company was otherwise engaged in debt collection activities.

BANKRUPTCY

Property of the Estate

246. *In re South Side House, LLC*,
[474 B.R. 391](#) (Bankr. E.D.N.Y. 2012)
Post-petition rents received by the debtor are property of the estate under New York law despite an assignment of rents clause in the mortgage that purports to be absolute because the assignment provides that the rents revert back to the debtor when the mortgage debt is satisfied. Post-petition payments made to the mortgagee are to be applied first to the mortgagee's unsecured claim, then to the post-petition interest, fees, costs, and charges allowed under Section 506(b), and finally to principal.
247. *In re Martinez*,
[476 B.R. 627](#) (Bankr. D.N.M. 2012)
Mobile home for which secured party obtained writ of replevin prepetition but for which the secured party had not conducted a disposition or acceptance was property of the debtor's bankruptcy estate even though the replevin order, which had not been served or executed, stated that the debtor retained no interest in the mobile home.

248. *In re Beauchamp*,
[2012 WL 5985321](#) (Bankr. M.D. Ga. 2012)

Restrictions on the debtor's corporate stock that were properly created and noted on the certificates and that prohibited transfer to anyone for ten years and, at any time, to anyone other than the lineal descendants of the couple who created the business were unreasonable and invalid under Georgia law, in part because they gave the stockholder no means to realize the value of the stock. As a result, creditor that purchased the stock prepetition at a judicial sale was the owner of the stock and the stock was not part of the debtor's bankruptcy estate.

Claims & Expenses

249. *In re 804 Congress, L.L.C.*,
[2012 WL 1067566](#) (W.D. Tex. 2012)

Because the bankruptcy court lifted the stay to allow a secured party to foreclose on real property, the debtor's interest in the sale proceeds must be determined by reference to state law. Accordingly, the secured party's attorney's fees and the sale commissions of the trustee under the deed of trust are to be determined under state law, not pursuant to the Bankruptcy Code.

250. *In re Wallett*,
[2012 WL 4062657](#) (Bankr. D. Vt. 2012)

While a creditor holding a fully secured claim is entitled to post-petition attorney's fees if such fees are authorized under its contract with the debtor, because the loan agreement obligated the debtor to pay the creditor's attorney fees only in the event of default, and there was no default, the creditor was not entitled to post-petition attorney's fees incurred in reviewing the plan and preparing a proof of claim.

251. *In re SW Boston Hotel Venture, LLC*,
[479 B.R. 210](#) (1st Cir. BAP 2012)

Oversecured creditor is entitled to postpetition interest at the default rate unless equitable considerations compel a different result. There were no such equitable considerations in this case because: (i) there was no creditor misconduct; (ii) application of the default rate would not harm unsecured creditors, who were to be paid in full; (iii) the default rate was not a penalty; and (iv) application of the default rate would not impair the debtor's fresh start.

252. *In re 785 Partners LLC,*[470 B.R. 126](#) (Bankr. S.D.N.Y. 2012)

Oversecured creditor is entitled to prepetition interest at the default rate and debtor's appeal for equitable relief has no place under New York Law. Post-petition interest is presumptively also at the contractual default rate, which the court may vary only if the secured creditor is guilty of misconduct, application of the rate would harm unsecured creditors or impair the debtor's fresh start, or the rate constitutes a penalty. Because the debtor is solvent, there is even more reluctance to alter the contract rate. The 5% increase in the interest rate due to default is not a penalty under New York law. However, a contractual term providing for an additional 5% premium on all payments that are more than five days late is not enforceable because the debtor's obligations will be based on the confirmed plan, not the original loan agreement and, in any event, an oversecured creditor cannot receive both default-rate interest and a late payment fee.

253. *In re Omega Optical, Inc.,*[476 B.R. 157](#) (Bankr. E.D. Pa. 2012)

Secured party whose attorney filed unsecured claim and subsequently received Chapter 11 debtor's plan and disclosure statement classifying the claim as unsecured and providing for the secured party to terminate its financing statement and release its lien was bound by the confirmation order and could not modify its claim to assert secured status.

254. *In re Furr's Supermarkets, Inc.,*[2012 WL 3396146](#) (Bankr. D.N.M. 2012)

Supplier was not entitled to an administrative priority reclamation claim under § 503(b)(9) because the supplier's right to reclaim goods sold under U.C.C. § 2-702 was cut off by the debtor's inventory lenders, who qualified as good faith purchasers for value and whose claims exceeded the value of that inventory.

Automatic Stay & Injunctions255. *In re Michigan BioDiesel, LLC,*[2012 WL 1941648](#) (Bankr. W.D. Mich. 2012)

Automatic stay would be annulled with respect to creditor that, minutes after inadvertently filing a post-petition termination statement instead of an assignment, filed a correction statement. Consequently, the termination and correction statements stand as filed, for whatever effect they may have on the rights of the parties.

256. *In re Burrell*,[2012 WL 3727130](#) (S.D. Tex. 2012)

Car dealer that repossessed car, provided the debtor with notification of sale, entered into contract for sale, and received payment under that contract, had not completed the sale because it had not delivered the car to the buyer. Accordingly, the debtor still had rights in the car when she filed her bankruptcy petition and the dealer was liable for both compensatory and punitive damages for violating the automatic stay by refusing to return the car upon demand.

257. *In re Herbst*,[469 B.R. 299](#) (Bankr. W.D. Wis. 2012)

Bank that replevied collateral prepetition violated the automatic stay by refusing to return it after the debtor filed for bankruptcy protection and demanded return of the collateral.

258. *Weber v. SEFCU*,[477 B.R. 308](#) (N.D.N.Y. 2012)

Secured party that lawfully repossessed the debtor's vehicle before the debtor filed for bankruptcy protection violated the automatic stay by failing to promptly return the vehicle upon learning of the bankruptcy proceedings because the vehicle became property of the estate.

259. *In re Sauls*,[2012 WL 1224379](#) (Bankr. M.D.N.C. 2012)

Creditor that, after being informed of the bankruptcy case, refused to return automobile it had repossessed prepetition or allow the debtor access to the personal property therein violated the stay and was liable for the debtor's attorney's fees and punitive damages which would reduce the amount of the creditor's secured claim.

260. *In re Velichko*,[473 B.R. 64](#) (Bankr. S.D.N.Y. 2012)

Creditor that, postpetition, refused to return vehicle it had repossessed prepetition unless the debtor paid the arrearage and provided proof of insurance violated the automatic stay and was liable for both compensatory and punitive damages.

261. *In re Jones*,[2012 WL 5993760](#) (Bankr. E.D. Va. 2012)

Creditor that repossessed debtor's motor vehicle prepetition, initially refused to return the vehicle after the petition was filed, and when it did finally return the vehicle, the debtor's college textbooks and work uniforms were missing, was liable for damages, including lost income, transportation expense, and attorney's fees, but not for tuition paid because there was inadequate proof that the loss of textbooks and temporary loss of the car were the proximate cause of debtor's withdrawal from college.

262. *In re McBride*,[473 B.R. 813](#) (S.D. Ala. 2012)

Creditor that willfully violated the automatic stay by repossessing leased vehicle post-petition was liable for compensatory damages but was not liable for punitive damages because the repossession was a one-time incident, as opposed to ongoing conduct, and there was no evidence that the creditor was motivated by malice, vindictiveness, or bad faith.

263. *In re Mwangi*,[473 B.R. 802](#) (D. Nev. 2012)

Prior to expiration of the 30-day period for objecting to exemptions, bank did not violate the automatic stay by refusing to release funds on deposit to Chapter 7 debtor who claimed them as exempt because the debtor had no right to possess the funds. After expiration of the 30-day period, the funds were not property of the estate, the stay therefore did not apply to them, and thus the debtor again had no claim against the bank for violating the stay by failing to turn over the funds. The debtor had no standing to pursue the trustee's turnover claim under § 542. Even if the above conclusions are incorrect, the bank still did not violate § 362(a)(3) because a deposit account is nothing more than the bank's promise to pay and a bank does not exercise control over property of the estate when it refuses to perform its contractual obligation to pay the account owner. Court refuses to adopt analysis of *In re Mwangi*, [432 B.R. 812](#) (9th Cir. BAP 2010).

264. *In re Jernigan*,[475 B.R. 535](#) (Bankr. W.D. Va. 2012)

Bank did not violate stay by placing an administrative hold on a depositor's account after receiving notice that the depositor had filed a Chapter 7 bankruptcy petition, given that it also immediately mailed a letter to the trustee inquiring what to do with account funds and released the hold promptly upon receiving a reply from trustee, and thus the bank's actions were taken to maintain the status quo and preserve property of the estate.

265. *In re Williams*,[474 B.R. 604](#) (Bankr. N.D. Ill. 2012)

Secured party does not violate the stay by foreclosing on collateral in which the bankruptcy debtor, as guarantor of the secured obligation, has a right to redeem.

266. *In re Blixseth*,[684 F.3d 865](#) (9th Cir. 2012)

Termination of the stay under § 362(h) for the debtor's failure to file a statement of intention with respect to collateral applies to all collateral for the secured claim, not merely the collateral listed in the debtor's schedules as securing the claim.

Sales of Assets

267. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*,
[132 S. Ct. 2065](#) (2012)

Under § 1129, debtor cannot cram down a plan that calls for sale of encumbered assets free and clear without allowing the secured claimants to credit bid; such a sale procedure does not provide the secured claimants with the indubitable equivalent of their claims.

268. *In re Lehigh Coal and Navigation Co.*,
[2012 WL 27465](#) (Bankr. E.D. Pa. 2012)

Because lienor was not adequately protected by allowing sale free and clear with lien to attach to the sale proceeds, given that post-petition lender with superpriority was allowed to credit bid and thus there were no sale proceeds, the lien will remain on the property sold.

269. *In re PBBPC, Inc.*,
[467 B.R. 1](#) (Bankr. D. Mass. 2012)

Sale of assets under § 363(f) free and clear of all claims and interests, including claims under a successor liability theory, meant that buyer acquired the debtor's assets free of the debtor's experience rating and contribution rate to the state's unemployment compensation fund.

270. *In re Grumman Olson Industries, Inc.*,
[467 B.R. 694](#) (S.D.N.Y. 2012)

Although bankruptcy court's order approving § 363 sale expressly provided that the buyer of the debtor's assets took the assets free of successor liability, due process requires that future claimants – who do not suffer injury until after the bankruptcy case is closed – receive notice and an opportunity to participate in the proceedings before their rights are affected. Accordingly, the buyer's motion to dismiss the action brought by such a claimant was properly denied.

271. *Pusser's (2001) Ltd. v. HMX, LLC*,
[2012 WL 1068756](#) (N.D. Ill. 2012)

Bankruptcy court order authorizing the sale of the debtors' trademark free and clear of encumbrances precluded the prior owner from bringing an action to cancel the trademark due to abandonment, fraudulent renewal, and transfer in gross on the basis of the debtors' conduct prior to the sale.

272. *In re Jundanian*,
[2012 WL 1098544](#) (Bankr. D. Md. 2012)

Debtor's membership and distribution rights in Maryland LLC became part of his bankruptcy estate but nothing in the Bankruptcy Code overrode the restrictions on transfer of the membership rights and thus the trustee's sale to the debtor included only the distribution rights and the debtor did not re-acquire rights as member to participate in the management of the LLC.

Discharge, Dischargeability & Dismissal273. *In re Johnson,*[2012 WL 1833890](#) (Bankr. D. Wyo. 2012)

Debtors who purchased business on credit and granted a security interest in business assets to secure the debt, which the seller did not timely perfect, and who later obtained a bank loan secured by the same assets, which the bank did timely perfect, did not cause willful and malicious injury to the seller under § 523(a)(6) because there was no evidence that the debtors intended the bank's security interest to prime the seller's security interest.

274. *In re Rabinowitz,*[2012 WL 1072212](#) (Bankr. D.N.J. 2012)

Debtor that sold collateralized membership interest in LLC, failed to notify the secured party of the sale, had the proceeds deposited into his attorney's trust fund account rather than one of his own deposit accounts, and then had the attorney make disbursements to insiders who were not shown to be actual creditors, made transfers with the intent to hinder, delay, or defraud the secured party and this was not entitled to a discharge.

275. *In re Franceschini,*[2012 WL 113337](#) (Bankr. S.D. Tex. 2012)

Creditor's claim against owner of car dealership pursuant to guaranty of dealership's floor plan financing arrangement was nondischargeable under § 523(a)(6) because the owner willfully and maliciously transferred over \$1.6 million in proceeds of collateral to family members, affiliates, and other creditors after it became clear that the business would fail.

276. *In re Martelle,*[2012 WL 1833906](#) (Bankr. E.D. Tenn. 2012)

Debtor who received insurance proceeds for destruction of personal property collateral and used the funds to repair her home, rather than replace the collateral or repay the secured party, willfully and maliciously injured the secured party within the meaning of § 523(a)(6).

277. *Eaton v. Ford Motor Credit Co.,*[2012 WL 3579644](#) (M.D. Tenn. 2012)

Debt of owner/guarantor of automobile dealership who failed to remit to the dealership's floor plan financier the proceeds of vehicles sold despite demand therefor and state court order restraining sale without the financier's consent and without remitting the sale proceeds to the financier was nondischargeable under § 523(a)(6).

278. *In re Parra,*[2012 WL 4107310](#) (Bankr. D.N.M. 2012)

Claim of creditor who consigned 18 vehicles for sale on debtor's used car lot was nondischargeable under § 523(a)(2) to the extent relating to three vehicles for which the debtor provided title as a substitute for a consigned vehicle, but the substitute vehicle had already been sold and nondischargeable under § 523(a)(6) to the extent relating to four vehicles for which the debtor obtained a duplicate title, sold the vehicle, and did not pay the creditor.

279. *In re Leonard,*[2012 WL 1565120](#) (Bankr. E.D. Tenn. 2012)

Debt of guarantor/manager of automobile dealership who failed to remit to the dealership's secured creditor the proceeds of vehicles sold was not nondischargeable under § 523(a)(4) because inclusion of language of trust in the security agreement – without any requirement to segregate the proceeds – was insufficient to render the relationship a fiduciary one. However, the debt could be nondischargeable under § 523(a)(6).

280. *In re Hannan,*[477 B.R. 603](#) (Bankr. W.D. Pa. 2012)

Debtor who submitted false affidavit about what happened to item of collateral in connection with adversary proceeding would be denied a discharge. Even if a discharge were granted, claim of secured creditor would be nondischargeable under § 523(a)(6) because the debtor, as president and majority owner of the borrower and as guarantor of the secured loan, orchestrated sale of collateral and deposit of proceeds into account of family member's business.

281. *In re Nail,*[680 F.3d 1036](#) (8th Cir. 2012)

State statute that refers to the debtor as a "trustee" of proceeds but imposes no trust-like duties such as segregation of the funds does not create a fiduciary relationship and thus mortgagor's liability for a deficiency was not nondischargeable under § 523(a)(4).

282. *In re Bittar,*[2012 WL 1605160](#) (Bankr. D.N.J. 2012)

Obligation of debtor who sold the collateralized dental equipment and used the proceeds to try to keep his business afloat was not nondischargeable under § 523(a)(4) because the debtor was not a fiduciary of the secured party. The obligation was not nondischargeable under § 523(a)(6) because the debtor was not an experienced businessman, was unrepresented when he signed the security agreement, did not initial the page containing language prohibiting sale of the collateral, used all the proceeds to try to save the business and about half to pay the secured party, and thus the debtor did not act willfully.

283. *In re Devries*,

[2012 WL 528223](#) (Bankr. N.D. Iowa 2012)

PMSI trust loan and motorcycle loan were nondischargeable under § 523(a)(6) because the debtor concealed the location of the vehicles from the secured party, stripped the motorcycle and stored the parts removed in a separate location, and, the evidence suggests, similarly disassembled the truck and sold it for parts.

284. *In re Casper*,

[466 B.R. 786](#) (Bankr. M.D.N.C. 2012)

Credit union's claim against debtor for failing to remit proceeds of ten repossessed vehicles that credit union had consigned to debtor's business was nondischargeable under § 523(a)(2) as to the first two vehicles but not as to the other vehicles consigned later because the credit union could not have justifiably relied on the debtor's representation of payment after the debtor failed to remit the proceeds of the first two vehicles.

285. *In re Tayeh*,

[2012 WL 162033](#) (Bankr. C.D. Ill. 2012)

Buyer's claim against debtor/used car dealer for failing to comply with state title law by not submitting paperwork required to transfer clear title, which resulting in the debtor's secured lender repossessing and selling the car, was nondischargeable under § 523(a)(2)(A).

286. *In re Pagnini*,

[2012 WL 5489032](#) (9th Cir. BAP 2012)

Credit union's claim that reasonably relied on debtor's misrepresentation and concealment about the condition of the collateral when it refinanced the loan was not nondischargeable under § 523(a)(2) because the creditor's loss was not caused by the misrepresentation and concealment. There was no evidence that the amount the creditor received in connection with the refinancing was less than it would have collected had it enforced its security interest at that time.

Avoidance Powers

– Preferences

287. *In re LGI Energy Solutions, Inc.*,
[482 B.R. 809](#) (8th Cir. BAP 2012)

Utility companies that provided services to customers who paid their bills through a payment processor were creditors of the payment processor because: (i) they were beneficiaries of a trust created by the agreements between the customers and the payment processor and became creditors when the payment processor violated the trust by using the funds provided without paying the utilities' invoices; and (ii) they were third-party beneficiaries of the agreements between the customers and the payment processor. As a result, the utilities had preference liability in the payment processor's bankruptcy. However, the utilities were entitled to a "new value" defense under § 547(c)(4) for both the utility services they provided and the funds the customers provided to the payment processor after the payment processor's transfers to the utilities.

288. *In re Mitchek*,
[2012 WL 930249](#) (Bankr. D. Colo. 2012)

Bank that had perfected its security interest in vehicle in a preferential manner and later agreed to transfer title to the vehicle to the trustee in return for the right to retain prior payments breached that agreement by accepting full payment of the debt from a non-debtor because the promised assignment of the title and of the rights in the collateral "necessarily included any payments made pursuant to the security interest after the date of the agreement."

289. *In re Cedar Funding, Inc.*,
[2012 WL 1110023](#) (N.D. Cal. 2012)

Bankruptcy court did not err in ruling that transfer of fractional interests in originator's mortgage loans occurred for preference purposes when transfers were perfected, which because the transfers involved an interest in California real estate, required recording of the assignment in the real estate records. However, summary judgment was improper on the issue of whether the transaction created a debtor-creditor relationship or a trust.

290. *In re Patterson*,
[2012 WL 1292642](#) (Bankr. N.D. Ga. 2012)

Trustee who was able to avoid creditor's lien on real property because of a substantial delay in perfection was entitled to a monetary judgment for the value of the property as of the date the trustee would have sold it had the creditor acquiesced in the sale, if such value can reliably be determined.

291. *In re Brooke Corp.*,

[2012 WL 3066706](#) (Bankr. D. Kan. 2012)

Bankruptcy trustee that had abandoned interest in debtor's wholly owned subsidiary and allowed bank to conduct strict foreclosure against the debtor's interest in the subsidiary could later maintain \$8.6 million avoidance action against the subsidiary and its successor even though the trustee had asserted that the debtor's interest had no value to the estate and the successor later allegedly invested substantial sums to resurrect the subsidiary's business.

– Strong-Arm Powers

292. *In re Mollison*,

[463 B.R. 169](#) (Bankr. D. Mass. 2012)

Even though property encumbered by an unperfected security interest is removed from the estate and becomes free of the automatic stay 30 days after the first date set for the § 341 meeting if the debtor does not file a property statement of intent to surrender, reaffirm, or redeem, the trustee retains the power to avoid the security interest. While the avoided lien cannot be preserved for the benefit of the estate under § 551 if the collateral itself is no longer property of the estate, the trustee can recover under § 550 the value of the property transferred.

– Fraudulent Transfers

293. *In re Mirant Corp.*,

[675 F.3d 530](#) (5th Cir. 2012)

New York law, which by contract governed “the rights of the parties” to a guarantee agreement, applied to a claim that guarantee was an avoidable fraudulent transfer rather than the law of Georgia, the jurisdiction in which the guarantor was located.

294. *In re TOUSA, Inc.*,

[680 F.3d 1298](#) (11th Cir. 2012)

Lenders that shortly before bankruptcy were paid off with the proceeds of a new loan secured by subsidiaries' assets received a fraudulent transfer because they were entities for whose benefit the liens were transferred and, even if the opportunity to avoid default and bankruptcy constitutes “value” for this purpose, this value subsidiaries received was not, as the bankruptcy court found, reasonably equivalent to what they transferred.

295. *Bash v. Textron Financial Corp.*,

[2012 WL 5472077](#) (N.D. Ohio 2012)

Refinancing of secured loan pursuant to which the parties “amended” and “restated” the terms of their relationship and reduced the amount of credit available to the debtor — which operated a Ponzi scheme — was not a novation and did not create a new security interest in the collateral, and thus could not be avoided as a fraudulent transfer. Even if the lender engaged in bad faith after the initial loan transaction, such that its claims could be subordinated, such bad faith would not invalidate its lien such that the refinancing involved a new transfer.

296. *Wachovia Securities, LLC v. Banco Panamericano, Inc.*,

[674 F.3d 743](#) (7th Cir. 2012)

Corporation’s grant of a blanket lien to lender controlled by the corporation’s subsidiaries was an intentionally fraudulent transfer designed to shield the corporation from its financial obligations because: (1) the debtor entered into the transaction shortly before or after incurring substantial debt to its stock broker; (2) the loan was between insiders; (3) the debtor retained possession or control of the property; (4) the transfer was of most of the debtor’s assets; and (5) the debtor was insolvent or became insolvent shortly after the transfer.

297. *In re Barton-Cotton, Inc.*,

[2012 WL 2803742](#) (Bankr. D. Md. 2012)

Trustee stated a claim for both intentional and constructive fraudulent transfers in connection with leveraged buyout by which the debtor — the target — granted a security interest in its assets to secure a loan that it received but distributed upstream to its stockholders, who transferred their interests to the acquirer. Trustee also stated fraudulent transfer claims for subsequent cash out by which the debtor borrowed from a non-insider to repay the leveraged buyout lender, an insider.

298. *In re Tronox Inc.*,

[464 B.R. 606](#) (Bankr. S.D.N.Y. 2012)

Liability for a fraudulent transfer — even one avoided pursuant to § 544 and state law designed to protect creditors — is not limited to the amount of creditor claims, but may extend to the entire value of the property transferred, subject to the limitations and offsets provided for in the Code.

299. *Jefferson-Pilot Investments, Inc. v. Capital First Realty, Inc.*,
[2012 WL 1952656](#) (N.D. Ill. 2012)

Because cash collateral order expired when bankruptcy case was dismissed, secured party had no claim against entities to whom the debtor transferred the funds post-petition for unjust enrichment, aiding a breach of fiduciary duty, tortious interference with contract, or conversion. The secured party also failed to plead with particularity a claim for an intentionally fraudulent transfer or explain how the transfers were to insiders within the meaning of state fraudulent transfer law. However, the secured party did state a claim for a constructively fraudulent transfer.

300. *U.S. Bank v. Verizon Communications Inc.*,
[2012 WL 3100778](#) (N.D. Tex. 2012)

Even if debts assumed and notes issued by former subsidiary in spin-off transaction were avoidable as fraudulently incurred *obligations*, they were not fraudulent *transfers*, and thus while the obligations can be rendered unenforceable no recovery is permitted under § 550 even though the former parent transferred some of the newly issued notes to discharge its own obligations.

– Liens Impairing Exemptions

301. *In re Carter*,
[466 B.R. 468](#) (8th Cir. BAP 2012)

Judicial lienor that paid off secured party to facilitate sheriff's sale was subrogated to the secured party's security interest and thus the debtor could not avoid the lien under § 522(f)(1) to the extent of the payment.

302. *In re Young*,
[467 B.R. 792](#) (Bankr. W.D. Pa.), *rev'd*, [477 B.R. 594](#) (W.D. Pa. 2012)

Condominium association's lien on debtor's condominium created by the association's declaration and by-laws, is a security interest, not a statutory lien, and cannot be avoided under § 522(f)(1).

On appeal, held that condominium association's lien was a statutory lien.

– Protection for Settlement Payments

303. *In re Quebecor World (USA) Inc.*,
480 B.R. 468 (S.D.N.Y. 2012)

The repurchase for \$376 million of privately placed notes shortly before bankruptcy was a “settlement payment” because it was to a financial institution serving as trustee for the noteholders, even though the financial intermediary did not take a beneficial interest in the notes during the course of the transaction and thus the transaction did not implicate the systemic risks that prompted Congress to enact § 546(e). Because the transaction was structured as a repurchase, rather than redemption, of the notes, it was also insulated from avoidance by § 546(e) as a “transfer . . . in connection with a securities contract.”

304. *In re Lehman Brothers Holdings Inc.*,
469 B.R. 415 (Bankr. S.D.N.Y. 2012)

Section 546(e) fully insulates from avoidance as a preference or constructive fraudulent transfer the grant and perfection of liens to the debtor’s main lender and clearing house, the lender’s sweeping of funds shortly before the petition, and, even though § 546(e) does not purport to protect “obligations” incurred, it also protects the liens provided to secure new guarantees. Section 546(e) does not protect transfers from avoidance as an actually fraudulent transfer or shield the lender from common-law claims.

305. *In re Viola*,
469 B.R. 1 (9th Cir. BAP 2012)

Bankruptcy trustee of debtor who operated Ponzi scheme could not avoid the transfer of \$1 million to purchase corporate stock because the transfer was made through a subsidiary that qualifies as a financial institution and therefore the transfer is insulated from avoidance under § 546(e) because the transfer was outside the two-year period covered by § 548(a)(1)(a) and was avoidable, if at all, under § 544.

306. *In re Lancelot Investors Fund, L.P.*,
467 B.R. 643 (Bankr. N.D. Ill. 2012)

Investors that redeemed securities in debtor’s Ponzi scheme prepetition were protected by § 546(e) against avoidance as a preference, constructively fraudulent transfer, or transfer avoidable under § 544 and state law, but were not protected from avoidance as an actually fraudulent transfer under § 548(a)(1)(A).

307. *In re Appleseed’s Intermediate Holdings, LLC*,
470 B.R. 289 (D. Del. 2012)

Dividend payment is not a protected settlement payment under § 546(e) because the shareholder does not exchange anything for value in return for the payment.

308. *In re Qimonda Richmond, LLC*,

[467 B.R. 318](#) (Bankr. D. Del. 2012)

Payment to LC issuer to collateralize reimbursement obligation was not protected under § 546(e) even though the LC had been issued to support bonds and the funds were used to redeem the bonds because the bonds were not a securities contract.

Equitable Subordination

309. *In re QuVIS, Inc.*,

[469 B.R. 353](#) (D. Kan. 2012)

Secured party that re-perfected its own security interest after financing statement filed on behalf of multiple secured creditors had lapsed would not be equitably subordinated to the other, now unperfected, creditors. Although the secured party's managing director served as a director of the debtor, that did not make the secured party an insider of the debtor. Moreover, the secured party's actions with the debtor were all done at arm's length. While the secured party did re-file to protect its own interest, the secured party did not have a duty to inform other creditors of the lapse. Indeed, the secured party had actually argued in court, albeit unsuccessfully, that the re-filings benefitted all the creditors, not merely those who re-filed.

Other Bankruptcy Matters

310. *In re Loop 76, LLC*,

[465 B.R. 525](#) (9th Cir. BAP 2012)

Fact that unsecured claim is supported by a third-party guaranty is a relevant consideration in determining whether claims are substantially similar, and therefore must be placed in different classes.

311. *In re 4th Street East Investors, Inc.*,

[2012 WL 1745500](#) (Bankr. C.D. Cal. 2012)

Because the existence of a third-party guaranty is an insufficient basis to classify a secured party's deficiency claim separately from other unsecured claims, there was no reasonable possibility that the debtor could cram down a plan; therefore, the secured party was entitled to relief from the stay.

312. *In re Reid Park Properties L.L.C.*,

[2012 WL 2934001](#) (Bankr. D. Ariz. 2012)

Undersecured senior claim could not be put in same class as wholly under water subordinated claim secured by the same collateral.

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313. *In re Coastal Broadcasting Systems, Inc.*,
[2012 WL 2803745](#) (Bankr. D.N.J. 2012)
Clause in subordination agreement authorizing senior lender to vote the claims of the subordinated creditors was enforceable in bankruptcy. Because the senior creditor approved the plan and would be deemed to have voted the claims of subordinated creditors, the plan could be confirmed even though it extinguished the subordinated creditors' claims.
314. *In re Windmill Durango Office, LLC*,
[481 B.R. 51](#) (9th Cir. BAP 2012)
Creditor that purchased claim after original claimant had voted in favor of the debtor's reorganization plan but before the ballot deadline did not have cause under Rule 3018 to change the vote.
315. *In re Lichtin/Wade, LLC*,
[2012 WL 6589794](#) (Bankr. E.D.N.C. 2012)
Consulting company that provided services to the debtor (one of its largest clients) and which purchased secured claims one day before votes on the debtor's plan were due was a non-statutory insider and therefore ineligible to vote. The company's sole purpose was to help out the debtor's principal, it purchased the claims at his request without ever reviewing any documentation and without exercising any independent business judgment.
316. *In re KB Toys, Inc.*,
[470 B.R. 331](#) (Bankr. D. Del. 2012)
Purchasers of claims from creditors identified on statement of financial affairs as having received potentially avoidable preferential transfers took the claims subject to their disabilities in the hands of the original creditors, and thus subject to disallowance under § 502(d).
317. *In re Bataa/Kierland, LLC*,
[476 B.R. 558](#) (Bankr. D. Ariz. 2012)
Even if the debtor's purpose for incurring a small, prepetition secured debt was to create a class that would likely satisfy § 1129(a)(10) and therefore render the plan confirmable, such a motive is not a basis for redesignating the claimant's vote.
318. *In re Interstate Bakeries Corp.*,
[690 F.3d 1069](#) (8th Cir. 2012)
Prepetition agreement by which Chapter 11 debtor granted to a licensee a perpetual, royalty-free, exclusive license to its trademarks in a specified geographic area was an executory contract that the debtor could reject.
319. *Sunbeam Products, Inc. v. Chicago Mfg., LLC*,
[686 F.3d 372](#) (7th Cir. 2012)
Rejection of executory contract by which debtor granted a license of its trademarks did not terminate the licensee's right to use the trademarks.

320. *In re Heath*,
[2012 WL 6042610](#) (Bankr. E.D. Ark. 2012)
Chapter 12 debtor could not through plan confirmation strip secured loans of their cross-collateralization.
321. *In re Blixseth*,
[2012 WL 6562839](#) (9th Cir. BAP 2012)
For venue purposes, the debtor's principal assets – intangible interests in LLCs – were located in the jurisdiction of organization because that is where collection efforts must be pursued, even though for UCC purposes the assets would be located at the jurisdiction of the debtor's residence.

GUARANTIES & RELATED MATTERS

322. *Capitol Group, Inc. v. Collier*,
[365 S.W.3d 644](#) (Mo. Ct. App. 2012)
Corporate president who signed application for credit to corporation did not thereby guaranty the resulting debt even though the application stated “we the undersigned, agree to be jointly, severally, and individually responsible for the payment of any and all goods and/or services furnished . . . to or for our business or to us individually” because the purpose of the application, as evidenced by its structure and single signature block, was to bind the corporation, not the individual president.
323. *U.S. Bank v. Polyphase Electric Co.*,
[2012 WL 1394397](#) (D. Minn. 2012)
Guaranty agreements were enforceable even though not signed by the creditor because the agreements waived notice of acceptance and the act of extending credit is sufficient acceptance. Although the guaranty agreements expressly stated that “only those terms in writing . . . signed by the parties are enforceable,” the creditor was not a party to the agreement.
324. *Sherwin-Williams Co. v. Culotta*,
[2012 WL 1550589](#) (La. Ct. App. 2012)
Guaranty that “remain[ed] in full force and effect until written notice of revocation is received by” the creditor was not implicitly revoked once the creditor's representatives learned that the guarantor had retired from business and sold the corporate debtor to his son.

325. *MB Financial Bank v. Paragon Mortg. Holdings, LLC*,
[89 So. 3d 917](#) (Fla. Ct. App. 2012)

Transfer of senior loan to newly formed entity owned by two of the four guarantors did not operate as a payment of the senior loan and thus did not terminate the subordination agreement and its standstill provision. Language in the subordination agreement providing for the senior loan to be paid in full before any payment was made “by or on behalf of” the debtor did not prevent the junior lender from obtaining a judgment against the guarantors, although it prevented enforcement of the judgment until the senior loan was paid in full.

326. *Haggard v. Bank of Ozarks Inc.*,
[668 F.3d 196](#) (5th Cir. 2012)

Unconditional guaranty that did not require the lender to first seek payment from the borrower but which was “limited to the last to be repaid \$500,000” of a \$1.6 million loan and which also provided that “until the principal balance of the Loan is reduced to less than \$500,000, there will be no reduction in the amount guaranteed hereunder” was ambiguous as to whether the creditor could pursue the guarantor before the balance of the loan was reduced to \$500,000.

327. *J. Remora Maintenance LLC v. Efromovich*,
[943 N.Y.S.2d 792](#) (N.Y. Super. Ct. 2012)

Language in guaranty agreement by which the guarantor purported to “waive[], and agree[] not to assert any defense in any action” to enforce the guaranty barred the guarantor’s alleged defenses based on fraudulent inducement and failure of consideration even though the guaranty did not otherwise state that it was “absolute and unconditional” and even though the waiver language appeared under the heading “Governing Law” because the agreement also expressly provided that captions were inserted for convenience only and were not relevant to the interpretation of the agreement.

328. *Bank of America v. Freed*,
[2012 WL 6725894](#) (Ill. Ct. App. 2012)

“Carve-out” provision in guaranty agreement by which guarantors, who otherwise guaranteed only \$50.3 million of the \$205 million loan, would be liable for the full amount of the debt if they contest, delay or otherwise hinder any action taken by the lenders in connection with foreclosure or the appointment of a receiver was enforceable and thus the guarantors were liable for the full debt. The care-out provision was not an unenforceable penalty because the lenders are still permitted to recover only their actual damages: the amount remaining on the loan. The carve-out provision was also not an unenforceable restraint on the guarantors’ right to defend themselves and to seek due process because they could – and did – contest the appointment of a receiver, they were merely subject to consequences for doing so.

329. *SSI Holdco, Inc. v. Mourton*,
[2012 WL 4094301](#) (N.D. Okla. 2012)

Although guaranty agreement that covered the interest due on a secured loan required the creditor to apply to the guaranteed obligation “[a]ll payments received from [the debtor] or on account of the Guaranteed Indebtedness from whatsoever source,” the secured party’s credit bid at a foreclosure sale did not result in a “payment received,” and thus the secured party was free to apply the credit bid to the principal portion of the secured obligation rather than to the guaranteed interest obligation.

330. *Principal Commercial Acceptance, LLC v. Buchanan Fund V, LLC*,
[2012 WL 6095236](#) (Tex. Ct. App. 2012)

Guaranty agreement obligating the guarantor to pay borrower’s unfunded deferred equity contributions to construction project was not triggered when borrower defaulted in another manner – by failing to fund an operating escrow; the lender’s acceleration of the loan did not accelerate the obligation to pay the deferred equity contributions and hence there was nothing due on the guaranty. This was true even if the guarantor controlled the borrower and could therefore cause it to default other than by failing to make deferred equity contributions.

331. *Biel Loanco III-A, LLC v. Labry*,
[862 F. Supp. 2d 766](#) (W.D. Tenn. 2012)

Although creditor must act in good faith in deciding whether to foreclose on the collateral before seeking payment from the guarantors, the guarantors failed to present any evidence that the creditor acted in bad faith. While failure to protect and preserve the collateral can discharge guarantors, a failure to foreclose is not a failure to protect and preserve the collateral and problems that made the realty collateral unmarketable were not caused by the creditor. Thus the creditor was entitled to summary judgment against the guarantors.

332. *Eagerton v. Vision Bank*,
[99 So. 3d 299](#) (Ala. 2012)

Consolidation of two loans in debtor’s bankruptcy that did not alter the interest rate of the first loan or change the collateral for either loan discharged the guarantors of the first loan even though the guaranty agreement covered extensions, renewals, and replacements of that loan and waived “any and all defenses . . . pertaining to Indebtedness” because the consolidation increased the amount of the debt. It did not matter that the creditor sought to allocate foreclosure proceeds proportionally.

333. *Kanawha-Gauley Coal & Coke Co. v. Pittston Minerals Group, Inc.*,
[2012 WL 6622708](#) (4th Cir. 2012)

Because under West Virginia law a landlord’s lien on the tenant’s personal property does not arise until the landlord petitions a court for a distress warrant – something the landlord had not done in this case – there was no lien and thus the surety could have no impairment of collateral defense.

334. *LFG Nat. Capital, LLC v. Gary, Williams, Finney, Lewis, Watson, and Sperando P.L.*,
[2012 WL 2856106](#) (N.D.N.Y. 2012)

Guaranty agreement that provided that “a separate action may be brought against Guarantor irrespective of whether an action is brought against Debtor” and “Guarantor’s liability hereunder shall not be contingent upon the exercise or enforcement by Creditor of any remedies it may have against Debtor” was sufficient to waive the defenses in sections 2845 and 2849 of the California Civil Code, which require, respectively, the creditor to pursue the collateral and the principal obligor before proceeding against the guarantor. Further, an additional clause generally waiving all suretyship defenses and then expressly listing five defenses other than sections 2845 and 2849 did not alter this conclusion because nothing indicated that the enumerated defenses were the only ones waived.

335. *Mid-Wisconsin Bank v. Koskey*,
[819 N.W.2d 563](#) (Wis. Ct. App. 2012)

Although bank’s statement to guarantor that it would pay off the existing lender and obtain a first lien on the collateral was not an actionable promise because of the integration clause in the guaranty, it was a misrepresentation that entitled the guarantor to rescind the guaranty.

336. *JP Morgan Chase Bank v. Winget*,
[2012 WL 5342412](#) (E.D. Mich. 2012)

Guaranty agreement by which individual and his living trust both guaranteed a commercial loan and which expressly stated that it could be enforced against the individual only with respect to certain pledged stock – but which had no such limitation with respect to the trust – would be reformed due to mistake to impose the same limitation with respect to the trust because the trust was added to the guaranty late in negotiations merely due to uncertainty about who owned the stock, the lender had never investigated the creditworthiness of the trust, and the parties had no discussions about the lender’s position being enhanced by an unlimited guaranty from the trust.

337. *Porter Capital Corp. v. Thomas*,
[2012 WL 3139871](#) (Ala. Civ. App. Ct. 2012)

Guarantor was not a third-party beneficiary of loan agreement and thus was not bound by arbitration clause in that agreement. Guarantor was also not compelled to arbitrate his claims against lender based on arbitration clause in guaranty agreement because that clause defined arbitrable claims to “mean” those between the lender and borrower, even though the clause then went on to indicate that it “includes” claims “arising out of, in connection with, or relating to” the guaranty.

338. *Uhlmann v. Richardson*,
[287 P.3d 287](#) (Kan. Ct. App. 2012)

Guarantor who paid debt had no claim for unjust enrichment against co-guarantors but was entitled to contribution from them, subject to any equitable defenses that may apply.

339. *In re Basil Street Partners, LLC*,

[2012 WL 6101914](#) (Bankr. M.D. Fla. 2012)

Entity formed by one guarantor to purchase note and guaranties at steep discount from lender could not collect the entire amount due from the other guarantors but was limited to contribution toward the amount paid. No decision on whether the amount of contribution should be calculated on a per capita basis or in proportion to different caps on the guaranties. The guarantor, as president of the debtor, breached a fiduciary obligation to the debtor by essentially buying the note for himself but material facts remained in dispute about whether the debtor waived or is estopped from raising that claim. The guarantor owed no fiduciary duties to the other guarantors, who were themselves negotiating with the lender, unless all the guarantors impliedly agreed, at meeting shortly before the purchase of the note, to create such a fiduciary duty by forming a common negotiating strategy.

LENDING, CONTRACTING & COMMERCIAL LITIGATION

340. *Retirement Board of the Policemen's Annuity & Benefit Fund v. Bank of New York Mellon*,
[2012 WL 1108533](#) (S.D.N.Y. 2012)

Certificates issued under a pooling and servicing agreement for mortgage-backed securities are debt, not equity, and are therefore subject to the Trust Indenture Act. Investors stated claim against indenture trustee for failing to require the master servicer to cure, substitute, or repurchase defective loans.

341. *Bank of America v. FDIC*,

[2012 WL 6105147](#) (D.D.C. 2012)

FDIC stated claim against custodian of mortgage loans despite exculpatory clause in Custodial Agreement because the clause excepted not only gross negligence, willful misconduct, and a bad-faith, material breach not cured within 10 days of notice, but also "other malfeasance," which was undefined and too broad to constitute clear and unequivocal notice of what rights were contracted away.

342. *FH Partners, LLC v. Complete Home Concepts, Inc.*,

[378 S.W.3d 387](#) (Mo. Ct. App. 2012)

Entity that contracted with FDIC to purchase a loan participation that the FDIC had previously sold to a different buyer, did not acquire any interest even though the FDIC attempted to cure the defect by contracting with the other buyer to reacquire the participation interest retroactively to immediately before the second sale because it was not shown that both parties intended the transaction to be retroactive and, even if they had, retroactive effect between the parties would not have affected the rights of a third party so as to automatically give the second buyer rights in the participation interest.

343. *Oddo Asset Management v. Barclays Bank PLC*,
[973 N.E.2d 735](#) (N.Y. 2012)

Mezzanine note holder had no cause of action for a breach of fiduciary duty against asset managers of SPV holding mortgage backed securities and no cause of action for aiding and abetting a breach of fiduciary duty against the warehouse lender that sold the securities to the SPV or the rating agency that rated them because the note holder was a debt investor, not an equity investor, and thus was owed no fiduciary duty.

344. *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*,
[36 A.3d 776](#) (Del. Super. Ct. 2012)

Although security agreement provided that the secured party's "sole remedy for payment of the Secured Obligations is the Pledged Securities pledged under this Agreement," ambiguity sufficient to prevent summary judgment existed because the promissory note appeared to create a carve-out for certain "Mandatory Payments."

345. *Carver Federal Savings Bank v. 3 Whale Square, LLC*,
[2012 WL 3194314](#) (N.Y. Super. Ct. 2012)

Promissory note that contained waiver of notification of default was not rendered ambiguous by another clause requiring notifications to be sent by certified mail because the note also required the borrower to provide notification of certain prepayments.

346. *Wells Fargo Bank Northwest v. RPK Capital XVI, LLC*,
[360 S.W.3d 691](#) (Tex. Ct. App. 2012)

Post-bankruptcy sale of aircraft as part of orderly liquidation of business by aircraft lessor was not a sale in ordinary course of business and therefore buyer did not acquire under § 2A-310(d) rights to goods that were an accession to the aircraft.

347. *Edelman Arts, Inc. v. Art International (UK) Ltd.*,
[841 F. Supp. 2d 810](#) (S.D.N.Y. 2012)

Placement of signed purchase order in escrow was a mechanism to create a condition precedent to validity of the parties' contract, not merely a condition to the buyer's duty to pay.

348. *In re Royal Manor Management, Inc.*,
[480 Fed. Appx. 362](#) (6th Cir. 2012)

Loan agreement signed by individuals without any indication that they did so on behalf of the business entities they owned and controlled, and which agreement referred in several places to the obligations of the individuals without ever referring to an obligation of the business entities, bound the individuals but not the business entities.

349. *Hudson Insurance Co. v. Simmons Construction, LLC*,
[2012 WL 869383](#) (D. Ariz. 2012)

Issuer of surety bond that had received several claims relating to insured construction projects was entitled to a temporary restraining order enjoining the contractor from transferring property other than in the ordinary course of business but was not entitled to an order that contractor provide collateral because it has not alleged irreparable injury even though the issuer's agreement with the contractor provides for such relief and declares that the issuer will suffer irreparable injury upon the contractor's default.

350. *Bayerische Landesbank v. Aladdin Capital Management LLC*,
[692 F.3d 42](#) (2d Cir. 2012)

Investors in collateralized debt obligation that sold interests in a credit default swap sufficiently alleged that they were third-party beneficiaries of the portfolio management agreement entered into between CDO issuer and the registered investment adviser because the agreement specifically delineated the adviser's obligations and liabilities to the investors. Although the agreement identified the swap counter-party as an intended third party beneficiary and disclaimed the existence of other third-party beneficiaries "except as otherwise specifically provided herein," the exception might refer to the entire agreement, not merely the clause on third-party beneficiaries.

351. *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC*,
[360 S.W.3d 152](#) (Ky. 2012)

Piercing corporate veil is appropriate because grandparent and parent corporations deprived wholly-owned subsidiary of all income and rendered it an asset-less shell by: (i) making all employees of the subsidiary employees of the grandparent; (ii) having all payments by the subsidiary's customers go into a "lock box" account controlled by the grandparent and then treating the funds as property of the grandparent; (iii) having the grandparent pay all the vendors and lessors who provided goods, services, or property to the subsidiary; (iv) listing the parent and grandparent as the named insureds on the property damage insurance for the subsidiary's leased premises; (v) failing for numerous years to hold an annual board of directors or shareholders meeting for either the parent or the subsidiary; and (vi) failing to file sales and use tax returns for the subsidiary but instead including all of the subsidiary's transactions in the returns of the grandparent and another affiliate.

352. *CBR Event Decorators, Inc. v. Gates*,
[962 N.E.2d 1276](#) (Ind. Ct. App. 2012)

The shareholders of a corporation formed to purchase assets of an existing business were not liable for the corporation's breach of the purchase contract because piercing the corporate veil requires some causal connection between the principal's misuse of the corporate form and the fraud on third parties and the only fraud alleged was the corporation's claim that the seller made misrepresentations that the merger clause in the purchase agreement contradicted, and this had no relationship to the corporation's status. The seller was aware that the corporation was newly formed and thus would lack corporate records.

353. *In re Perry H. Koplik & Sons, Inc.*,

[476 B.R. 746](#) (Bankr. S.D.N.Y. 2012)

Officers of closely-held corporation violated their duty of care with respect to extensions of credit to a customer and their duty of loyalty in forgiving loans to themselves but their liability for breach of the duty of care was limited by the failure to prove that the breach was the proximate cause of the losses given the customer's accounting fraud.

354. *Lotsadough, Inc. v. Comerica Bank*,

[2012 WL 5258300](#) (E.D. Mich. 2012)

Loan applicant that had granted to its prospective landlord a security interest in all its business assets, including its liquor license, and thus was unable to provide the prospective lender with a first-priority security interest, had no cause of action against the prospective lender for refusing to make the loan because the term sheet signed by the applicant made the loan expressly subject to documentation satisfactory to the lender and other loan documents required the applicant to represent and warrant that the collateral was not and would remain not subject to any other security interest.

355. *In re BankAtlantic Bancorp, Inc. Litigation*,

[39 A.3d 824](#) (Del. Ch. 2012)

Because bank holding company's proposed sale of bank constituted a sale of "all or substantially all" assets but the buyer had not agreed to assume the holding company's debts, the proposed sale violated contractual covenants of the holding company and would be enjoined.

356. *In re MF Global Inc.*,

[478 B.R. 611](#) (Bankr. S.D.N.Y. 2012)

Clause in accounting firm's engagement letter with client which prohibited the client from assigning any rights or claims "arising under this engagement letter" and declared any assignment in violation of this restriction as void did not restrict SIPC, which succeeded to the client's rights, from assigning a malpractice claim against the accounting firm because that claim arose in tort, not under the engagement letter.

357. *In re Adam Aircraft Industries, Inc.*,

[2012 WL 646273](#) (Bankr. D. Colo. 2012)

Prepetition forbearance agreement in which debtor released all claims against secured party arising from the credit agreement or the secured party's conduct did not preclude third-party creditors from pursuing causes of action bestowed by the Bankruptcy Code and inuring to the benefit of unsecured creditors and thus did not preclude the trustee from pursuing a claim for equitable subordination based on the secured party's refusal to fund the entire loan pursuant to the commitment letter and its declaration of default under the credit agreement for "technical" defaults without providing the debtor an opportunity to cure.

358. *Fish Creek Capital, LLC v. Wells Fargo Bank*,
[2012 WL 2335315](#) (10th Cir. 2012)

Lender did not violate the duty of good faith and fair dealing by extending a letter of credit the lender had issued to ensure the beneficiary's completion of infrastructure improvements to the borrower's property.

359. *Gaia House Mezz, LLC v. State Street Bank and Trust Co.*,
[2012 WL 1530385](#) (S.D.N.Y. 2012)

Bank that had agreed, subject to certain conditions, to waive \$4.5 million in accrued interest to induce borrower to complete project and pay off loan could not, after borrower fully performed, rely on the fact that those conditions had not for a time been satisfied because the bank's conduct violated the duty of good faith, the bank is equitably estopped by its silence for months while the borrower continued to perform, and equitable principles prohibit such a forfeiture.

360. *JCC Development Corp. v. Levy*,
[146 Cal. Rptr. 3d 635](#) (Cal. Ct. App. 2012)

Promissory note that authorized the lender to accelerate the debt upon the borrower's default and, in the same paragraph, provided that "[t]hereafter, interest shall accrue at the maximum legal rate" did not call for default-rate interest after the note matured. The default-rate interest applied only after acceleration and, upon maturity, there was nothing to accelerate.

361. *Cataphora Inc. v. Parker*,
[848 F. Supp. 2d 1064](#) (N.D. Cal. 2012)

Although under state law a successful plaintiff on a contract action is entitled to prejudgment interest if either the contract so provides or the amount of the damages is certain or capable of being made certain with calculation, here the amount of damages was uncertain and the contract provided for 18% interest on "[a]ny payments that are late" but not on any other breach or dispute. Similarly, although parties are free to contract around federal law on post-judgment interest in diversity actions, here the agreement covered merely late payments and did not expressly state that the parties agreed to a specified post-judgment interest rate or an intent to contract around 28 U.S.C. § 1961.

362. *Hosier v. Citigroup Global Markets, Inc.*,
[858 F. Supp. 2d 1206](#) (D. Colo. 2012)

Federal law governs the award of post-judgment interest in federal cases, including those confirming an arbitration award. The arbitration panel may not establish a post-judgment rate different from the federal statutory rate unless it determines the parties have clearly, unambiguously, and unequivocally contracted for their own rate.

363. *California Bank & Trust v. Shilo Inn*,
[2012 WL 5605589](#) (D. Or. 2012)

Term in promissory note providing for the interest rate to increase by 5% upon default was an unenforceable liquidated damages provision under California Civil Code § 1671 because the creditor offered no evidence that the higher interest rate bore any relation to the anticipated harm arising from default.

364. *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equipment, LLC*,
[813 N.W.2d 49](#) (Minn. 2012)

Pursuant to state constitution, debtor was entitled to a jury trial on bank's contractual claim for attorney's fees in connection with action to enforce a secured loan. The claim is legal, not equitable, because it is more like one for indemnity than for restitution or specific performance.

365. *Lane v. U.S. Bank*,
[2012 WL 3670467](#) (Cal. Ct. App. 2012)

Clause in deed of trust entitling lender to attorney's fees "in connection with Borrower's default" and "for the purpose of protecting Lender's interest in the Property and rights under this Security Agreement" was broad enough to cover quasi-contract claims for unjust enrichment and imposition of a constructive trust, and such claims were "on the contract" within the meaning of California's reciprocity statute. Thus, the lender was liable for the attorney's fees incurred by the borrower's representative in successfully defending against those claims of the lender.

366. *In re Makris*,
[482 Fed. Appx. 695](#) (3d Cir. 2012)

Clause in promissory note making borrower liable for lender's attorney's fees incurred "in enforcing this Note" was not broad enough to cover attorney's fees incurred in unsuccessfully pursuing the borrower for fees the lender incurred in suing the guarantor.

367. *In re Glazier Group Inc.*,
[2012 WL 6005764](#) (Bankr. S.D.N.Y. 2012)

Creditor's claim for attorney's fees incurred subsequent to payoff of loan survived even though the payoff letter provided that upon receipt of payment "all obligations of the Borrower and any guarantors under any and all of the Loan Documents shall be deemed paid in full" because the payoff letter also expressly stated that the amount owed was "[a]s of December 5, 2011" and, in any event, the loan agreement contained an all-encompassing unambiguous survival clause that provided that all indemnification obligations survive repayment of the loan.

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368. *In re Guggenheim Corp. Funding, LLC*,
[380 S.W.3d 879](#) (Tex. Ct. App. 2012)
Credit agreement's jury waiver clause, which applied to any "legal action or proceeding relating to this agreement or any other loan document," including "any amendment" or "modification" thereto, covered claims relating to amended warrants given that a contemporaneous fee letter identified the original warrants as a "loan document" and the parties had agreed that the credit agreement and fee letter should be construed together.
369. *Green Tree Servicing, LLC v. Woods*,
[2012 WL 3222360](#) (Tex. Ct. App. 2012)
Loan servicing agreement, its amendment, and sub-servicing agreement established that sub-servicer had capacity to bring action against debtors on allegedly securitized loan. Whether the sub-servicer could establish that the loan was transferred from the original creditor to one of the parties to the servicing agreement and whether the loan remained subject to the servicing agreement relates not to capacity but to standing, an issue that could not properly be determined in a no-evidence motion for summary judgment.
370. *Epitech, Inc. v. Kann*,
[139 Cal. Rptr. 3d 702](#) (Cal. Ct. App. 2012)
Creditors were not third-party beneficiaries of contract between the debtor and its financial advisor and thus their action against the advisor for misrepresentation – based on statements made before, during, and after the advisor's contractual relationship with the debtor – was not subject to the arbitration clause contained in that contract.
371. *Commercial Real Estate Inv., L.C. v. Comcast of Utah II, Inc.*,
[285 P.3d 1193](#) (Utah 2012)
Contractual liquidated damages clauses are enforceable unless unconscionable at the time the parties enter into the contract.
372. *Citizens Bank v. Merrill, Lynch, Pierce, Fenner and Smith, Inc.*,
[2012 WL 5828623](#) (E.D. Mich. 2012)
Because no contrary intention was manifest in the choice-of-law clause in the parties' control agreement, Michigan procedural law, including its six-year statute of limitations, not the chosen law of New York, with its three-year limitations period, applied to tort and contract claims brought under New York law.
373. *Crastvell Trading Ltd. v. Marengere*,
[90 So. 3d 349](#) (Fla. Ct. App. 2012)
Forum-selection clause in loan agreements was not binding on the debtors' affiliates or their controlling shareholder because the agreements expressly indicated that there were no third-party beneficiaries entitled to enforce the agreements.

374. *IDACORP, Inc. v. American Fiber Systems, Inc.*,
[2012 WL 4139925](#) (D. Id. 2012)

Clause in stock purchase agreement selecting New York as the exclusive forum to litigate disputes was not a basis for a federal court in Idaho to dismiss or transfer an action brought for breach of that contract because Idaho law invalidates choice-of-forum clauses that restrict access to Idaho courts.

375. *Newton v. American Debt Services, Inc.*
[854 F. Supp. 2d 712](#) (N.D. Cal. 2012)

Arbitration clause in consumer's contract with debt settlement company was procedurally unconscionable because the contract was one of adhesion and the arbitration clause was located on the back of a double-sided form that was incorporated by reference into the actual contract but not contained within the contract itself or signed by the consumer. The arbitration clause was substantively unconscionable because it: (i) limited the debt settlement company's liability to the amount the consumer paid even though federal law expressly authorizes greater recovery, (ii) allows for the prevailing party to recover reasonable attorney's fees even though state law permits such an award in a consumer contract only if the action was not brought in good faith; (iii) required arbitration in Tulsa, the debt settlement company's home city, thereby requiring the consumer to incur substantial expense; and (iv) gave the debt settlement company the unilateral right to choose an arbitrator.

376. *Grosvenor v. Qwest Corp.*,
[854 F. Supp. 2d 1021](#) (D. Colo. 2012)

Arbitration clause in an internet subscriber agreement was illusory and not enforceable because the provider reserved the right to modify any of the agreement's provisions, including the arbitration clause, at its sole discretion.

377. *MV Insurance Consultants v. NAFH National Bank*,
[87 So. 3d 96](#) (Fla. Ct. App. 2012)

Because agreements executed contemporaneously by the same parties and concerning the same transaction are construed together as a single contract, arbitration clause in the parties' Collateral Assignment of Termination Payments and Economic Interests applied to claims brought under the promissory note, security agreement, and guaranty.

378. *Amegy Bank v. Monarch Flight II, LLC*,
[870 F. Supp. 2d 441](#) (S.D. Tex. 2012)

Secured party's claims for conspiracy and fraudulent transfer against debtor's wife and entities controlled by the debtor were subject to arbitration between the secured party and the debtor because the conspiracy claim alleges substantially interdependent and concerted misconduct between the debtor and the nonsignatory defendants and the fraudulent transfer claim is premised on the security agreement.

379. *Ping v. Beverly Enterprises, Inc.*,
[376 S.W.3d 581](#) (Ky. 2012)

Although mother's durable power of attorney regarding financial decisions and medical treatment gave her daughter authority "[t]o generally do any and every further act and thing of whatever kind, nature, or type required to be done on my behalf" and directed that "the language of this document be liberally construed," the power of attorney did not give the daughter authority to enter into an arbitration agreement with a long-term care facility, which agreement was not a condition to admission to the facility – because the agency was limited to managing the mother's property and finances and to making healthcare decisions on her behalf, and did not authorize the daughter to waive the mother's access to courts when there was no reasonable necessity to do so.

380. *In re Kentwood Pharmacy, L.L.C.*,
[475 B.R. 602](#) (Bankr. W.D. Mich. 2012)

Michigan does not recognize a common-law landlord's lien on the tenant's personal property in the leased premises.

381. *Wells Fargo Bank v. Baker*,
[139 Cal. Rptr. 3d 502](#) (Cal. Ct. App. 2012)

National Bank Act preempts Iowa law that requires a foreign corporation, but not an Iowa resident, to obtain a certificate of authority to transact business in Iowa before using substituted service. Accordingly, a national bank may acquire personal jurisdiction over a defendant using substituted service even if the bank lacks such a certificate.

382. *Proficio Bank v. Wire Source, LLC*,
[2012 WL 1448207](#) (D. Utah 2012)

Utah court lacked personal jurisdiction over Connecticut LLC whose principal place of business was in Georgia and whose only contact with Utah was signing a security agreement as one of the managing members of the debtor in connection with claims for conversion, fraudulent transfer, and disregard of corporate form, all relating to the other managing member's alleged conduct. However, the court did have personal jurisdiction over the Connecticut LLC in connection with alleged breach of the Validity Indemnity it signed in its individual capacity.

383. *In re Lexi Development Co., Inc.*,
[2012 WL 1596717](#) (Bankr. S.D. Fla. 2012)

Senior creditor and its assignee breached intercreditor agreement by failing to provide notice of the debtor's default to the junior lender concurrently with notice to the debtor. Because the intercreditor agreement authorized the junior lender to cure a default to avoid accrual of default rate interest and the concomitant erosion of its junior lien, the senior creditor's failure to provide notice prohibited the senior lender from charging interest at the default rate.

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384. *Huntington National Bank v. RDJ Land & Property Group, LLC*,
[2012 WL 4357443](#) (S.D. Ind. 2012)
Intercreditor agreement that provided for lien subordination but contained no provision for debt subordination had no applicability once the collateral was sold and the creditors were pursuing the guarantors for the deficiency.
385. *Prudential Ins. Co. of America v. WestLB AG*,
[2012 WL 4854713](#) (N.Y. Sup. Ct. 2012)
Because credit agreement and related documents required that payments received be distributed on a pro rata basis among all the lenders and required the consent of all lenders – not merely the Required Lenders – to an amendment to the credit agreement or to the release of substantially all the collateral, the administrative agent for the credit facility was not permitted to distribute the proceeds of the collateral in a manner that substantially benefitted those lenders that provided exit financing.
386. *BAC Home Loans Servicing, LP v. Semper Investments L.L.C.*,
[277 P.3d 784](#) (Ariz. Ct. App. 2012)
Lender that refinanced existing senior mortgages was subrogated to them because the junior mortgagee was not prejudiced thereby, even though the refinanced loan required interest at a variable rate and the new loan carried a fixed rate of interest that was lower than the maximum variable rate and even though the junior mortgagee's predecessor was not notified of the refinancing transaction before the predecessor made subsequent advances.
387. *Niday v. GMAC Mortgage, LLC*,
[284 P.3d 1157](#) (Or. Ct. App. 2012)
Although assignee of mortgage note also acquires the mortgage securing the note, the assignee cannot foreclose nonjudicially in Oregon without previously having recorded the assignment. Using MERS as an agent does not avoid this requirement.
388. *Bain v. Metropolitan Mortg. Group, Inc.*,
[285 P.3d 34](#) (Wash. 2012)
MERS is ineligible to be a "beneficiary" of a deed of trust under the Washington Deed of Trust Act, if it never held the promissory note secured by the deed of trust.
389. *Edelstein v. Bank of New York Mellon*,
[286 P.3d 249](#) (Nev. 2012)
When MERS is the named beneficiary of a deed of trust and a different entity holds the promissory note, the note and the deed of trust are split, making nonjudicial foreclosure by either improper. However, any split is cured when the promissory note and deed of trust are reunited; because the foreclosing bank in this case became both the holder of the promissory note and the beneficiary of the deed of trust, it had standing to foreclose nonjudicially.

390. *Cadlerock Joint Venture, L.P. v. Lobel*,
[143 Cal. Rptr. 3d 96](#) (Cal. Ct. App. 2012)

Assignee of loan secured by junior deed of trust that was created simultaneously and by the same originator as the loan secured by the senior deed of trust was not subject to the state's anti-deficiency statute and thus was permitted to pursue the debtor on the debt after the senior lender foreclosed nonjudicially. The decision distinguishes *Bank of America v. Mitchell*, 204 Cal. App. 4th 1199 (2012) (single lender with both senior and junior deeds of trust cannot avoid the application of section 580d by assigning the junior loan after the trustee's sale on the senior lien).

391. *Baer v. Douglas*,
[2012 WL 917190](#) (Cal. Ct. App. 2012)

The relative priority of two simultaneously executed deeds of trust that were stamped as recorded at the same time was not determined by which received the lower indexing number. Although neither of the trust deeds indicated on its face the relative priority of the lien created thereby, the trial court acted within its legal discretion when it based priority on the grantor's intent.

392. *Onyeoziri v. Spivok*,
[44 A.3d 279](#) (D.C. 2012)

Mortgagee that conducted foreclosure sale at which it purchased the property for \$59,000 after learning that the debtor had a contract to sell the property for \$280,000 to a buyer who was pre-approved for financing could potentially be liable for intentional interference with business relations.

393. *In re Singer*,
[469 B.R. 293](#) (Bankr. W.D. Wis. 2012)

Forbearance agreement that bank entered into with debtors that permitted partial payments for six months, while a request for a loan modification was pending, but which did not expressly indicate when the deferred payment amounts would be due, would be construed against the bank, which drafted it. As a result, the deferred payment amounts fell under the "due on maturity" clause of the loan agreement, not the clause providing that acceptance of partial payments does not constitute a waiver of the bank's rights and remedies, and thus were not due until the end of the loan term.

394. *BHC Interim Funding II, L.P. v. FDIC*,
[851 F. Supp. 2d 131](#) (D.D.C. 2012)

Assignment agreement pursuant to which bank agreed to assume responsibility for obligations arising out of customer deposit accounts and pooled deposit accounts established on behalf of customers did not cover a guarantee agreement that was secured by the fees generated by the deposit agreements.

395. *In re Qimonda Richmond, LLC*[476 B.R. 431](#) (Bankr. D. Del. 2012)

Indemnification clause in participation agreement relating to equipment lease which required the lessee to indemnify certain parties for costs and expenses “which may be imposed on, incurred by or asserted against any Indemnatee” did not cover claims for the lost residual value of equipment after the debtor filed bankruptcy and rejected the lease because the clause covers only claims asserted against the indemnitees by third parties, not claims they assert against the lessee for their lost investment opportunity.

396. *In re BankAtlantic Bancorp, Inc. Litigation,*[39 A.3d 824](#) (Del. 2012)

Transaction in which bank holding company would: (i) sell all of its equity interest in its regulated savings bank; (ii) receive 100% of the equity in a newly formed entity owning the savings bank’s “criticized assets” and (iii) no longer function as a federally regulated bank holding company, constituted a sale of substantially all of its assets in violation of a trust indenture and was therefore permanently enjoined.

397. *Dawson v. Pittco Capital Partners, L.P.,*[2012 WL 1564805](#) (Del. Ch. Ct. 2012)

Members of LLC who also held secured notes could not be forced to surrender the notes in connection with a merger to which they objected because the LLC agreement did not clearly and unambiguously provide for a mandatory capital contribution in connection with an approved merger. Consequently, the notes survived the merger, as did the security interest.

398. *Blythe v. Bell,*[2012 WL 6163118](#) (N.C. Super. Ct. 2012)

Absent something to the contrary in an LLC’s operating agreement, under the North Carolina LLC Act, the assignment of a membership interest to another member transfers both the assignor’s economic interest and control interest without the need for consent by the other members, but an assignment to a non-member transfers only the economic interest unless the other members unanimously consent. As a result, original member’s transfer of its interest to two other members left the original member with no interest in the LLC and it lost status as a member. A subsequent transfer of another member’s interest to the original member, without the consent of all the members, effectively transferred only economic rights; the original member acquired no control rights and the transferor retained those rights.

399. *Hamilton Equity Group, LLC v. Juan E. Irene, PLLC,*[2012 WL 6720735](#) (N.Y. Sup. Ct. App. Div. 2012)

Individual attorney who was sole member of PLLC could not be successor by *de facto* merger to PLLC after it was dissolved. As a result, while secured lender might have a security interest in fees generated in personal injury cases previously handled by the PLLC and now handled by the individual attorney, the individual attorney, who did not guaranty the loan, had no personal liability.

400. *Synectic Ventures I, LLC v. EVI Corp.*,
[2012 WL 6628093](#) (Or. 2012)

Factual issue required reversal of summary judgment in favor of debtor that exercised option to convert the secured party's loan to equity after the secured party's manager agreed to an extension of the debt because the manager – who was also chairman of the board and treasurer of the debtor and who stood to benefit personally from the extension – had a conflict of interest and the extension may not have been fair to the secured party, in which case the manager lacked authority to agree to the extension. Although the secured party's operating agreement expressly gave members permission to: (i) invest in other ventures with no obligation to account to the secured party for such opportunities; and (ii) own securities issued by and participate in the management of other companies in which the secured party invested, neither of these authorizations expressly waived a conflict of interest by the managing member.

401. *Leica Geosystems, Inc. v. L.W.S. Leasing, Inc.*,
[872 F. Supp. 2d 1191](#) (D. Colo. 2012)

Seller's standard terms that seller's written price quotations referenced but did not include, describe, or provide a link to were not part of the agreement formed initially. Seller's invoice sent the following day and containing a link to the standard terms operated as a confirmation; the choice-of-law clause became part of the agreement because it is an immaterial additional term but the disclaimers of the implied warranty of fitness, incidental damages, and consequential damages are material changes that did not become part of the agreement.

402. *West v. Houchin*,
[2012 WL 2810298](#) (M.D.N.C. 2012)

Prepaying buyer of specially manufactured goods had no cause of action against the seller for conversion due to the seller's sale and delivery of the goods to another buyer because, unless the sales agreement provides otherwise, title goes not pass until delivery and thus the prepaying buyer lacked ownership or a superior possessory interest.