Commercial Law Developments

2014

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SECURED TRANSACTIONS

Scope Issues

1. *Burton v. Lucido*,
82 U.C.C. Rep. Serv. 2d 801 (N.Y. Sup. Ct. 2014)
Security interest in a real estate broker's right to a commission was not excluded from Article 9 by § 9-109(d)(3) as compensation to an employee because the broker is an independent contractor, not an employee, or by § 9-109(d)(5) as an assignment of accounts for collection only because the right to the commission secured a loan to the broker.

2. *Pain Control Institute, Inc. v. GEICO General Insurance Co.*,
447 S.W.3d 893 (Tex. Ct. App. 2014)
Even if the woman injured in an auto accident had a claim against the driver's insurer, so that she could grant a security interest in that claim to the medical provider that treated her, such a security interest would be excluded from the scope of Article 9 under § 9-109(d)(12).

3. *Delphi Automotive Systems, LLC v. Capital Community Economic/Industrial Dev. Corp.*,
434 S.W.3d 481 (Ky. 2014)
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," applies only to transactions in which the government is a debtor, not a secured party. Accordingly, 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, and thus was truly a sale with a retained security interest, was within the scope of Article 9. Because there is no public policy exception to Article 9's perfection requirements when a state agency is the secured party, the state agency's unperfected security interest was subordinate to the perfected security interest of a lender.

4. *Clinton v. Adams*,
2014 WL 6896021 (C.D. Cal. 2014)
Even if law firm had a security interest in its client's copyright infringement action, that security interest was outside the scope of Article 9 because the firm received merely a promise to pay money that might accrue in the future as a means of collecting its fees and § 9-109(d)(5) excludes an assignment of payment intangibles "which is for the purpose of collection only" and § 9-109(d)(9) excludes an assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral.

5. *In re Montreal, Maine & Atlantic Railway, Ltd.*,
83 U.C.C. Rep. Serv. 2d 461 (Bankr. D. Me. 2014), *aff'd*,
521 B.R. 703 (1st Cir. BAP 2014)
Creditor's security interest in the debtor's accounts and payment intangibles did not extend to the debtor's right to payment under its business interruption insurance policy because Article 9 does not apply to an interest in or a claim under an insurance policy and to have a security interest under Maine common law possession of the policy is required, which the creditor did not have.

6. *Joseph Skilken & Co. v. Oxford Aviation, Inc.*,
2014 WL 5361336 (D. Me. 2014)
Because a judgment creditor is entitled to turnover of and a lien on only the property in which a creditor could obtain an Article 9 security interest, the creditor in this case was not entitled to a lien on the judgment debtor's claim against the underwriter of an insurance policy on the debtor's aircraft because a lien on such claim is "arguably" excluded from Article 9 under § 9-109(d)(8) or (12).

7. *Patterson v. University Ford, Inc.*,
758 S.E.2d 185 (N.C. Ct. App. 2014)
Because the retail installment contract for the purchase and sale of an automobile and the conditional delivery agreement were part of the same transaction and could be read together even though the retail installment contract contained a merger clause, and because parol evidence is admissible to show the existence of a condition precedent, the unsatisfied financing condition in the conditional delivery agreement prevented the existence of a contract.

8. *In re Polke*,
2014 WL 5474632 (Bankr. N.D. Ga. 2014)
Transaction by which creditor paid off the initial lender in a car title pawn transaction, received title in his name, and obtained a security agreement and promissory note from the debtor was a secured transaction because, by everyone's account, the car was to belong to the debtor once she made all of the payments. Even though Georgia statutes govern title pawns and afford fewer protections to the debtor than the UCC, such transactions are still secured transactions, not absolute sales. Moreover, the creditor did not comply with the title pawn statute either in the form of documentation or the procedures on default. By selling the car without sending prior notification to the debtor, the creditor failed to comply with the UCC and is subject to a claim for damages by the debtor.

9. *In re Purdy*,
763 F.3d 513 (6th Cir. 2014)
50-month leases of dairy cows were true leases even though the lessee had no right to terminate and 50 months exceeds the economic life of dairy cows, 30% of which need to be culled each year. The relevant "good" was the herd of cattle, which had an economic life far greater than the lease term, not the individual cows originally provided.

10. *Sunshine Heifers, LLC v. Moohaven Dairy, LLC*,
13 F. Supp. 3d 770 (E.D. Mich. 2014)
Postpetition lease of 240 cows to a dairy for 48 months was a true lease because, even though the transaction was not terminable by the dairy, there was no option or obligation to renew the lease or to buy the cows, and the term of the lease did not exceed the economic life of the cows because data indicates that more than 57% of cows produce milk for longer than four years. Accordingly, the transaction was in the ordinary course of business of the dairy and consistent with the confirmed plan, and thus did not need bankruptcy court approval.

11. *In re Gutierrez*,
2014 WL 3888277 (Bankr. D.P.R. 2014)
Six-year lease of automobile, after which the putative lessee had the option to purchase the automobile for $150 was a true lease because the agreement expressly provided that it was a finance lease under the Puerto Rice Act to Regulate Personal Property Lease Contracts, not a secured transactions, and thus the lessee had waived the right to have the lease treated as a secured transaction.

12. *In re James*,
2014 WL 5785316 (Bankr. D. Kan. 2014)
Three-year lease of used vehicle was a sale with a retained security interest because even though the debtor could terminate the lease early, the debtor remained obligated for the rent due during the entire rental period, and the debtor had an option to purchase during the lease term by paying the remaining rent, an option which a rational lessee would exercise.

13. *In re ES2 Sports & Leisure, LLC*,
519 B.R. 476 (Bankr. M.D.N.C. 2014)
40-month lease of exercise equipment that was not subject to cancellation and under which the lessee had an option to purchase the equipment at the end of the lease term for $1 was not a true lease, but instead a sale and retained security interest. This conclusion was bolstered by the fact that lease payments exceeded $262,000 but the value of the equipment when delivered was less than $200,000.

14. *ConocoPhillips Alaska, Inc. v. Williams Alaska Petroleum, Inc.*,
322 P.3d 114 (Alaska 2014)
Agreement by which crude oil buyer provided $13 million to seller following seller's demand for adequate assurance of the buyer's ability to comply with a retroactive price increase that might be mandated by the Federal Energy Regulatory Commission, which funds were segregated pending resolution of the FERC action, was a modification of the parties' sales agreement governed by Article 2, not a security interest governed by Article 9, and § 2-207 applied to resolve the interest rate to which the buyer was entitled on those funds.

15. *In re C.W. Mining Company*,
509 B.R. 378 (Bankr. D. Utah 2014)
Agreements by which coal broker purported to prepay mining company for coal to be mined and expressly provided that the broker would be the owner of the coal upon severance of the land, but which also purported to grant the broker a security interest in the proceeds of all of the debtor's coal sale contracts did not mean that broker owned the receivables from such contracts. Even though the broker was the party that sent the invoices, the mining company owned the receivable and the broker had merely a security interest. That security interest was not excluded from Article 9 by § 9-109(d)(5) or (6) and, because it was unperfected, was therefore junior to the interests of the mining company's bankruptcy trustee.

16. *In re Davis,*
2014 WL 5306088 (Bankr. N.D. Ohio 2014)
Agreement by which debtor purported to grant 50% ownership in a laser to a lender until the $57,000 loan for the purchase price was paid off created a security interest. The lender therefore had a security interest in half the proceeds of the laser.

Attachment Issues

– Existence of Security Agreement

17. *Weinandt v. Peckham*,
84 U.C.C. Rep. Serv. 2d 118 (Minn. Ct. App. 2014)
A filed financing statement did not, by itself, satisfy the requirement for an authenticated security agreement even though the debtor filled in the form by hand because the debtor did not authenticate the financing statement.

18. *In re Eyerman*,
517 B.R. 800 (Bankr. S.D. Ohio 2014)
Individuals who guaranteed the debts of two LLCs that they owned had not granted a security interest in their personal property to secure the debts because each security agreement identified the "borrower" as one of the LLCs and the guarantors signed only as a "member" of the LLCs, not in their individual capacities. Although a filed financing statement identified the guarantors as additional debtors, the financing statement lacked granting language and does not constitute a security agreement.

19. *In re Inofin, Inc.*,
512 B.R. 19 (Bankr. D. Mass. 2014)
Original security agreement that described the collateral to be installments sales contracts "purchased by Debtor with the proceeds of loans from Secured Party and assigned and delivered to Secured Party" did not include chattel paper not financed by the secured party, and because the secured party could not show that any installment contracts were traceable to the proceeds of its loans, the security agreement was ineffective to grant a security interest. Subsequent loan agreement did not remedy the problem because it lacked granting language. However, the parties' course of performance over 15 years in which the debtor, in return for financing, weekly delivered installment contracts with allonges stating that the debtor "hereby assigns [to Secured Party] all of its right, title and interest in, to and under the following [Retail Installment Sale Agreement]" was sufficient to serve a security agreement and grant a security interest in the delivered contracts, regardless of whether those contacts were purchased with the loan proceeds. Moreover, the loan modification agreement entered into by the parties modified the scope of the security interest and granted the secured party a security interest in all delivered installment contracts.

20. *Saili v. Parkland Auto Center, Inc.*,
329 P.3d 915 (Wash. Ct. App. 2014)
Because the purchase agreement for a GMC car, pursuant to which the buyer purported to grant a security interest in both the GMC and in a Chevy, was conditioned on financing that was denied, the agreement was void, thus the seller did not acquire a security interest in the Chevy, and the seller committed conversion by repossessing the Chevy.

21. *Tough Company, Inc. v. Wurlitzer*,
2014 WL 298699 (Cal. Ct. App. 2014)
Credit buyer of a truck, a trailer, and a bulldozer had granted a security interest in all three items even though the bill of sale did not mention a security interest because all documents relating to the transaction can be read together, the title documents for the truck and trailer identified the seller as a lienholder, the seller testified he believed the bill of sale was granted as security, and a bill of sale, although absolute in form, may be shown in fact to have been given as security.

22. *Jones v. Simon*,
2014 WL 3695818 (W.D. Ky. 2014)
Settlement Agreement pursuant to which the debtor promised to pay $30,000 within one year, unless specified pending litigation was "successfully mediated or settled" sooner, in which case the debtor would have six months from the date of the mediation or settlement to pay, did not give the creditor a security interest in the settlement proceeds. The settlement agreement addressed *when* payment would come due; it did not discuss a source of funds or indicate whether any property would secure the obligation.

23. *In re Pallet Company LLC*,
2014 WL 432790 (Bankr. D. Del. 2014)
Law firm that represented the bankruptcy debtor in its pending tort litigation had no lien on the proceeds of the sale of the debtor's assets – including the pending tort claims – because the sale order provided for liens to attach to the proceeds to the extent of their value and validity at the time of the sale but the law firm did not have a valid charging lien at the time of the sale because a charging lien does not arise until a judgment is issued.

24. *Jackson Walker LLP v. FDIC*,
13 F. Supp. 3d 953 (D. Minn. 2014)
Law firm had no security interest in retainer paid to it because the retainer agreement, although it stated that the law firm could apply the retainer to the payment of fees and expenses from time to time, did not commit the retainer as a means to ensure payment and in fact contemplated that the client would timely pay for services through direct billing. Further, the retainer served as advanced payment because the agreement provided that it would be applied toward the final statement. Even if the retainer agreement were a security agreement, the additional $100,000 retainer provided later was not collateral because the agreement provided that it could only be modified by a signed writing.

25. *Clinton v. Adams*,
2014 WL 6896021 (C.D. Cal. 2014)
Law firm did not acquire a security interest in its client's copyright infringement action because the "Assignment of Monies" signed by the client did not expressly grant a security interest in or assign the action. Instead, the client merely agreed "to irrevocably assign any and all money due to [him] based on the claim(s) made" in infringement action, and thus merely promised to pay proceeds from the action that may accrue in the future.

26. *In re Jeter*,
2014 WL 993043 (Bankr. E.D. Tenn. 2014)
Financier that provided nonrecourse funding to accident victim and in return received an assignment of a portion of the victim's right to proceeds of his tort claim obtained an outright assignment valid under New Jersey law even though the agreement contained a backup grant of a security interest because the agreement contained clear evidence of the intent to assign the proceeds, the proceeds were described sufficiently to identify what was covered, and the victim retained no power to revoke the assignment.

27. *Commercial Law Corp. v. FDIC*,
2014 WL 413934 (E.D. Mich. 2014)
Even if the security agreement between a law firm and its bank client, which purported to secure the client's obligation to pay for legal services, was signed before the FDIC took over, a fact the FDIC disputed, the security interest was nevertheless not effective against the FDIC because there was no evidence that the security agreement was approved by the bank's board of directors or that such an approval was reflected in the minutes of a board meeting, as required by 12 U.S.C. § 1823(e).

28. *In re STN Transport Ltd.*,
2014 WL 585311 (Bankr. S.D. Tex. 2014)
Even if a person who puts up collateral but is not an obligor on the secured debt qualifies as a "debtor" for the purposes of the Uniform Fraudulent Transfer Act, the corporation that owned trucks allegedly used to collateralize a loan to one of its directors did not grant a security interest in the trucks because the director lacked authority to bind the corporation. The director lacked actual authority because the document purporting to grant that director authority to act for the corporation was signed only by that sole director, not by both of the directors. The director lacked apparent authority because the corporation did nothing to create the appearance that the director was authorized to act on the corporation's behalf.

29. *Terry J. Nosan Declaration of Trust v. GS CleanTech Corp.*,
2014 WL 2753150 (Mich. Ct. App. 2014)
While the guaranty agreements signed by the debtor's affiliates stated that the note to a group of new lenders "shall be guaranteed by a pledge of the [debtor's] net cash flows" and the subordination agreement signed by the prior lender stated that "[t]he Borrower shall be entitled to pledge the Net Cash Flow" to the new lenders, there was no security agreement signed by the debtor and thus the new lenders did not acquire a security interest.

– Description of the Collateral

30. *In re Salander-O'Reilly Galleries, LLC*,
506 B.R. 600 (Bankr. S.D.N.Y. 2014), *rev'd*,
2014 WL 7389901 (S.D.N.Y. 2014)
Bank's blanket lien on art gallery's inventory attached to consigned painting even though the security agreement provided that: (i) goods held on consignment were excluded from the borrowing base; and (ii) the gallery warranted that it had ownership of all "collateral." However, a dispute about whether the consignor actually retrieved the painting after the consignment agreement expired and then returned the painting to the gallery for exhibition purposes prevented summary judgment on the issue of priority between the consignor and the bank.

On appeal, court ruled that security agreement granting a security interest in "assets and rights of the [gallery] wherever located, whether now owned or hereafter acquired or arising," was limited to property then or thereafter owned by the gallery, and thus did not cover property held on consignment.

31. *In re Eyerman*,
517 B.R. 800 (Bankr. S.D. Ohio 2014)
Even if a promissory note and filed financing statement were together sufficient to indicate an intention by individual guarantors to grant a security interest, the documents' only description of the collateral as "certain business assets" would not be sufficient to reasonably identify what was covered.

32. *In re Nickeson*,
2014 WL 6686524 (Bankr. D.S.D. 2014)
Security agreement that described the collateral as "all farming equipment and machinery, Farm Products, claims, accounts receivable, inventory, general intangibles, business tort claims, and all other business and agricultural assets owned by [Debtor]" did not cover the debtor's stock in a closely held corporation, which is classified as investment property, not a general intangible. Although the filed financing statement identified the stock, it did not create or provide for the security interest and it was not signed by the debtor.

33. *Russell Road Food and Beverage, LLC v. Galam*,
585 F. App'x 745 (9th Cir. 2014)
Even if the lender had attempted to enforce the guaranty, which granted a security interest in property "in the physical possession of or on deposit with the Lender," that would not have covered the guarantor's trademark. Although the guarantor's corporate resolutions authorized the guarantor to give the lender a security interest in the trademark, the guarantor did not expressly provide such a security interest in the guaranty.

– Obligations Secured

34. *In re Duckworth*,
586 F. App'x 672 (7th Cir. 2014)
Although security agreement that misdescribed the secured obligation as a note executed on December 13, 2008, when the note was actually executed and dated December 15, 2008, could be reformed as between the debtor and the secured party, it was not effective to perfect the security interest against the debtor's bankruptcy trustee, who had the status of a judicial lien creditor and against whom parol evidence is inadmissible.

35. *Heritage Bank v. Kasson*,
853 N.W.2d 868 (Neb. Ct. App. 2014)
Parents, who had granted a security interest in their farm products to a bank to secure their debts were not in a partnership or joint venture with their son, who had granted the bank a security interest in his farm products to secure his obligations to the bank. Even though the parents and son occasionally shared equipment and resources, they held themselves out to be engaged in separate businesses, they obtained separate financing, they maintained separate accounts and records, they used different identifying marks on their cattle, and they maintained separate insurance on their equipment and herds. Thus, the parents were not liable for the son's debts and the bank could not use the proceeds of the parents' cattle to reduce the debt owed by the son.

36. *Mount Spelman & Fingerman, P.C. v. GeoTag, Inc.*,
2014 WL 4954632 (E.D. Tex. 2014)
Contingent fee agreement between a law firm and its client that granted the firm a lien on recoveries "for any amounts owing to us" and which also stated that "[f]ees are fully earned as of the date of execution of the settlement agreement between plaintiff and defendant," created a lien only on amounts due in settled cases, even if the client owed the firm for services in connection with other cases or as a result of the client's termination of the firm. Moreover, the lien on the receivable in connection with any single case is limited to the fee owing in connection with that case; it does not secure the client's obligations in connection with other cases.

37. *Matter of Liquidation of Freestone Insurance Co.*,
2014 WL 7399502 (Del. Ch. Ct. 2014)
Bank could not retain the assets credited to the custodial account of an insurance company, now in receivership, to protect the bank's contingent right to indemnification because that right was not secured by the collateral. The custody agreement granted the bank a security interest to secure "payment obligations," which, when the agreement is read in context, means (i) costs incurred by the bank in providing the limited administrative services contemplated by the agreement, (ii) fees charged for those services, (iii) advances of funds by the bank to make payment on or against delivery of securities, and (iv) overdrafts in the account; the term "payment obligations" does not include claims for indemnification.

– Rights in the Collateral

38. *In re Circle 10 Restaurant, LLC*,
519 B.R. 95 (Bankr. D.N.J. 2014)
New Jersey liquor license is not property for the purposes of state law even though it is property: (i) to which a federal tax lien can attach; (ii) for the purposes of due process; and (iii) that can be sold in bankruptcy. Because the debtor's license is not property, it does not qualify as a general intangible, § 9-408 is inapplicable, and no security interest can attach to it.

39. *Nautilus Insurance Co. v. Cheran Investments LLC*,
82 U.C.C. Rep. Serv. 2d 560 (Neb. Ct. App. 2014)
Bank with a security interest in assets of seller had no right to insurance proceeds of goods sold to buyer who failed to pay therefor because the buyer acquired ownership of the goods despite the failure to pay. However, because the interpleader action brought by the insurer is an equitable proceeding, the bank had a security interest in the seller's right to payment from the buyer, and the seller agreed that the proceeds should go to the bank, the trial court could direct that the insurance proceeds be paid over to the bank.

40. *Vehicle Development Corp. v. Livernois Vehicle Development, LLC*, 995 F. Supp. 2d 758 (E.D. Mich. 2014)

Bank with a perfected security interest in all inventory and equipment of a Michigan borrower that operated a vehicle repair facility did not have a security interest in the 81 trucks that a Singapore company provided to the borrower for conversion from left-hand drive to right-hand drive. The written agreement expressly stated that title to the trucks remained with the Singapore company and thus the borrower lacked sufficient rights in the trucks for the bank's security interest to attach to them. Moreover, the trucks did not fit within the definition of either equipment or inventory.

41. *Perini/Tompkins Joint Venture v. Comerica Bank*, 2014 WL 1028945 (E.D. Mich. 2014)

Because, pursuant to the Michigan Builder's Trust Fund Act a contractor holds building contract fund in trust for unpaid subcontractors and suppliers, a lender's security cannot attach to those funds. The funds paid to the lender can be recaptured to the extent the subcontractors and suppliers were unpaid at the time of the payment but offset by the amount that the funds provided by the lender were used to pay subcontractors and suppliers.

42. *Dougherty v. Trustmark Bank*, 2014 WL 2767380 (Tex. Ct. App. 2014)

Although the individual debtor represented in a security agreement with a lender that he was the owner of specified property in which he purported to grant a security interest, the debtor's sworn testimony three years later in bankruptcy that his corporation owned the property meant that the lender obtained no security interest. The representation in the security agreement was insufficient to create an issue of fact to avoid summary judgment in the lender's action against the bank that later obtained and foreclosed on a security interest from the corporation.

43. *Fifth Third Bank v. Gulf Coast Farms, LLC*, 573 F. App'x 515 (6th Cir. 2014)

LLC that authenticated security agreement purporting to grant a bank a security interest in all its stallions, stallion syndicate agreements, fractional interests in stallions, and stallion shares did in fact grant a security interest in a share of Distorted Humor, a thoroughbred, because the evidence established that: (i) the owners of the dissolved partnership that previously owned the share contributed it to the LLC; (ii) the LLC reported the income subsequently produced from ownership of the share on its tax returns while the dissolved partnership did not file further tax returns; (iii) the income from the share was deposited into the LLC's deposit account; and (iv) the LLC, not the partnership, insured the share. It was irrelevant that another entity had a right of first refusal on the partnership's share because that right was never triggered due to the fact that the partnership and the LLC had common owners.

44. *In re Webb*,
520 B.R. 748 (Bankr. E.D. Ark. 2014)
Although joint venture by husband and wife was not a partnership, merely an agreement about how they would conduct their farming business together, and thus not a legal entity, the security agreements signed by the husband on behalf of the venture were effective because the venture had more mere naked possession of the collateral, it had sufficient rights in the collateral to grant a security interest.

45. *Pain Control Institute, Inc. v. GEICO General Insurance Co.*,
2014 WL 5474777 (Tex. Ct. App. 2014)
Because under Texas law a person injured in an auto accident has no direct claim against the driver's insurer, a woman so injured could not grant a security interest in her right to payment from the driver's insurer to the medical provider that treated her. Consequently, the insurer did not, after settling with the woman, violate the provider's rights by paying the woman directly despite having received instructions to pay the provider. No discussion of why the security interest could not attach to the right to payment under the settlement agreement.

– Other

46. *Woodbridge Structured Funding, LLC v. Arizona Lottery*,
326 P.3d 292 (Ariz. Ct. App. 2014)
Financier did not acquire a security interest in individual's right to periodic payments of state lottery jackpot because even though the individual signed an assignment agreement with the financier before petitioning a court to approve an assignment to a different jackpot buyer, the financier had not paid the individual and thus had not given value for the security interest to attach.

47. *Blanken v. Kentucky Highlands Investment Corp.*,
82 U.C.C. Rep. Serv. 2d 815 (E.D. Ky. 2014)
Language in a security agreement defining "excluding property" to consist of "any contract, lease, license, or other agreement that contains a provision prohibiting the assignment or grant of a security interest therein" did not exclude equipment that the debtor acquired in a transaction structured as a lease but which was really a sale with a retained security interest even though those transaction documents prohibited future encumbrances. Equipment is not a "contract, lease, license, or other agreement." Moreover, the prohibition on further encumbrances was ineffective under § 9-407 to prevent the attachment of a second security interest.

48. *Dow Family, LLC v. PHH Mortgage Corp.*,
848 N.W.2d 728 (Wis. 2014)
The doctrine of equitable assignment survives in Wisconsin and has been codified by § 9-203(g), so that a person who becomes a holder of a promissory note automatically becomes entitled to enforce a mortgage that secures the note.

49. *Richter v. CC-Palo Alto, Inc.*,
2014 WL 6687238 (N.D. Cal. 2014)
Residents of retirement community who, as part of their residency contract, loaned funds to the owner of the retirement community, did not have a security interest in the funds either because the documents failed to label the loan as "unsecured" or because lenders have a security interest in the property subject to the loan. The fact that state regulations might require the owner to maintain a statutory reserve for "refundable contracts" was immaterial because the residents did not allege that their contracts qualified as refundable contracts.

Perfection Issues

– Method of Perfection

50. *In re Anderson*,
2014 WL 172222 (Bankr. D. Utah 2014)
Despite a state statute providing that water shares – rights to use water evidenced by shares of stock in a corporation – shall be transferred pursuant to U.C.C. Article 8, such shares remain real property, not personal property, and hence a security interest in them can be perfected through a properly recorded deed of trust.

51. *Sturtz Machinery, Inc. v. Dove's Industries, Inc.*,
83 U.C.C. Rep. Serv. 2d 425 (N.D. Ohio 2014)
Lender perfected its security interest in the debtor's fixtures by filing a financing statement in Pennsylvania, where the debtor was located, even though the fixtures were located in Virginia.

52. *In re Faison*,
518 B.R. 849 (Bankr. E.D.N.C. 2014)
Husband who, in connection with divorce proceedings, filed lis pendens against wife did not thereby perfect any interest he might have in the wife's 20% interest in an LLC, which is a general intangible. Filing a financing statement is the only way to perfect an interest in a general intangible.

53. *In re SGK Ventures, Inc.*,
521 B.R. 842 (Bankr. N.D. Ill. 2014)
Debtor's advance deposits for rent, utilities, legal services, and insurance were not deposit accounts because they were not maintained with a bank and thus control was not required to perfect a security interest in those deposits.

– Adequacy of Financing Statement

54. *Clinton v. Adams*,
2014 WL 6896021 (C.D. Cal. 2014)
Even if law firm had an Article 9 security interest in the debtor's copyright infringement claim, that security interest was unperfected because the law firm filed a financing statement in California, where the infringement claim was prosecuted, rather than in Florida, where the debtor is located.

55. *In re Northern Beef Packers Ltd. Partnership Tax ID/EIN 26-2530200*,
83 U.C.C. Rep. Serv. 2d 104 (Bankr. D.S.D. 2014)
Even if equipment lessor had a blanket security interest in the debtor's other assets, that security interest became unperfected when the lessor amended its financing statement to restate the collateral to consist only of the equipment covered now or in the future by a lease or security agreement between it and the debtor.

56. *In re Eng*,
83 U.C.C. Rep. Serv. 2d 500 (Bankr. E.D.N.C. 2014)
Recorded deed of trust served as an effective fixture filing because it stated that the "collateral is or includes fixtures . . . including but not limited to all heating, plumbing, ventilating, cooling, and lighting goods, equipment and other tangible and intangible property now or hereafter acquired, attached to or reasonably necessary to the use of such property."

57. *In re Patriot Electric and Mechanical, Inc.*,
2014 WL 1761928 (Bankr. D. Md. 2014)
Whether the filed financing statement and continuation statements that listed the debtor's original name – "Patriot Electric, Inc." – but not the name the debtor adopted after the financing statement was filed – "Patriot Electric and Mechanical, Inc." – and which were discoverable in response to a search against "patriotelectric" but not "patriotelectricmechanical" were effective to perfect was an issue that would be certified to the Maryland Court of Appeals.

58. *In re Webb*,
520 B.R. 748 (Bankr. E.D. Ark. 2014)
Although joint venture by husband and wife was not a partnership, merely an agreement about how they would conduct their farming business together, and thus not a legal entity, the financing statements identifying the debtor as the venture were effective because the venture was an unregistered organization and describing such an organization by its name is not seriously misleading.

59. *In re Baker*,
511 B.R. 41 (Bankr. N.D.N.Y. 2013)
Financing statement that identified collateralized cattle by name and ear tag number was ineffective with respect to cattle whose ear tag had either fallen off or did not match one of the listed numbers. While the names of the cattle were referenced in a certificate of registration for each cow, each certificate included a sketch of the cow's distinctive markings, and those markings could be used to identify the cows, there was insufficient evidence that lenders to the cattle industry, in the course of their due diligence, regularly used registration certificates to identify cattle subject to a prior interest for the certificates to overcome the deficiencies in the financing statement.

60. *In re Sterling United, Inc.*,
519 B.R. 586 (Bankr. W.D.N.Y. 2014)
Because a filed financing statement is seriously misleading, and therefore ineffective, only if a reasonably diligent searcher would be misled, a financing statement that ambiguously describes the collateral as "all assets, including [x, y, and z] now owned or hereafter acquired and located at [a specified place]" is not ineffective even if the collateral is located elsewhere. Moreover, in this case there was a long succession of filed financing statements that set forth the debtor's name change, address change, and the change in the description of the collateral, so that no reasonably diligent searcher could not have been misled.

– Authorization or Effect of Termination Statement

61. *In re Motors Liquidation Co.*,
755 F.3d 78 (2d Cir. 2014)
In connection with a case in which the debtor's counsel filed termination statements for multiple secured transactions, only some of which were being refinanced, the court certified to the Delaware Supreme Court the question of whether a termination statement is authorized if the secured party of record reviewed and approved its filing or whether the secured party must also intend to terminate the security interest.
103 A.3d 1010 (Del. 2014)
A termination statement is authorized by the secured party if the secured party of record reviewed and knowingly approved the termination statement for filing, regardless of whether the secured party subjectively intended or understood the effect of the filing.

62. *Fjellin ex rel. Leonard Van Liew Living Trust v. Penning*,
2014 WL 4298053 (D. Neb. 2014)
Termination statement filed without the knowledge or consent of the secured parties by the law firm representing the debtor was ineffective; the security interest remained perfected and continued to encumber the collateral, even after the debtor sold it.

– Collateral Covered by a Certificate of Title

63. *In re Conklin*,
511 B.R. 688 (Bankr. D. Id. 2014)
Pursuant to a 2007 amendment to Idaho's certificate-of-title statute, a security interest in a vehicle is perfected when a properly completed application for a certificate is received by the Department of Transportation or its agent, not the date the certificate is issued. Because that date was within 30 days of when the debtor acquired the vehicle, the bankruptcy trustee could not avoid the security interest.

64. *In re Scott*,
2014 WL 6871932 (Bankr. W.D. Mo. 2014)
Bank perfected its security interest in a vehicle when a new certificate of title noting the bank's lien was issued. Because that was 36 days after the date the security interest attached, perfection did not relate back to the time of attachment under Mo. Rev. Stat. § 301.600(2) and was avoidable as a preference. The bank could have perfected earlier by filing a notice of lien, but submitting the title application did not substantially comply with that process because the application did not provide the requisite information and fee on the requisite form.

65. *In re Alvarado*,
517 B.R. 880 (Bankr. C.D. Ill. 2014)
Secured party that was properly identified as lienholder on California certificate of title but that changed its name before the debtor moved and had the car re-titled in Illinois remained perfected even though the Illinois certificate used the former name of the secured party. The address listed for the secured party was correct and an inquiry directed to that address in the secured party's former name would have enabled a reasonably diligent creditor to ascertain the correct information about the status of the lien.

66. *In re Bryant*,
2014 WL 6968066 (Bankr. W.D. Ky. 2014)
Lender had a perfected security interest in the debtor's car even though the duplicate certificate of title erroneously listed the lender as a second lienholder rather than the only lienholder and even though because of space limitations it identified the lender as "Santander Consumer" rather than by its correct name, "Santander Consumer USA, Inc."

67. *Stanley Bank v. Parish*,
317 P.3d 750 (Kan. 2014)
Bank perfected its security interest in vehicle by properly filing a filed a notice of security interest with the Kansas Department of Revenue, which maintained a record of the lien in its electronic database even though it later issued a certificate that omitted the lien.

68. *In re Thompson*,
2014 WL 2919313 (Bankr. W.D. Mich. 2014)
Because Michigan law provides that a security interest in a motor vehicle is perfected upon receipt by the Secretary of State of a proper application for a certificate of title that identifies the security interest, not upon issuance of the certificate, the lender's security interest in the debtor's vehicle was perfected when the dealer submitted two conflicting applications for a certificate of title, one of which correctly identified the secured party as lienholder, even though the Secretary of State initially issued a certificate based on the other application that named a different entity as the lienholder.

69. *In re Lozar*,
2014 WL 910352 (Bankr. N.D. Ohio 2014)
Secured party with a security interest in a motorcycle perfected by notation on the certificate of title became unperfected when, upon receiving a check – later dishonored – for the secured obligation, it noted a lien release on the certificate and returned the certificate to the debtor.

70. *In re Webb*,
2014 WL 5472568 (Bankr. E.D. Ark. 2014)
Secured parties whose security interests were not noted on the certificates of title for the debtors' vehicles were not perfected in the two trailers that qualified as vehicles under the state's certificate of title statute even though no certificates of title for those trailers were admitted into evidence.

71. *In re Keen*,
2014 WL 6871867 (Bankr. W.D. Va. 2014)
Bank that had a security interest in numerous items of the individual debtor's equipment to secure the debt owed by the individual's business was not perfected in the motor vehicles, trailers or the boat listed because the only way to perfect the security interest in such items is to have the security interest noted on the certificate of title, and there was no evidence that the bank had done that.

– Other

72. *In re Inofin, Inc.*,
512 B.R. 19 (Bankr. D. Mass. 2014)
Lender that financed the debtor's purchase of installment sales contracts from car dealerships, and which had a security interest in the delivered contracts in its possession, but whose financing statement did not adequately describe the collateral, was perfected by possession of the installment contracts even though it did not possess the original Partial Purchase and Assignment that the debtor entered into with the dealerships because, without expert testimony as to how the business of purchasing and servicing sub-prime loans is documented, the trustee had failed to prove that the PPAs were the operative documents or part of the chattel paper.

73. *In re GEM Refrigerator Co.*,
512 B.R. 194 (Bankr. E.D. Pa. 2014)
Bank with a security interest in the debtor's investment account with a securities intermediary brokerage – as to which the bank both filed financing statements and entered into a control agreement with the intermediary – remained perfected when the assets credited to the account were transferred to three sub-accounts at the same intermediary. The original investment account was investment property, not a deposit account, and the sub-accounts were also investment property even though they contained some cash. The financing statements covering "all investment property" were sufficient to perfect the security interest.

74. *In re Jesup & Lamont, Inc.*,
507 B.R. 452 (Bankr. S.D.N.Y. 2014)
Bank that had a perfected security interest in deposited funds lost that interest when the funds were transferred to a second bank and then a third bank because control is required to perfect of security interest in a deposit account and the second and third banks took free of the security interest under § 9-332(b). As a result, subsequent transfer of the funds to the original bank during the preference period was an avoidable preference.

75. *In re Colony Beach and Tennis Club, Inc.*,
508 B.R. 468 (Bankr. M.D. Fla. 2014)
Post-petition lapse of financing statement did not cause the secured party to lose its lien or make the lien avoidable under Bankruptcy Code § 544(a) because lapse makes the security interest retroactively unperfected only against purchasers, not lien creditors.

– Bogus Filings

76. *United States v. Agra*,
113 A.F.T.R.2d 2014-1896 (E.D. Cal. 2014)
Taxpayer had no basis for filing financing statements against two IRS employees and thus court could order that the financing statements be stricken from the filing office's records and the taxpayer enjoined from filing any notices of non-consensual liens, recording any documents, or otherwise taking any action in the public records which purports to name a federal officer as a debtor or encumber the rights or the property of any federal officer.

77. *State v. Andrus*,
2014 WL 3881553 (Ariz. Ct. App. 2014)
Individual who submitted for filing baseless financing statement against court clerk was guilty of one count of harassment of a public officer even though the filing office did not record or index the financing statement.

78. *Nichols v. Branton*,
995 N.Y.S.2d 450 (N.Y. Sup. Ct. 2014)
Judge presiding over an incarcerated defendant's criminal trial was entitled, under the state's non-uniform § 9-518, to have the financing statement filed by the defendant against the judge expunged from the public record. The defendant was also liable for the costs incurred by the state attorney general's office in responding to the defendant's frivolous cross-motions.

79. *United States v. Halajian*,
2014 WL 4968287 (E.D. Cal. 2014)
Because the financing statement that an individual and corporation filed against a bankruptcy court clerk was baseless and false, the clerk was entitled to a declaratory judgment that the financing statement has no legal effect. Because the filing of the financing statement violates 18 U.S.C. § 1343, the clerk was also entitled to an injunction under 18 U.S.C. § 1345 prohibiting the individual and corporation from filing another financing statement against the clerk.

Priority Issues

– Buyers of Goods

80. *Financial Federal Credit, Inc. v. Crane Consultants, LLC*,
21 F. Supp. 3d 264 (W.D.N.Y. 2014)
Agreement providing for buyer of new crane to trade in an old crane to the seller was to be regarded as two independent transactions because neither was conditioned on the other, the buyer paid cash for the new crane while the seller provided a note for the old crane, the seller never paid any part of the price, and the buyer never delivered the old crane. The buyer was a buyer in ordinary course of business with respect to the new crane even though the buyer had the right to sell the new crane back to the seller for a specified price if the seller did not have possession of the old crane. Thus, the buyer took free of a perfected security interest in the new crane.

81. *Stanley Bank v. Parish*,
317 P.3d 750 (Kan. 2014)
Bank whose security interest in a vehicle was perfected by compliance with the applicable certificate of title statute had priority over a buyer who purchased the vehicle from a subsequent judicial lien creditor after the state issued a certificate of title omitting reference to the lien. The buyer could not win under § 9-320(b) because compliance with the statute was the equivalent of filing a financing statement and the buyer could not win under § 9-337 because that provision applies only to a security interest perfected under another state's law.

82. *Mercedes-Benz Financial v. Powell*,
2014 WL 3844013 (Mich. Ct. App. 2014)
The buyer who purchased a vehicle after a bank's security interest in the vehicle was removed from the certificate of title with a forged release of lien could have taken free of the security interest if the buyer had no notice of any fraud or irregularity in the title and he paid valuable consideration for the vehicle, so as to qualify as a good faith purchaser.

83. *VW Credit, Inc. v. Robertson*,
2014 WL 4207635 (E.D.N.Y. 2014)
Neither the lender with a security interest in a vehicle nor the buyers of the vehicle were entitled to summary judgment in the lender's replevin action. Although the lender's security interest was not perfected at the time of the sale to the buyers, factual issues remained as to whether the seller was authorized by the debtor to sell the vehicle and, even if so, whether the buyers acted in good faith given that the allegation that they paid substantially less than the value of the vehicle.

84. *Chen v. New Trend Apparel, Inc.*,
8 F. Supp. 3d 406 (S.D.N.Y. 2014)
Buyers who purchased the debtor's inventory at a liquidation sale at "closeout" prices did not qualify as buyers in ordinary course of business. The debtor's desire to be paid exclusively in cash for large sums was a red flag obligating the buyers to investigate further into the ownership of the goods and their failure to do so prevented them from qualifying as buyers in ordinary course. However, the creditor with a perfected security interest in the goods purchased was not entitled to summary judgment on its conversion and replevin claims because it was unclear that it had made a demand for the goods.

85. *Farmers-Merchants Bank & Trust Co. v. Southern Structures, LLC*,
134 So. 3d 142 (La. Ct. App. 2014)
Sale of collateralized goods was made by the debtor, not the broker, and because it involved the debtor's equipment, not inventory, the sale was not in ordinary course of business and the buyer did not take free of the perfected security interest.

86. *Guaranty Bank & Trust Co. v. FGDI Division of Agrex, Inc.*,
2014 WL 1289466 (N.D. Miss. 2014)
Because two buyers of grain purchased not from a person engaged in farming operations, but from the farmer's buyer, they took free of any security interest in the grain held by the farmer's lender and thus the lender's joinder of the subsequent buyers was without basis and would not be considered in determining whether there was diversity jurisdiction in the lender's action against the initial buyer.

– Competing Security Interests

87. *Millennium Bank v. UPS Capital Business Credit*,
327 P.3d 335 (Colo. Ct. App. 2014)

Secured party that, pursuant to intercreditor agreement, had priority in subcontractor's general intangibles but not accounts, had priority in the subcontractor's breach of warranty claim against a paint seller even though the damages were measured by the cost of the extra services provided to the contractor in several repainting efforts, for which the contractor did not pay the subcontractor. The subcontractor did not any render services to the paint seller and the contractor was not liable for the cost of the extra services and hence the claim was not an account.

88. *Southern Fidelity Managing Agency, LLC v. Citizens Bank & Trust Co.*,
82 U.C.C. Rep. Serv. 2d 412 (D. Kan. 2014), *rev'd*,
In re Brooke Capital Corp,
588 F. App'x 834 (10th Cir. 2014)

Regardless of whether the participation interests in a loan secured by shares of stock were sales of a fractional interest or secured loans, the participants acquired a security interest in the stock because the participation agreements expressly so provided and those security interests were perfected under § 9-310(c) because the originator's interest was perfected by possession. The originator's subsequent subordination agreement with another secured party was not binding on the participants because the participation agreement required the participants' consent to any subordination agreement.

On appeal, because the participants' interests were loans to the originator secured by a general intangible (the secured receivable), not sales of fractional interests in the loan, the participants' interests were not automatically perfected. Because the participants did not file a financing statement, their interests were unperfected and thus subordinate the interest of another secured party with a perfected security interest.

89. *Co-Alliance, LLP v. Monticello Farm Service, Inc.*,
7 N.E.3d 355 (Ind. Ct. App. 2014)

Agreement by which secured party in first priority position agreed to subordinate its interest to secured party in third priority position did not result in "complete subordination" to the benefit of the intermediate secured party, and instead resulted in "partial subordination," which effectively left the intermediate secured party unaffected. The junior secured party steps into the shoes of the senior secured party only to the extent of the lesser of: (i) the amount owed to the senior secured party; or (ii) the amount owed to the junior secured party.

90. *Feresi v. The Livery, LLC*,
2014 WL 7021107 (Cal. Ct. App. 2014), *modified*,
182 Cal. Rptr. 3d 169 (Cal. Ct. App. 2015)
Perfected security interest of the manager of an LLC in the debtor's membership interest in the LLC was equitably subordinated to the previously created but unperfected security interest of the debtor's ex-wife, who was also a member of the LLC, because the manager breached his fiduciary duty to the ex-wife by destroying the value of her security interest. The manager, knowing of the ex-wife's security interest and that the debtor was in default on his obligations to his ex-wife, loaned money to the debtor, created a conflicting security interest, and then surreptitiously perfected it to gain an advantage over the ex-wife.

91. *Sturtz Machinery, Inc. v. Dove's Industries, Inc.*,
83 U.C.C. Rep. Serv. 2d 425 (N.D. Ohio 2014)
Lender perfected its security interest in the debtor's fixtures by filing a financing statement in Pennsylvania, where the debtor was located, even though the fixtures were located in Virginia. The lender's security interest had priority over the seller's security interest that was later perfected by a fixture filing in Virginia, almost a year after delivery of the goods to the debtor.

92. *Financial Federal Credit, Inc. v. Crane Consultants, LLC*,
21 F. Supp. 3d 264 (W.D.N.Y. 2014)
Agreement providing for buyer of new crane to trade in an old crane to the seller was to be regarded as two independent transactions because neither was conditioned on the other, the buyer paid cash for the new crane while the seller provided a note for the old crane, the seller never paid any part of the price, and the buyer never delivered the old crane. The seller's secured party was also not entitled to the old crane because the trade-in was never consummated and thus the seller never acquired ownership rights in the old crane. Even if the seller did acquire rights in the old crane without possession, the buyer's retained PMSI in the old crane had priority over the security interest of the seller's secured party either under § 9-324(a), because the old crane never became inventory of the seller, or under § 9-324(b), because the notification requirement of § 9-324(b) never applied.

93. *Priestley v. Panmedix Inc.*,
18 F. Supp. 3d 486 (S.D.N.Y. 2014)
Although the security interest of a lender who failed to file a continuation statement before obtaining a judgment against the debtor was junior to the security interest granted post-judgment by the debtor to a group of 20 existing creditors – mostly insiders – after the debtor learned of the lapse of perfection, the senior security interest was an avoidable constructively fraudulent transfer because the existing creditors' promise to forebear for four months was not fair consideration for the transfer of the security interest and because the transfer gave preferential treatment to controlling shareholders. The transfer was also an avoidable transfer made with intent to hinder, delay or defraud because it was made to controlling shareholders, unusual, for inadequate consideration, made with knowledge of the lender's unpaid claim and judgment, and to allow the debtor to retain use of the collateral.

94. *Wakefield Kennedy, LLC v. Baldwin*,
2014 WL 910029 (D. Utah 2014)
Debtor that, pursuant to contract to sell a note and mortgage, placed the note into escrow had insufficient rights remaining in the note to grant a security interest in the note superior to the rights of the buyer.

95. *Colbert v. First NBC Bank*,
2014 WL 1329834 (E.D. La. 2014)
The debtor was not a necessary party in one secured creditor's declaratory judgment action against another secured party to determine the validity and priority of the latter's security interest in a commercial tort claim.

– Other

96. *Farmers National Bank v. Green River Dairy, LLC*,
318 P.3d 622 (Idaho 2014)
The statutory lien of agricultural commodity dealers who supplied feed for the maintenance of a debtor's dairy cows did not extend to the livestock that consumed the encumbered feed, and thus a bank with a perfected security interest in the debtor's cows was entitled to the proceeds from the sale of the cows.

97. *In re Big Sky Farms Inc.*,
512 B.R. 212 (Bankr. N.D. Iowa 2014)
Feed supplier's agricultural lien on the debtor's hogs had priority over previously perfected security interest only for the price of the feed supplied with the 31 days preceding the supplier's filings. In the absence of an agreement, payments to the supplier are credited to the oldest invoices first.

98. *In re Schley*,
509 B.R. 901 (Bankr. N.D. Iowa 2014)
Summary judgment denied on whether a feed supplier had an agricultural lien on the proceeds of the debtor's pigs that was prior to the perfected security interests of two lenders because: (i) the debtor had pigs at different locations and it was unclear whether the pigs sold had consumed the feed supplied; (ii) priority applies only to the feed supplied with the 31 days preceding the supplier's filings and it was unclear whether the payments made to the supplier paid for that feed. However, although Article 9 is silent on the issue, an Iowa agricultural lien does extend to proceeds of the collateral to which the lien attached.

99. *J & M Cattle Co. v. Farmers National Bank*,
330 P.3d 1048 (Idaho 2014)
The agister's lien of company that provided food, care, and other services necessary to raise the debtor's dairy cattle had priority over Bank's previously perfected security interest in the cattle. Under § 9-333(b), a possessory lien, such as the agister's lien in this case, has priority unless the statute creating the lien expressly provides otherwise. Although the statute specifies that proceeds of the cattle "must be applied to the discharge of any prior perfected security interest, the lien created by this section and costs; [and] the remainder, if any, must be paid over to the owner," this language could be either a directive on priority or merely a list of the potential payees. Because it was ambiguous, the statute did not expressly give priority to the secured party.

100. *In re Cam Trucking LLC*,
84 U.C.C. Rep. Serv. 2d 588 (Bankr. D. Ariz 2014)
Lender's perfected security interest in vehicle had priority over later garagemen's lien regardless of whether Arizona or Colorado law applies. Arizona's § 9-333 gives priority to a possessory lien unless the statute creating it expressly provides otherwise and its garagemen's lien statutes does expressly provide otherwise. Colorado's non-uniform § 9-333 gives priority to a garagemen's lien only if the statute creating so provides and its garagemen's lien statute does not so provide. Although the security interest was governed by Arizona law and the garagemen's lien was created under Colorado law, the garageman could not combine the Arizona § 9-333 and the Colorado garagemen's lien statute to obtain priority, particularly given that Colorado cases decided before the current version of Article 9 refused to accord a garagemen's lien priority over a prior, perfected security interest.

101. *In re Bissett Produce, Inc.*,
512 B.R. 528 (Bankr. E.D.N.C. 2014)
Grower that provided sweet potatoes to its own agent for storage, curing, packaging, and sale was not exempt from the PACA notice requirements and, because it did not comply with those requirements, was not entitled to the benefits of a PACA trust against either the agent or its secured lender.

102. *Attorney's Title Guaranty Fund, Inc. v. Town Bank*,
850 N.W.2d 28 (Wis. 2014)
Lender with a perfected security interest in the proceeds of the debtor's malpractice action, which attached upon settlement of the action, had priority over the rights of an earlier judgment creditor because even though the judgment creditor obtained a court order requiring the debtor to appear at supplemental proceedings, that did not give the creditor a judgment lien.

103. *Heartland Bank & Trust Co. v. Leiter Group*,
18 N.E.3d 558 (Ill. Ct. App. 2014)
Lender with a security interest in borrower's equipment and accounts had a claim for conversion against the law firm that first deposited into its IOLTA account checks from the borrower's customers and checks representing proceeds of the borrower's equipment, and then used the IOLTA account to pay its fees. The law firm was not a holder in due course of the checks because it knew of the lender's security interest. The law firm did not take free under § 9-332(b) because the deposit account was not the debtor's, it was the law firm's.

104. *Hartford Fire Insurance Co. v. Columbia State Bank*,
334 P.3d 87 (Wash. Ct. App. 2014)
Even though the agreement between an insurer and contractor for a surety bond provided that "[a]ll money paid [under the construction contract] shall be impressed with a trust for the purpose of satisfying the obligations of the Bond," the insurer had no claim against the contractor's secured lender for applying a progress payment deposited into a control account to the secured obligation. The agreement was not with the owner who provided the funds, did not provide that payments be held in trust for subcontractors, and did not actually require that the funds be "held" at all, merely "impressed" with a trust. Therefore, the contract provided for the creation of a trust at some point in the future, after the insurer made payment on the bond, which was after the secured party acted.

105. *Zimmerling v. Affinity Financial Corp.*,
14 N.E.3d 325 (Mass. Ct. App. 2014)
Account debtor's wire of funds to an escrow account pursuant to a court order in action brought by judgment creditor did not cause either the escrow agent of the judgment creditor to take free of the secured party's perfected security interest under § 9-332(b), particularly given that the court order was intended to preserve the existing priorities.

106. *Mishcon de Reya New York LLP v. Grail Semiconductor, Inc.*,
82 U.C.C. Rep. Serv. 2d 778 (S.D.N.Y. 2014)
The attachment lien that a law firm obtained on a client's patent arose when the attachment order was entered, not when a receiver was later appointed, and thus had priority over a security interest in the patent that was created and perfected subsequently. The security interest was extinguished when the attachment lien was foreclosed at an auction sale at which the law firm was the highest bidder.

107. *Blue Sky Telluride, LLC v. Intercontinental Jet Service Corp.,*
328 P.3d 1223 (Okla. Ct. App. 2014)
Summary judgment could not be awarded on secured party's action to replevy aircraft from service company that had possession of and had made repairs to aircraft because, while it remained unclear if the service company had a possessory lien on the aircraft due to questions about whether it was authorized to make repairs, if it did have a lien, that lien has priority under § 9-333 over the secured party's perfected security interest.

108. *Tenet Health Care Sys. Hospitals Dallas, Inc. v. North Texas Hosp. Physicians Group, P.A.*, 438 S.W.3d 190 (Tex Ct. App. 2014)

Judgment creditor of tenant could garnish sublessee's obligation to pay rent despite landlord's security interest in the tenant's accounts because the landlord never filed a financing statement to perfect its security interest and by serving the writ of garnishment the judgment creditor became a lien creditor.

109. *ACF 2006 Corp. v. Merritt*, 557 F. App'x 747 (10th Cir. 2014)

Lender with a perfected security interest in law firm's accounts had priority in the firm's share of the proceeds of a client's tort claim settlement over those who had provided services in connection with the litigation and were still unpaid for their services, even if the service providers had a contractual lien on the settlement proceeds – a fact that had not proven – because there was no evidence that the lien was perfected. The service providers were not entitled to a constructive trust because the law firm did not unjustly acquire the funds nor was it inequitable for the lender to take priority. One dissenting judge concluded that the firm's right to funds for expenses was not a right to payment for *the firm's* services, and thus was not an account. Moreover, the firm had no right to reimbursement with respect to those funds because the firm had not paid the expenses. Thus, the dissenting judge would have ruled that the firm did not have a right to the portion of the settlement allocated to it for expenses, and therefore the lender's security interest did not attach to that portion.

110. *Amegy Bank v. DB Private Wealth Mortgage, Ltd.*, 2014 WL 791503 (M.D. Fla. 2014)

Secured party with a perfected security interest in corporate stock that the debtor then sold and placed in a deposit account was not entitled to summary judgment against another bank that received some the sale proceeds on the basis that the recipient acted in collusion with the debtor to violate the secured party's rights. The evidence of collusion was circumstantial and did not eliminate all material factual disputes.

111. *Quarles v. D&D Transport, Inc.*, 2014 WL 6685479 (Ky. Ct. App. 2014)

Assignee of unperfected security interest in manufactured home had priority over buyer of real estate to which the home was attached because the security interest was enforceable even though unperfected and the buyer acquired no interest in the manufactured home because the manufactured home was not converted to real estate under state law and was expressly excluded from the tax sale deed.

112. *In re Provider Meds, LP*,
2014 WL 4162870 (Bankr. N.D. Tex. 2014)
Secured party with a security interest in the debtor's IP, including source code, was not entitled to rescind or terminate the debtor's licenses of the source code even though the licenses were allegedly perpetual, royalty-free, and permitted the licensees to modify the code, thus greatly reducing the code's value as collateral. The secured party had no claim for fraudulent inducement because the debtor made no false representation to the secured party (the term sheet contained no representations and the separate purchase and sale agreement, which did contain representations, related only to the debtor's patents and patent-related rights), the debtor's promise to provide a "senior security interest" was not breached by the license, and in any event a valid fraudulent inducement claim would not warrant rescission of the licenses, at most it might lead to rescission of the secured party's contracts with the debtor. Even if the license agreements were executed after the security agreement, and backdated to before the before the date of the security agreement, that does not render them fraudulent or forgeries. The signatories had authority to act and their signatures were authentic. The licensee were not liable for tortious interference with contract because even though the licensees might have known that the secured party's consent was needed to encumber the source code, the licenses were not an encumbrance.

Enforcement Issues

– Default

113. *GMAC v. Everett Chevrolet, Inc.*,
317 P.3d 1074 (Wash. Ct. App. 2014)
Security agreement between car dealership and floor plan financier that provided that the secured obligation was due "on demand" was a demand obligation even though another provision required faithful and prompt payment after a sale of each vehicle and even though there was no secured obligation when the dealership executed the agreement. Because the secured obligation was due on demand, the secured party had no duty of good faith to avoid exercising the right to demand payment.

114. *Trejo de Zamora v. Auto Gallery, Inc.*,
2014 WL 1685925 (D. Nev. 2014)
Because the seller of a vehicle violated the Nevada Retail Installment Sales Act, and was therefore not permitted to recover any finance charge or fees, the buyer could not have been in default when repossession occurred and thus had a valid claim for conversion.

115. *TTO Drilling Co. v. Hopkinson*,
2014 WL 5314770 (S.D.N.Y. 2014)
Secured party with a security interest in promissory notes had no right to collect them absent some default by the debtor.

116. *Moniuszko v. Karuntzos*,
2014 WL 4657134 (Ill. Ct. App. 2014)
Because the parties' lease agreement expressly required the landlord to release its security interest in the tenant's equipment on a specified date unless, prior to that date, the tenant "was found to be in default of this Lease and failed to cure such default," and the landlord had not obtained by the specified date a court ruling that the tenant was in default, the landlord was required to release its security interest. It did not matter that the security agreement permitted the landlord to declare a default in its sole discretion because such language was conspicuously absent from the lease.

117. *Bayader Fooder Trading, LLC v. Wright*,
2014 WL 5369420 (W.D. Tenn. 2014)
Buyer of alfalfa hay that had security interest in farmer's equipment to secure farmer's obligations under the sales agreement was entitled to emergency order for immediate possession of the collateral because the farmer had failed to deliver the hay by the date provided for in their contract and was not entitled to a defense based on the *force majeure* clause because the weather conditions were not significantly impacting other nearby growers and were not so severe as to be unforeseeable and the farmer did not take action to mitigate the effects of the poor weather conditions.

– Replevin & Repossession

118. *Farm Credit Services of America, PCA v. Cargill, Inc.*,
750 F.3d 965 (8th Cir. 2014)
Secured party with a perfected security interest in a farmer's corn crop, and which filed in compliance with the Food Security Act, had priority in the corn over the buyer to whom the corn had been delivered – and was entitled to possession thereof – even though the buyer had setoff rights against the debtor and defenses to payment under § 9-404. Section 9-404 was irrelevant to the parties' relative interests in the corn.

119. *Roberts Holdings, Inc. v. Becca's Barkery, Inc.*,
423 S.W.3d 920 (Mo. Ct. App. 2014)
The lessee of bakery equipment that then contributed the equipment to a joint venture was a necessary party in the lessor's replevin action against the joint venturer and because that party was not joined and both the lease and the joint venture agreement required litigation to occur in superior court in Spokane, the Missouri court correctly dismissed the action.

120. *In re Brady*,
508 B.R. 736 (Bankr. E.D. Wash. 2014)
Because § 9-335(d) made a tire seller's purchase-money security interest in tires sold to individual subordinate to another lender's perfected security interest in the debtor's car, pursuant to § 9-335(e) the tire seller did not have a right to repossess the tires and thus the debtor's reaffirmation agreement with the seller would not be approved.

121. *Duke v. Garcia*,
2014 WL 1318646 (D.N.M. 2014)
Repossession agent intentionally trespassed on the debtor's property and violated § 9-609 by remaining on the property and continuing repossession efforts after the debtor repeatedly protested and a physical altercation between the agent and the debtor occurred. The repossession agent also violated the state UDAP law by falsely representing, though its actions, that it was entitled to proceed with repossession on the debtor's property, over her protest, and with police assistance

122. *Duke v. Garcia*,
2014 WL 1333182 (D.N.M. 2014)
While officers involved in repossession that breached the peace might be liable for damages under § 1983, the junior officer was not liable for punitive damages given his limited involvement in and lack of control during the incident.

123. *Thompson-Young v. Wells Fargo Dealer Services, Inc.*,
84 U.C.C Rep. Serv. 2d 200 (Ill. Ct. App. 2014)
Debtors' failed to raise a claim for breach of the peace by alleging that: (i) two repossession agents came to their apartment building at 4:00 a.m.; (ii) one remained outside the building ringing their buzzer and the other went inside and "banged loudly" on their apartment door for an "extended" period of time; (iii) they "yelled loudly" and identified themselves as agents there to repossess the car; and (iv) they put a club on the car, left, and returned later and repossessed the car.

124. *Davis v. Toyota Motor Credit*,
2014 WL 1653230 (S.D. Tex. 2014)
Summary judgment denied on debtor's claim for damages resulting from repossession that allegedly resulted in a breach of the peace when the debtor tried to access the trunk of her vehicle as the repossession agent was hooking the car up to the tow truck, causing her to be lifted up with the car, and then injuring her ankle when she jumped down.

125. *Aviles v. Wayside Auto Body, Inc.*,
2014 WL 4932993 (D. Conn. 2014)
Summary judgment denied on whether secured party and its repossession agent breached the peace in repossessing the debtor's vehicle over the debtor's oral protects, even though there was no physical contact, the police were not called, the agent did not use trickery, and the debtor was permitted to remove his personal belongings.

126. *Golden v. Prosser*,
2014 WL 4626489 (D. Minn. 2014)
Debtor had no cause of action under § 9-609 for secured party's letter threatening repossession because repossession never occurred.

127. *Goldenstein v. Repossessors, Inc.*,
2014 WL 3535112 (E.D. Pa. 2014)
Debtor had no cause of action under either the Fair Debt Collection Practices Act or RICO against company that repossessed her vehicle, even if the secured loan was usurious, because the security interest was nevertheless enforceable and the debtor was in default. The debtor's redemption of the vehicle by paying the usurious interest was not actionable because it was voluntary.

128. *Hayes v. Find Track Locate, Inc.*,
2014 WL 5111587 (D. Kan. 2014)
Company that finds, tracks, and locates property to be repossessed is not a "debt collector" within the meaning of the Fair Debt Collection Practices Act and thus could have no liability under the Act for the phone calls it made to locate the debtor's vehicle.

– Notification of Disposition

129. *In re Inofin, Inc.*,
512 B.R. 19 (Bankr. D. Mass. 2014)
Secured party did not provide reasonable notification of its disposition of chattel paper because it sent notifications for three different dates and never informed any of the debtor's creditors with financing statements on file that the first notification was erroneous or that the last superseded the prior notifications.

130. *TCFIF Inventory Finance, Inc. v. Appliance Distributors, Inc.*,
82 U.C.C. Rep. Serv. 2d 836 (N.D. Ill. 2014)
Clause in guaranty agreement providing that "[a]ny notice of a disposition [of collateral] shall be deemed reasonably and properly given if given to the Guarantor at least 10 days before such disposition" did not impose an affirmative requirement on the creditor but merely provide a guideline for the reasonableness of notice required by the UCC. Hence, the creditor's failure to provide the guarantors with notice was not a breach of the guaranty. Although the failure to provide notice did result in a rebuttable presumption that there was no deficiency, the creditor rebutted the presumption by showing that most of the collateral was sold back to the manufacturer pursuant to repurchase agreements, the guaranty agreement declared that to be a commercially reasonable disposition, and the bulk of the secured obligation related to inventory that was apparently sold out of trust and hence never disposed of by the creditor.

131. *Wells Fargo Bank v. Witt*,
2014 WL 1373633 (N.D. Ala. 2014)
Because the debtor – not the secured party – sold the collateral, the secured party had no duty to provide notice of the sale to the guarantor and the requirement that the sale be conducted in a commercially reasonable manner did not apply.

132. *In re ProvideRx of Grapevine, LLC*,
507 B.R. 132 (Bankr. N.D. Tex. 2014)
Secured party's notification of disposition that referred only to the debtor's patent and patent-related rights must be read together with the letter accompanying the notification that referred to all the collateral, and thus the secured party disposed of all of the debtor's IP assets, not merely the patent and patent-related rights as to which the security interest was perfected. Even if the notification was deficient, that did not invalidate the sale or render it voidable.

133. *Newman v. Federal Nat'l Mort. Ass'n*,
2014 WL 7334192 (N.Y. Sup. Ct. 2014)
Because compliance with the non-uniform New York rule requiring notification 90 days in advance of a disposition of shares in a residential cooperative apartment is a condition to having an effective sale, secured party that purchased the shares at a disposition conducted without the proper notification would be enjoined from bringing an eviction action against the debtor.

– Conducting a Commercially Reasonable Disposition

134. *In re Adobe Trucking, Inc.*,
551 F. App'x 167 (5th Cir. 2014)
Bankruptcy court did not err in concluding that a public sale of collateralized drilling equipment, at which the secured party made the winning bid of $41 million, was commercially reasonable given that the price was higher than the amount of one appraisal, the other appraisal had to be discounted because it was prepared well before the market for such equipment was declined, and the secured party resold the equipment four months later for only $10 million. Advertising for the sale for one day in newspapers of general circulation was adequate because the security agreement provided that it would not be commercially unreasonable "to advertise dispositions of Collateral through publications or media of general circulation, whether or not the Collateral is of a specialized nature." The debtors could not complain about the secured party's failure to clean or paint the equipment prior to the sale or make it available for inspection given their refusal to turn the collateral over, identify its location, otherwise cooperate and because the security agreement provided that the secure party need not prepare the collateral for sale or have possession at the time of sale.

135. *Keybank v. Hartmann*,
82 U.C.C. Rep. Serv. 2d 730 (E.D. Ky. 2014)
Private sale of encumbered boats that the secured party conducted through a broker, as the debtor suggested and later admitted would be commercially reasonable, merely with a different broker and for a higher price, was commercially reasonable.

136. *GECC v. FPL Service Corp.*,
995 F. Supp. 2d 935 (N.D. Iowa 2014)
Secured party proved that it conducted a commercially reasonable disposition of the collateral – two copiers – by showing that: (i) it hired a remarking firm that emailed approximately 2500 potential buyers, which the firm had identified from past transactions and marketing efforts as those that customarily purchase this type of equipment for parts; (ii) the firm sold the copiers to the highest bidder; and (iii) this process conforms to that used by copier dealers who wish to maximize the price of used copiers.

137. *Builders Development & Finance, Inc. v. Vern Reynolds Construction Company, Inc.*,
2014 WL 1875804 (Minn. Ct. App. 2014)
Trial court did not err in concluding that judicially approved sale of a minority interest in a limited liability company was commercially reasonable. The secured party did not procure the ruling through fraud merely because the secured party's appraiser misstated some facts and other appraisers disagreed with his methodology. The trial court did err in refusing to award the secured party the attorney's fees it incurred post-judgment in defending the sale because the promissory note expressly provided for attorney's fees "incurred in protecting or preserving the security."

138. *Jack in the Box, Inc. v. Mehta*,
2014 WL 2069530 (N.D. Cal. 2014)
Franchisor, in an action for breach against the franchisee, was entitled to an order authorizing the sale of the franchisee's collateralized equipment by the franchisee's secured party to the franchisor. The sale was negotiated at arms length and thus was commercially reasonable.

139. *In re Sandpoint Cattle Co.*,
83 U.C.C. Rep. Serv. 2d 863 (D. Neb. 2014)
Secured party with a security interest in cattle gave the debtor a fair credit of $95,000 on the secured obligation for the 38 cattle he did not sell but simply retained. The secured party conducted a commercially reasonable disposition of 167 heifers because the evidence showed that these were the poorest quality of the abandoned cattle and the marginal increase in price that might have resulted from keeping and calving the heifers would not outweigh the increased costs of feeding and sheltering the animals. The secured party conducted a commercially reasonable public disposition of 509 cattle even though there was minimal advertising – some personal phone calls and online ads – and the sale was conducted at a commercial beef barn, not a registered Angus sale barn because the debtor insisted that the secured take possession on short notice and there were few or no other viable options for where to take the cattle and sell them from. The secured party's later sale of cattle at an annual bull sale was also commercially reasonable; the secured party had no duty to delay the sale in the hope that the collateral's value would rise. The secured party's final sale of 1210 cattle at a public sale was commercially reasonable even though made in December, at a barn predominantly used to auction commercial beef cattle, not purebred Angus, and advertised for only four months. The cattle were sold for more than their appraised value, the secured party had no duty to delay the sale, and the sale was on a recognized market.

140. *Harley-Davidson Credit Corp. v. Galvin*,
2014 WL 4384632 (D.N.H. 2014)
The guarantor of an airplane loan failed to raise a factual issue about the secured party's disposition of the collateral to avoid summary judgment on the secured party's claim for a deficiency. Even if the guarantor was correct in asserting that the airplane was missing components at the time of sale and this could have affected the sales price, he did not properly supported that contention. There was no evidence that the secured party's agent concealed the vandalism of the airplane from the guarantor or that knowledge of the vandalism would have changed the sale price. At its core, the guarantor's complaint was with the sale price, but there was no evidence that the sale process was commercially unreasonable.

141. *Adame v. Vista Bank*,
2014 WL 5839893 (Tex. Ct. App. 2014)
By answering with a general denial the secured party's complaint in an action for a deficiency, the debtor failed to place the commercial reasonableness of the disposition of limousines at issue.

142. *FL Receivables Trust 2002-A v. Arizona Mills, LLC*,
82 U.C.C. Rep. Serv. 2d 764 (Ariz. Ct. App. 2014)
Creditor with a security interest in a restaurant building and fixtures that was contractually superior to the interest of the landlord lost its lien when it failed within a commercially reasonable time to find a suitable new tenant. The length of time between repossession and disposition is a factor in determining whether the disposition is commercially reasonable under § 9-610.

143. *Provident Bank v. Steele*,
83 U.C.C. Rep. Serv. 2d 433 (S.D. Tex. 2014)
Debtor raised a colorable claim that the bank, which spent more than $50,000 to tow and repossess a boat that the bank sold for only $16,000, either incurred unreasonable expenses or conducted the sale in a commercially unreasonable manner.

144. *Ross v. Rothstein*,
2014 WL 1385128 (D. Kan. 2014)
Summary judgment denied on the commercial reasonableness of the secured party's sale of stock on the OTCQB market because factual disputes about how that exchange operates left unresolved whether it qualifies as a "recognized market" under § 9-627.

145. *TAP Holdings, LLC v. Orix Finance Corp.*,
2014 WL 5900923 (N.Y. Sup. Ct. 2014)
Senior lenders that took control of the debtor's board, orchestrated a transfer of assets to a newly formed entity in exchange for a promissory note, and then had the debtor assign the note to the senior lenders in return for a release from the secured obligations did not conduct an acceptance of collateral but instead held a private sale of the collateral. Because the sale was conducted quickly, without the involvement of the junior creditors or equity holders, and without competitive dynamic, the debtor's creditors raised a claim that the senior lenders had not conducted the sale in a commercially reasonable manner.

146. *Kinzel v. Bank of America*,
2014 WL 346293 (N.D. Ohio 2014)
Disputes about material facts prevented summary judgment on whether the secured party breached the duty of good faith in liquidating the shares of stock in which it had a security interest. While the secured party liquidated the stock after it fell below the designated floor price, on several prior occasions when the collateral fell below the designated floor price the secured party reduced the loan to maintenance ratio, accepted cash payments and collateral, and most importantly, adjusted the floor price, and yet the secured party offered no explanation of why on this occasion it liquidated the collateral. Moreover, the secured party had not shown that it acted reasonably in concluding that all the pledged collateral was insufficient to support the loan solely because the share price of this stock fell. The debtors, who had not bargained for an express restriction on the secured party's discretion, had not shown as a matter of law that the secured party acted unreasonably in refusing to make further accommodations before liquidating the collateral.

147. *In re Inofin, Inc.*,
512 B.R. 19 (Bankr. D. Mass. 2014)
Secured party did not conduct a commercially reasonable sale of chattel paper because it made no reasonable efforts to market the loan portfolio, it provided limited and conflicting notification of the sales, the auctioneer made no effort to solicit bids from individuals or entities in the industry by placing ads in trade publications and instead merely placed ads in the Boston Herald, which resulted in insignificant interest and a single bid from the secured party. However, this did not render the sale void and the debtor's bankruptcy trustee failed to prove that any damages resulted.

– Collecting on Collateral

148. *ImagePoint, Inc. v. JPMorgan Chase Bank*,
84 U.C.C. Rep. Serv. 2d 36 (S.D.N.Y. 2014)
2014 WL 3891326 (S.D.N.Y. 2014)
Assignee of original secured party had standing to bring collection action against account debtor despite a prohibition against assignment in the account debtor's agreement with the debtor because § 9-406(d) rendered the prohibition ineffective. The assignment was not excluded from the scope of Article 9 by § 9-109(d)(5) or (7) and even if the assignee is subject to all claims and defenses of the account debtor, that does not make the prohibition on assignment effective. The fact the assignee never perfected the security interest or provided notification of the assignment to the account debtor did not undermine the assignee's right to collect.

149. *In re Duckworth*,
2014 WL 690553 (Bankr. C.D. Ill. 2014)
Grain buyer had claim for recoupment for partial breach of contract under which the debtor had made partial delivery and setoff claim for debtor's breach of second, unrelated contract. The grain buyer could use the recoupment claim under § 9-404(a)(1) to reduce its liability to the secured party with a security interest in the debtor's grain and the proceeds thereof. Whether the grain buyer could use its setoff rights to reduce its liability depended on whether the secured party's notice of its interest in the debtor's crop – which was deficient under the Food Security Act – nevertheless satisfied the requirements of § 9-404(a)(2).

150. *Vinings Bank v. Brasfield & Gorrie, LLC*,
759 S.E.2d 886 (Ga. Ct. App. 2014)
Bank with a security interest in the accounts of a subcontractor that had gone out of business was not entitled to summary judgment on the bank's collection action against the general contractor because the subcontracts entitled the contractor to withhold or deduct from any payment the amounts necessary to protect the contractor if the subcontractor failed to complete the work or failed to pay its suppliers, and those amounts were not yet determined. The bank was also not entitled to summary judgment on the contractor's claim against the bank for debiting the subcontractor's deposit accounts because some of the deposited funds might have been held in constructive trust for the subcontractor's suppliers who had filed liens or had the right to file liens.

151. *Catskill Hudson Bank v. A & J Hometown Oil, Inc.*,
982 N.Y.S.2d 592 (N.Y. App. Div. 2014)
Buyer of debtor's oil business – other than existing accounts – that received instruction to pay secured party all collections on accounts generated before the sale and knew of the debtor's promise not to modify the purchase agreement without the secured party's consent could setoff overpayment of purchase price against its obligation to pay future gallonage fees but not against its collections of pre-sale accounts, which it did not acquire.

152. *InfinaQuest, LLC v. DirectBuy, Inc.*
83 U.C.C. Rep. Serv. 2d 549 (N.D. Ind. 2014)
Even if lender's security interest in the debtor's accounts was perfected by the financing statement filed by the lender's affiliate, which also had a security interest, the lender had no claim against either the debtor's franchisor or another financier whose contracts with the debtor expressly gave the franchisor and financier setoff rights. The franchisor and financier were "account debtors" to the extent they owed contractual obligations to the debtor and the lender was an "assignee" whose rights were, pursuant to § 9-404(a), subject to all the terms in the agreements between the debtor and the account debtors.

153. *Colony Flooring & Design, Inc. v. Regions Bank*,
2014 WL 2021823 (Tex. Ct. App. 2014)
Account debtor submitted sufficient evidence of uncredited returns and setoff rights to avoid summary judgment in the secured party's action to collect the account.

154. *First Trinity Capital Corp. v. Canal Indemnity Insurance Co.,*
2014 WL 460894 (S.D. Miss. 2014)
Insurance premium financier had no cause of action against insurer for return of unearned insurance premiums because, due to the fraud of the independent broker, the insurer never received payment and never issued a policy. The broker had neither actual nor apparent authority to act on behalf of the insurer.

155. *First Trinity Capital Corp. v. Western World Ins. Group, Inc.*,
2014 WL 460887 (S.D. Miss. 2014)
Insurance premium financier had no cause of action against insurer for return of unearned insurance premiums because, due to the fraud of the independent broker, the insurer never received payment and never issued a policy. The broker had neither actual nor apparent authority to act on behalf of the insurer.

– Acceptance of Collateral

156. *Blanken v. Kentucky Highlands Investment Corp.*,
82 U.C.C. Rep. Serv. 2d 815 (E.D. Ky. 2014)
The assignee of a secured party in a transaction structured as a lease of equipment but which was really a sale with a retained security interest, who, after the debtor's default, entered into an agreement with the debtor to reduce the debtor's monthly payments and eliminate the debtor's purchase rights did not, thereby, accept the collateral in full satisfaction of the secured obligation because the debtor thought it was merely a lessee, not the owner, and thus could not have consented to an acceptance of the collateral. Whether the assignment was a disposition and whether the assignee acted in good faith so as to cut off a junior security interest were questions that could not be resolved prior to discovery.

157. *Born v. Born*,
320 P.3d 449 (Kan. Ct. App. 2014)
Creditor with a security interest in stock adequately proposed to accept the stock in satisfaction of the secured obligation even though the creditor's post-default letters to the debtor did not state that the debtor had the right to object or indicate either the amount due or a means of calculating that amount. Although the debtor timely objected to the proposal, because the security agreement limited the secured party's rights after default to acceptance of the collateral, and thus the secured party could not conduct a disposition, the debtor had to redeem the collateral within a timely manner. Because the debtor did not do so, the secured party became the owner of the stock.

158. *TAP Holdings, LLC v. Orix Finance Corp.*,
2014 WL 5900923 (N.Y. Sup. Ct. 2014)
Senior lenders who, after taking control of the debtor's board, acquired all of the debtor's assets in satisfaction of the secured obligation and then transferred those assets to a newly formed entity did not conduct an acceptance of the collateral. The Foreclosure Agreement stated that the debtor agrees to "sell, assign and transfer the Subject Assets" to the newly formed entity and that the "Buyer wishes to purchase the Subject Assets and assume certain liabilities" of the debtor. The terms of the Foreclosure Agreement therefore suggest, in substance, a private sale of an entire business as a going concern, rather than the simple taking of collateral by a secured party.

– Statute of Limitations

159. *EBC Asset Investment, Inc. v. Sullivan Auctioneers, LLC*,
2014 WL 675512 (C.D. Ill. 2014)
2014 WL 903955 (C.D. Ill. 2014)
Secured party's claim for conversion against auction house that sold encumbered farming equipment on behalf of the debtors and without the secured party's permission was subject to the five-year limitations period for conversion, not the three-year period under § 3-118 for conversion of an instrument.

160. *Mahanna v. U.S. Bank*,
747 F.3d 998 (8th Cir. 2014)
Debtors who in 1986 gave possession of gold coins to a bank to secure a loan from the bank and who in 1997, after a series of bank mergers, began inquiring as to the location of the coins, was on notice at least by 2001 that the bank's successor could not locate the coins and thus the debtors' 2011 action against the successor was barred by the 10-year statute of limitations.

161. *Huffman v. Credit Union of Texas*,
758 F.3d 963 (8th Cir. 2014)
Debtor's action for failure to send the proper notification of disposition under § 9-614 was barred by either the Missouri 5-year limitations period for actions created by statute other than for a penalty or by the 3-year limitations period for statutory penalties. The 6-year limitations period for actions against a moneyed corporation was not applicable.

– Other

162. *SECC v. Deer Valley Trucking, Inc.*,
2014 WL 6686731 (D.N.D. 2014)
Secured party with a security interest in mobile tanker-trailers was entitled to an order, without prior notice to the debtor, temporarily restraining the debtor from moving, sequestering, or using collateral. The secured party had demonstrated a strong likelihood of success on the merits based on the debtor's default, a threat of irreparable harm given the potential for depreciation and deterioration that will occur with continued use of the collateral coupled with the debtor's likely inability to satisfy a money judgment, and while the debtor might suffer some harm to its business operations, it was a harm that was bargained for in the loan documents.

163. *Flanders Corp. v. EMI Filtration Products LLC*,
2014 WL 1608359 (E.D.N.C. 2014)
Secured party that had provided evidence of default by debtors who were no longer represented by counsel in the case and who had not filed responsive pleadings was entitled to a preliminary injunction enjoining the debtors from disposing of any of the collateral and from withholding the collateral from the secured party. The secured party was required to post a nominal bond of only $1,000.

164. *395 Lampe, LLC v. Kawish, LLC*,
2014 WL 221814 (W.D. Wash. 2014)
A secured party with a security interest in the debtor's one-third ownership of an LLC did not, merely by transferring to itself after default title to that ownership interest, effect a disposition or an acceptance of the collateral. There was no disposition because a secured party cannot buy at a private sale and there was no public sale. There was no acceptance because there was no proposal therefor and the debtor had objected. As a result, there was no reason to determine the value of the LLC interest to determine what deficiency or surplus existed.

165. *Amegy Bank v. DB Private Wealth Mortgage, Ltd.*,
2014 WL 791503 (M.D. Fla. 2014)
Because § 9-201 provides that a security agreement is effective against creditors, the choice-of-law clause in the security agreement governed the secured party's declaratory judgment action against a third party in which the secured party sought an equitable lien to the extent that the proceeds from the sale of the collateral were used to benefit the third party. The chosen law did not govern the secured party's tort claims against the third party; those claims were governed by the law of the jurisdiction with the most significant relationship to the particular issues.

166. *Martin v. Cavalry SPV I, LLC*,
2014 WL 1338702 (E.D. Ky. 2014)
Buyer of credit card account was entitled to benefit of arbitration clause in the credit card agreement, and therefore cardholder's action against the buyer for violation of the Fair Debt Collection Practices Act and state usury laws was subject to arbitration.

167. *Dalton v. Santander Consumer USA, Inc.*,
2014 WL 7463867 (N.M. Ct. App. 2014)
Subprime automobile finance contracts that generally required arbitration of all claims but permitted the secured party to exercise self-help remedies such as repossession and permitted either party to bring an action in small claims court was unconscionable because it has the practical effect of preserving the secured party's ability to pursue in court its most important claims – replevin, judicial foreclosure, and deficiency actions – while severely limiting the debtor's access to judicial redress for the debtor's most likely claims – fraud, misrepresentation, and tortious debt collection – which are likely to fall outside the jurisdictional limits of small claims courts.

168. *Jode Investments LLC v. Burning Tree Properties, LLC*,
2014 WL 1515267 (Mich. Ct. App. 2014)
Entity formed by some guarantors and which claimed to have acquired the debtor's personal property collateral in a disposition conducted by the secured party had not in fact done so because the documents indicated merely that, in return for payment, the secured party: (i) would transfer the real property collateral; (ii) would file a termination statement with respect to its security interest in the personal property collateral; and (iii) was releasing its claims against those guarantors. The documents lacked any indication that the secured party was transferring the personal property collateral.

169. *3455 LLC v. NP Properties, Inc.*,
2014 WL 3845696 (N.D. Ga. 2014)
Landlord that had a security interest in the tenant's equipment to secure the obligation to pay rent was entitled to simply retain the equipment remaining on the leased premises because the lease also provided that upon being dispossessed, the tenant's "equipment shall be deemed conclusively to be abandoned and may be appropriated, sold, stored, destroyed or otherwise disposed of by Landlord without written notice . . . and without obligation to account for them,"and such a term is enforceable under Georgia law.

170. *Skaff v. Progress International, LLC*,
2014 WL 5454825 (S.D.N.Y. 2014)
Secured party's collateral was not limited to deposit accounts, which were the only collateral described in the security agreement, but included the additional collateral described in the parties' merger agreement, which also granted a security interest. A receiver appointed by the court after the secured party obtained a default judgment would be authorized to take control of and preserve the debtor's assets and conduct an accounting – broader authority than what the security agreement provided – but would not be authorized to liquidate the assets and apply the proceeds to satisfy the judgment debt.

171. *Lefkowitz v. Quality Labor Management, LLC*,
2014 WL 5877850 (Fla. Dist. Ct. App. 2014)
Trial court erred in denying secured party's request to intervene in action in which creditor obtained a charging order on the debtor's ownership interests in limited partnerships and LLC, which constituted the secured party's collateral.

172. *United Tactical Systems, LLC v. Real Action Paintball, Inc.*,
2014 WL 6788310 (N.D. Cal. 2014)
Entity that allegedly bought all of the debtor's tangible and intangible property, including the trademarks and goodwill, at a UCC foreclosure sale did not prove likelihood of success in its claim under § 32 of the Lanham Act, so as to be entitled to a preliminary injunction, because that claim (as distinguished from a claim under § 43(a)) can be brought only by the "registrant," and the buyer failed to prove that it was the registrant despite evidence of an assignment *nunc pro tunc* and bill of sale from the secured party to itself, and a later written assignment from the secured party to the buyer. There was no evidence of an assignment from the debtor to the secured party.

Liability Issues

– of the Secured Party

173. *Duke v. Garcia*,
2014 WL 1333182 (D.N.M. 2014)
Because there was sufficient evidence for the debtor's claim for punitive damages against the repossession agent to survive a motion for summary judgment, the debtor's claim for such damages against the secured party also survived, even though the secured party might not have known of or ratified the agent's wrongful conduct.

174. *Duke v. Garcia*,
2014 WL 1318647 (D.N.M. 2014)
Secured party's text messages to the debtor prior to repossession violated the state UDAP law by falsely representing that it had filed a warrant for the debtor's arrest. The secured party might also have violated the act by failing for four months to notify the debtor of the surplus resulting from its disposition of the collateral. The secured party violated § 9-615 by failing to pay the entire amount of the surplus. The secured party violated § 9-616 by sending an explanation of the surplus that did not substantially comply with the requirements. Finally, because the duty not to breach the peace during repossession is nondelegable, the secured party was liable for the repossession agent's breach of the peace.

175. *Phillips v. Phillips*,
2014 WL 902683 (Minn. Ct. App. 2014)
Even though *enforcement* of a security interest is insulated from avoidance under the Uniform Fraudulent Transfer Act § 8(e), the *grant* of a security interest to an insider on account of an antecedent debt while the debtor is insolvent can be an avoidable fraudulent transfer under § 5(b) if the insider had reasonable cause to know of the debtor's insolvency.

176. *Lake Treasure Holdings, Ltd. v. Foundry Hill GP LLC*,
2014 WL 5192179 (Del. Ch. Ct. 2014)
Security interest in software that the debtor transferred to an entity controlled by a long-time friend of its owner in return for loan proceeds representing a fraction of what the owner thought the software was worth, followed by an amicable surrender of the software to the secured party, was an avoidable fraudulent transfer made with actual intent to hinder, delay or defraud the investors who were seeking to dissolve the debtor. Although a transfer is not avoidable against a person who took in good faith and for a reasonably equivalent value, the secured party did not act in good faith because it conspired with the owner to circumvent the owner's lack of authority to sell the software and because it did not give reasonably equivalent value.

177. *Costin v. Ally Bank Corp.*,
2014 WL 130527 (E.D.N.C. 2014)
Bank that repossessed debtor's vehicle after allegedly stating that it would not do so if the debtor made a payment, which the debtor did, could not be liable for violation of the North Carolina Debt Collection Act because at most the claim states a cause of action for breach of contract, which cannot serve as a basis for a claim under the NCDCA. Bank was also not liable for intentional infliction of emotional distress in repossessing the vehicle because such action was not extreme and outrageous conduct and not liable for negligent infliction of emotional distress because the debtor had not alleged that his distress was a proximate and foreseeable result of the bank's negligence.

178. *Gwinnett Community Bank v. Arlington Capital, LLC,*
757 S.E.2d 239 (Ga. Ct. App. 2014)
Because the trial court's ruling that the bank that sold a promissory note was barred from seeking a deficiency by either § 9-608(b) or § 9-615(e) was law of the case (even though those provisions apply when the underlying transaction is a sale of a promissory note, not when the security interest is foreclosed by selling a promissory note), the ruling bound the debtor as well as the bank, and the debtor had no cause of action against the bank for lost surplus.

179. *Callaway Bank v. Bank of West*,
2014 WL 293823 (W.D. Mo. 2014)
Because facts remained in dispute about the prior lender's knowledge and actions, summary judgment was denied on refinancing bank's action against the prior lender for fraud and other torts in connection with loan as to which the debtor fraudulently claimed to own the cattle purporting to secure the debt.

180. *Patton v. Wells Fargo Financial Maryland, Inc.,*
85 A.3d 167 (Md. 2014)
Debtor's claim against assignee of secured loan for violation of the Maryland Credit Grantor Closed End Credit Law in repossessing and selling the collateral must be brought no later than six months after satisfaction of the loan and, because the loan was not satisfied and the debtor remained liable for a deficiency, the debtor's claim was not barred.

181. *Shrenuj USA, LLC v. Rosenthal & Rosenthal, Inc.*,
2014 WL 1226469 (S.D.N.Y. 2014)
While summary judgment would not be granted on jewelry consignor's conversion claim against lender that financed the debtor's inventory because of a factual dispute about whether the lender seized and sold any of the consigned goods, sanctions were appropriate against the lender because it continued to sell and melt down seized jewelry long after it knew that litigation was likely and even after the consignor's complaint was filed, and those actions undermined the consignor's ability to prove that the lender had seized consigned goods.

182. *Cox v. Community Loans of America, Inc.*,
2014 WL 1216511 (M.D. Ga. 2014)
Car title pawn transactions with members of the armed services were not sales with an option to repurchase but secured loan transactions subject to the federal Military Lending Act, even though the service member has no personal liability for the amount advanced. Thus, the pawnbrokers could be liable for their violations of the act.

183. *Source One Financial Corp. v. Road Ready Used Cars, Inc.*,
2014 WL 1013121 (Conn. Super. Ct. 2014)
Chattel paper financier that acquired a secured car loan from the car seller had no liability to the used car dealership that purchased the car from the individual buyer as part of a trade in for breach of the implied warranty of merchantability because the buyer made no such warranty in the trade in and the used car dealer had no privity of contract with the financier.

184. *Hibbs v. Berger*,
430 S.W.3d 296 (Mo. Ct. App. 2014)
Insider secured party that foreclosed on assets of closely-held business has no liability to another insider that was an unpaid unsecured creditor; there was no basis for piercing the corporate veil.

185. *Irwin v. West Gate Bank*,
848 N.W.2d 605 (Neb. 2014)
Because the secured party had a right but no duty to take possession of the collateral, there was no consideration for the secured party's abandonment of the debtor's collateral to the debtor's landlord and thus the secured party could not be liable for breach of the abandonment agreement by asserting its rights in the collateral and receiving payment in the debtor's bankruptcy.

186. *Dove East Estates v. Green Tree Servicing, LLC*,
2014 WL 4050591 (Del. Ct. Com. Pl. 2014)
Secured party that had a right to repossess the debtor's manufactured home but never did, and that never promised the landlord to pay storage fees, was not liable for those fees even if the secured party entered the premises to post a for sale sign.

187. *Idaho Property Management Services, Inc. v. Macdonald*,
2014 WL 7096454 (Idaho Ct. App. 2014)
Individual who had a security interest in the debtors' abandoned mobile home was not liable for rent damages to the owner of the lot on which the mobile home was situated. Although the individual was listed as the "legal owner" on the certificate of title, under the labels used by the Idaho Department of Transportation, that simply meant that the individual was a lienor, and thus could not be liable for trespass. Although a state statute does impose liability for rent on lienors, the landlord had not complied with the notification requirements of that statute.

188. *Davidson v. Capital One Bank (USA)*,
2014 WL 4071891 (N.D. Ga. 2014)
Entity that bought credit card receivables was not a debt collector for the purposes of the Fair Debt Collection Practices Act even if the cardholders were in default at the time the receivables were purchased because the buyer was admittedly not in a business the principal purpose of which was to collect debts and it was not regularly collecting debts owed to another. The statutory language creating an exception to the second prong of the definition if the debt was not in default when assigned does not mean that an assignee of a debt in default is a debt collections if the debt was in default, if the assignee is not collecting for another.

189. *Lankhorst v. Independent Savings Plan Co.*,
2014 WL 4101199 (M.D. Fla. 2014)
Lender that provided purchase-money financing for the debtors' water treatment equipment, which was installed as a fixture outside their home, had no liability under the Truth in Lending Act for failing to disclose examples of the minimum payments or for failing to provide a three-day rescission period because the collateral for the transaction was the fixtures, not the borrowers' home. The agreement described the collateral as "any purchases you charge to your account," which was limited to the fixtures. It did not matter that the agreement also stated that the security interest could be enforced "similarly as liens on the house" or that the lender made a fixture filing.

190. *Clayton v. Royal & Sun Alliance U.S.*,
2014 WL 7529953 (Cal. Ct. App. 2014)
Secured parties that acquired equipment leases had no liability under the California Unfair Competition Law to the account debtor/lessees for the allegedly usurious terms in the leases, even if the secured parties "approved" the leases as part of their underwriting and lending process. Liability under the law must be based on the defendant's personal participation in and unbridled control over the unlawful practices but the secured parties had no direct contact with lessees, and did not solicited them to be borrowers, draft or sign the leases, purchase the equipment, provide monies to the lessees or receive directly from them.

191. *Blixseth v. Credit Suisse AG*,
2014 WL 4799066 (D. Colo. 2014)
Individual debtor stated a cause of action against secured party that, in connection with a corporate bankruptcy case, joined a plan of reorganization pursuant to which the secured party would forego recourse to its collateral and instead proceeds as an unsecured claimant, knowing that repayment was likely to come from the individual debtor whom the secured party had released from personal liability.

192. *First Hill Partners, LLC v. Bluecrest Capital Management Ltd.*,
2014 WL 4928987 (S.D.N.Y. 2014)
Advisor that the debtor hired to find a buyer of its assets and negotiate a sale in return for a monthly retainer, a success fee, and reimbursement of expenses, stated causes of action against the debtor's secured party for unjust enrichment and tortious interference with contract by alleging that, after the advisor located a buyer and negotiated a transaction, the secured party foreclosed and sold the assets to the identified buyer on substantially the same terms.

193. *Anthony Marano Co. v. J & S Produce Corp.*,
2014 WL 4922324 (N.D. Ill. 2014)
Summary judgment denied on whether the banks that received payment on their secured loans from the debtor's PACA trust funds were entitled to a bona fide purchaser defense because there were factual issues about whether the banks had notice that the debtor was in breach of its duties with respect to the PACA trust. The debtor was profitable through 2010 and occasionally maintained cash reserves far in excess of its accounts payable. However, it also had cash-flow problems and overdrew its deposit accounts. Moreover, although the debtor historically paid all but a few of its PACA creditors, it often paid them late. Although the bank that received $565,000 in payment on a line of credit re-advanced $582,000, that created no defense to disgorgement for violation of the PACA trust.

194. *Pacific Space Design Corp. v. PNC Equipment Finance, LLC*,
2014 WL 6603288 (S.D. Ohio 2014)
Regardless of whether an equipment lease was a true lease or a sale, the lessee who, at the end of the lease term, had the option to return the equipment, buy the equipment for $17,000, or, if it failed to do either of those, continue to rent the equipment on a month-to-month basis, had no claim against the lessor for unjust enrichment after it paid over $100,000 to continue leasing the equipment for 34 months. The lessee's failure to exercise its rights did not make the lessors retention of the rent unjust.

– of the Debtor

195. *VFS US, LLC v. Southwinds Express Construction, LLC*,
2014 WL 2979035 (E.D. La. 2014)
Secured party was entitled to judgment on three of five secured promissory notes issued in connection with the purchase of construction equipment even though the debtors claimed that one of the items was defective. While the debtors might have a counterclaim for recoupment or breach of warranty to reduce the amount owing on one note, they bring such a claim in a timely manner.

196. *Spellman v. Independent Bankers' Bank of Florida*,
2014 WL 3871264 (Fla. Ct. App. 2014)
Bank that, after default, had the collateralized shares of stock reissued in the name of the bank's subsidiary and then tried but failed to sell the stock at a public sale was entitled to a judgment against the debtor for the full amount of the secured obligation. A secured party does not dispose of the collateral merely by having it re-titled in its own name and there is no reason not to apply that rule to a re-titling in a subsidiary's name.

197. *GECC v. FPL Service Corp.*,
995 F. Supp. 2d 935 (N.D. Iowa 2014)
Equipment lessor in a transaction that was really a sale with a retained security interest failed to send the debtor notification of the second disposition of equipment and thus there was a presumption that no deficiency was owing. However, the lessor rebutted that presumption by showing that the sale was conducted in a commercially reasonable manner and at the same price as the first sale, for which the lessor had sent notification to the debtor.

198. *John Deere Construction & Forestry Co. v. Parham*
755 S.E.2d 825 (Ga. Ct. App. 2014)
Secured party that repossessed and sold farm equipment was entitled to a deficiency judgment because it complied with the notification rules of § 9-613. Although the secured party did not, pursuant to the Georgia Retail Installment Act, provide pre-sale notification of its intent to seek a deficiency, that act applies only to collateral purchased for personal, family, or household use and thus was inapplicable.

199. *MSMTBR, Inc. v. Mid-Atlantic Finance Co.*,
2014 WL 953499 (Tex. Ct. App. 2014)
2014 WL 3697736 (Tex Ct. App. 2014) (revised opinion)
Debtor that, after selling chattel paper to financier and giving the financier the certificates of title to the underlying collateral, applied for substitute certificates of title by falsely certifying that the certificates had been lost or destroyed and sold many of the vehicles could be liable in tort for its actions even though it might also be liable for breach of contract. The evidence did not, however, conclusively establish that the debtor acted with the requisite intent to be liable under the Texas Theft Liability Act or for conversion.

200. *Express Working Capital, LLC v. Starving Students, Inc.*,
28 F. Supp. 3d 660 (N.D. Tex. 2014)
Seller of future accounts receivables had no usury defense against the buyer under Texas law because the defense applies only to loan transactions, not to sales of accounts, and despite the seller's recourse against the buyer, the transaction was a sale because there was no specified amount or due date and, more important, that is what the transaction purported to be, and pursuant to a non-uniform provision in Texas version of § 9-109, the parties' characterization of the transaction is binding.

201. *State v. Johnson*,
140 So. 3d 854 (La. Ct. App. 2014)
Debtor who sold collateral after default was not guilty of violating La. Stat. § 14.201, which criminalizes the sale of collateral "pledged" to a bank, because while the debtor had granted a bank a security interest in the collateral, he had not pledged it because he never gave the bank possession.

202. *State v. Collyns*,
99 A.3d 300 (N.H. 2014)
Debtor who attempted to sell restaurant equipment that the debtor had purchased on credit could not be guilty of attempted theft by unauthorized taking because even though the sales agreement expressly stated that the seller remained the owner until the debtor paid in full, that language was limited to the retention of a security interest and the theft statute does not criminalize the sale of property subject to a security interest.

203. *Deere & Co. v. Cabelka*,
84 U.C.C. Rep. Serv. 2d 705 (W.D. Okla. 2014)
Entity that sold a combine to a buyer without disclosing the existence of a perfected security interest in the combine and without providing for payment of the secured obligation was liable to the buyer for breach of the warranty of title for the amount that the buyer settled with the secured party.

204. *Wells Fargo Equipment Finance, Inc. v. Titan Leasing, Inc.*,
768 F.3d 741 (7th Cir. 2014)
Equipment lessor that used the lease to secure a nonrecourse loan, but warranted to the secured party that the equipment had been delivered and accepted by the lessee and that the lessee has acknowledged receipt and acceptance, breached those warranties because even if, under the terms of the lease, the lessee had accepted the equipment when it was shipped, the lessee never acknowledged receipt or acceptance and in fact never received the equipment or paid any rent under the lease.

– of Others

205. *Petroleum Enhancer, LLC v. Woodward*,
558 F. App'x 569 (6th Cir. 2014)
Although director of company breached his fiduciary duty by forming a new entity to acquire the secured obligation of the company and then foreclose on the collateral, the director's actions were not the proximate cause of the company's failure. While there was some evidence that, because the secured party did not know how to deal with the collateral, the director's action may have hastened both foreclosure and the company's bankruptcy, there was no evidence that the company could have avoided these fates or had any source of alternative financing.

206. *CNH Capital America LLC v. Hunt Tractor, Inc.*,
568 F. App'x 461 (6th Cir. 2014)
Summary judgment on secured party's conversion claim was improperly granted in favor of the defendant – a minority shareholder of the corporate debtor and the father-in-law of principal owner – whose guarantee of unsecured debt was discharged when the debtor sold the collateral and used the proceeds to pay that debt because a genuine issue of material fact existed as to whether the defendant exercised dominion and control over the proceeds. However, the trial court correctly granted summary judgment for the defendant on the secured party's fraudulent transfer claim because, under Kentucky law, recovery of a fraudulent transfer is available only from a transferor or transferee, not a third party who benefitted from the transfer.

207. *Security Alarm Financing Enterprises, Inc. v. Parmer*,
2014 WL 1478840 (N.D.W. Va. 2014)
Debtor's owner, whose aunt purchased secured notes and foreclosed by acquiring the collateral at a foreclosure sale by credit bid, allegedly as part of the owner's scheme to avoid payment to a judgement creditor who had agreed to halt a sheriff's sale pending settlement negotiations, was not entitled to summary judgment, even if the aunt was not aware of all aspects of the alleged fraudulent conspiracy. Summary judgment also denied on whether the aunt took free of the judgment lien because her good faith was in dispute.

208. *Jennings v. Shuler*,
147 So. 3d 847 (Miss. Ct. App. 2014)
Trial court erred in concluding as a matter of law that lawyer did not have a duty to file a financing to perfect his client's security interest; whether that failure constituted negligence is a case-by-case, fact-intensive question. However, summary judgment in favor of the lawyer was nevertheless proper because the client could not show that the failure to perfect cause injury or that her claim was brought within the limitations period.

209. *Fjellin ex rel. Leonard Van Liew Living Trust v. Penning*,
2014 WL 4298053 (D. Neb. 2014)
Secured parties had no cause of action under § 9-625 against the law firm representing the debtor for filing an unauthorized termination statement because § 9-625 deals with the liability of the secured party, not others. The secured parties also had no cause of action for negligence because the unauthorized termination statement was ineffective – the security interest remained perfected and continued to encumber the collateral, even after the debtor sold it – and thus the act of filing it did not cause any damages.

210. *In re Fish & Fisher, Inc.*,
557 F. App'x 259 (5th Cir. 2014)
Bank with a security interest in borrower's accounts had no cause of action against law firm that, after being notified of the security interest, obtained and collected a judgment against a client of the borrower and remitted the proceeds to the borrower. The law firm was not liable in negligence because it owed no duty to the bank. There was no constructive trust absent unconscionable conduct, fraud, or unjust enrichment. There was no claim for conversion because perfecting a security interest is insufficient to establish ownership. While a claim for conversion might exist if the disbursement violated a court order, the complaint lacked specific allegations about what order might have been violated.

211. *DLA Piper US, LLP v. Linegar*,
2014 WL 3698289 (Tex. Ct. App. 2014)
Individual whose Australian retirement fund – a separate legal entity – made a $1.75 million loan to company in which the individual held and interest had no standing to bring a malpractice claim against the borrower's law firm for failure to perfect the security interest because even though the individual might have suffered a loss, the fund was the real party in interest.

212. *Allen v. Continental Western Ins. Co.*,
436 S.W.3d 548 (Mo. 2014)
Secured party had no cause of action against its liability insurer for failing to defend it against claim for wrongful repossession because the insurance policy excluded "property damage expected or intended from the standpoint of the insured" and although the insured may have been mistaken about the right to repossess, its actions were intentional.

213. *Bankdirect Capital Finance v. Insurance Co. of State of PA*,
992 N.Y.S.2d 271 (N.Y. App. Div. 2014)
The trial court properly denied summary judgment on the claim of a putative assignee of an insurance premium financing agreement against the insurer for refunding the premium to the broker because it was unclear whether: (i) the policy holder transferred its entire interest or merely a security interest in the return premium; (ii) the original financier properly notified the insurer of its interest; (iii) the original financier assigned its interest to the putative assignee; and (iv) the putative assignee properly notified the insurer of the assignment.

214. *Candelario del Moral v. UBS Financial Services Inc. of Puerto Rico*,
2014 WL 7714385 (D.P.R. 2014)
Securities intermediary that, after being served with a writ of execution on behalf of a judgment creditor, liquidated the account and remitted a portion of the proceeds to a related party that had a security interest perfected by control and the remaining balance to the judgment creditor, was liable for the portion remitted to the secured party because the secured party never instructed the intermediary to pay it.

215. *Terry Phillips Sales, Inc. v. SunTrust Bank*,
2014 WL 670838 (E.D. Va. 2014)
Employee of bank that had a security interest in customer's investment account did not commit conversion by waiting a day to release a hold on withdrawals because the security agreement expressly stated that no withdrawals were permitted without the bank's prior written consent and thus there was not wrongful exercise or assumption of authority over the assets in the account.

216. *Peterson v. Northern Gaul Properties, Inc.*,
2014 WL 2921956 (Minn. Ct. App. 2014)
Individual who came into possession of real property on which the debtor had stored his RV to avoid repossession, and who investigated the ownership of the RV, learned of the secured party's pending replevin action, and surrendered possession of the vehicle to the secured party, was not liable to the debtor for conversion because the debtor was not the lawful possessor of the vehicle.

217. *American Asset Finance, LLC v. Trustees of Client Protection Fund of Bar of Maryland*,
86 A.3d 73 (Md. Ct. App. 2014)
Financier that had purchased portions of lawyer's right to attorney's fees in four cases had no standing to bring claim against the Client Protection Fund of the Bar of Maryland after the lawyer received the attorney's fees, deposited them into his IOLTA account, and then misappropriated them, because the financier was not a client of the lawyer and, despite language in the financing agreement by which the lawyer promised to hold funds received as the financier's "fiduciary," the lawyer did not have fiduciary duties to the financier arising from his role as a lawyer.

218. *Farmers-Merchants Bank & Trust Co. v. Southern Structures, LLC*,
134 So. 3d 142(La. Ct. App. 2014)
Because the buyer of equipment had knowledge of the perfected security interest in the equipment, knew that the security agreement required the secured party's consent to a sale, and knew that the seller was either out of business or going out of business, the buyer did not act in good faith for the purposes of a non-uniform Louisiana rule that exempts a good faith buyer of collateral from personal liability.

219. *Topek, LLC v. W.H. Silverstein, Inc.*,
2014 WL 1124311 (D.N.H. 2014)
Entity that bought from a secured party virtually all of the assets of a builder of custom-designed post and beam homes, including the builder's intellectual property, trade names, design templates, and goodwill, and then hired most of the builder's employees, probably had the right to hold itself as the builder. Thus, another entity that had hoped to acquire the assets had no likelihood of success in its action against the buyer for a false advertising claim under either the Lanham Act or the New Hampshire Consumer Protection Act.

220. *Prairie State Bank & Trust v. Deere Park Associates*,
84 U.C.C. Rep. Serv. 2d 644 (Ill. Ct. App. 2014)
Bank with a perfected security interest in debtor's inventory and proceeds had no conversion claim against subsequent lender that, in facilitating the debtor's liquidation sales, retained commissions, paid itself, and paid unsecured creditors because the bank had waived its security interest during the course of its relationship with the debtor by making loans without sufficient inventory collateral, renewing at least one of the loans when it knew of the going-out-of-business and inventory-reduction sales, failing to require the debtor to keep its business accounts on deposit with the secured party, failing to communicate with the defendant after receiving its purchase-money notice and obtaining knowledge of the sales, failing to take any action other than "rolling over notes" after the debtor issued bad checks, and failing to obtain recent income and asset statements from the debtor.

221. *Wise v. SR Dallas, LLC*,
436 S.W.3d 402 (Tex. Ct. App. 2014)
There was no basis for the jury's finding that the buyer of the debtor's furniture, fixtures, and equipment was liable in conversion to the secured party because there was no proof that the secured party made a demand for the property. Even if the buyer was liable, the jury erred in awarding damages equal to the amount of the debt owed to the secured party rather than the value of the property at the time of the alleged conversion, as to which no evidence was presented.

222. *Opportunity Fund, LLC v. Savana, Inc.*,
2014 WL 4079974 (S.D. Ohio 2014)
Summary judgment denied on whether entity formed by passive investor who owned 0.01% of the debtor and which acquired the bulk of the debtor's assets at a public foreclosure sale conducted by the debtor's secured lender had successor liability as the survivor in a defacto merger or as a mere continuation of the debtor.

223. *Agit Global, Inc. v. Wham-O, Inc.*,
2014 WL 1365200 (S.D. Cal. 2014)
Two entities that acquired the assets of business from a secured party – who itself had acquired them at a foreclosure sale – and who then operated the same business from the same location with the same employees did not have successor liability for the debtor's debts as a mere continuation because the buyers did not acquire the assets directly from the predecessor (the debtor). However, the buyers did have successor liability on that grounds that the transfers were a fraudulent scheme to escape liability for the debts in part because the assets were worth $31 million while the secured debt was only $13.6 million and the secured party resold them shortly thereafter for half their value.

224. *BRS-Tustin Safeguard Associates II, LLC v. iTherX Pharma, Inc.*,
2014 WL 2621117 (Cal. Ct. App. 2014)
The entity newly formed by lenders who, after a landlord obtained a writ of attachment for the debtor's property, conducted a strict foreclosure and transferred all of the debtor's assets to the entity, had successor liability as a mere continuation of the debtor because the new entity had a name very similar to the debtor's name, possessed all of the debtor's assets, continued to conduct the same clinical trials of the same drugs, operated under a manufacturing contract without any modification (*i.e.*, it did not make itself a party to the agreement), and shared many of the same key personnel, including the chief executive officer, chief scientist, and several board members.

225. *Amegy Bank v. DB Private Wealth Mortgage, Ltd.*,
83 U.C.C. Rep. Serv. 2d 720 (M.D. Fla. 2014)
Entity that was liable to the secured party for colluding with the debtor in converting the collateral was not liable for the secured party's attorney's fees incurred in obtaining the declaratory judgment. Under § 9-607(d), attorney's fees may be deducted from the amounts of a collection but may not be added to the award. Although the security agreement provided for recovery of attorney's fees, and § 9-201(a) makes the security agreement effective against creditors, the defendant was not a creditor of the debtor.

226. *Merit Homes, LLC v. Joseph Carl Homes, LLC*,
570 F. App'x 707 (9th Cir. 2014)
Because the bank that made a construction loan received from the borrower a collateral assignment of the construction plans for the benefit of itself, as well as for its successors and assigns, and the borrower warranted that it had received from its predecessors an assignment of all rights to the plans, the bank and its assignee had at least an implied license from the apparent copyright owner – a guarantor and partial owner of the debtor – to use the plans to complete construction.

227. *Shannon v. Windsor Equity Group, Inc.*,
2014 WL 977899 (S.D. Cal. 2014)
Company that provided skip tracing services in connection with consumer automobile loans was a debt collector for the purposes of both the Fair Debt Collection Practices Act and the California Rosenthal Act, and therefore could be liable to a third party who the company harassed at his place of work with numerous phone calls.

228. *Rentrak Corp. v. Handsman*,
2014 WL 1342960 (E.D.N.Y. 2014)
Individual owner of business that rented video game equipment was personally liable to the lessor even though the owner did not guaranty the lease obligations because the owner orchestrated a sale of the equipment and used the proceeds – along with sublease revenue held in trust for the lessor – to pay to satisfy debts that the owner had guaranteed, pay himself, and pay his expenses.

229. *Robertson v. Robertson*,
998 N.Y.S.2d 842 (N.Y. Sup. Ct. 2014)
Individual who received specific bequest of stock from his mother, who had pledged the stock to secure a debt guaranteed by the individual's brother, was subrogated to the secured party's rights against the brother when the executor of the mother's estate allowed the stock to be sold to satisfy the debt to the secured party.

BANKRUPTCY

Property of the Estate

230. *In re Webb*,
742 F.3d 824 (8th Cir. 2014)
Married couple that signed a joint venture agreement to operate a rice farming business did not thereby create a separate entity because the agreement expressly provided that it did not create a partnership, the couple never filed a partnership tax return or formally transferred assets to the joint venture, and the husband testified that he did not distinguish between the venture and himself. Accordingly, the business assets were property of the couple's bankruptcy estate and a bank claiming a security interest in the assets was subject to the automatic stay.

231. *In re Emoral, Inc.*,
740 F.3d 875 (3d Cir. 2014)
Personal injury claims of individuals allegedly harmed by a the debtor's products cannot be asserted against a pre-petition purchaser of the debtor's assets under the "mere continuation" theory of successor liability because they are "generalized claims" that belong to the debtor's bankruptcy estate rather than to the individuals who suffered the harm.

232. *In re Howard*,
507 B.R. 394 (Bankr. N.D. Ga. 2014)
Debtor's vehicles that were subject to title pawn transactions under a Georgia statute automatically became the property of the pawnbroker, before the debtor's bankruptcy petition was filed, when the redemption period expired, and thus did not become property of the bankruptcy estate.

233. *In re Nelson*,
521 B.R. 733 (Bankr. D.S.C. 2014)
A vehicle that a secured party repossessed but did not yet sell prior to the debtor's Chapter 13 bankruptcy petition was not property of the debtor's bankruptcy estate because Florida law governed the secured transaction and, under that law, the debtor's statutory right to redeem does not make the vehicle property of the estate unless the debtor takes affirmative steps towards redemption, such as by tendering fulfillment of all obligations secured by the collateral as well as the expenses incurred by the secured party in preparing to dispose of the collateral. The debtor's proposed plan providing for full payment of the debt over the life of the plan did not qualify under the Florida law governing redemption.

234. *In re Grenville*,
2014 WL 1347039 (Bankr. E.D. Ky. 2014)
Insurance proceeds of car that became payable due to accident occurring after confirmation of the debtor's Chapter 13 plan – which vested the car in the debtor – were property of the estate and the debtor could use the proceeds to acquire a new vehicle over the secured party's objection.

235. *In re Waksberg*,
2014 WL 5285648 (9th Cir. BAP 2014)
Although an ophthalmologist and his corporation had commingled and transferred funds with no apparent corporate formalities, such that it was impossible to determine whether one was a creditor of the other, and the bulk of their creditors had dealt with the two of them indistinguishably, substantive consolidation of their Chapter 7 bankruptcy estates was not appropriate. Consolidation would not result in any distribution to prepetition claimants. Instead, it allowed for payment of the ophthalmologist's personal exemptions out of corporate assets while Chapter 11 administrative claimants received nothing. Such a result was not equitable.

Claims & Expenses

236. *In re Fiorella*,
2014 WL 6687317 (D.N.J. 2014)
Creditor to whom debtor's credit card det was assigned had a valid claim even though it had not provided notification of the assignment to the debtor. Notification might be necessary to prevent the debtor from discharging the obligation by continuing to pay the assignor, but it is not necessary for the assignment to be effective.

237. *In re Alternate Fuels, Inc.*,
507 B.R. 324 (10th Cir. BAP 2014)
Funds that insiders advanced to corporate debtor that no longer conducted its mining business but merely performed the reclamation work necessary to enable its insiders to recover bonds that had been posted to ensure that reclamation work was performed, and which lacked any capital to repay these advances or ability to obtain loans from outside lenders, were properly re-characterized as equity contributions.

238. *United States v. State Street Bank and Trust Co.*,
520 B.R. 29 (Bankr. D. Del. 2014)
When considering whether to re-characterize as equity some 1996 junior PIK notes issued pursuant to a confirmed plan of reorganization, the analysis must focus on the issuance of predecessor notes as part of a 1988 leveraged buyout. While the 1988 notes had characteristics of equity, including deferred payment of interest until maturity, subordination to almost all other debt, and contingent interest based on the increase in the debtor's fair market value, the notes are better viewed as debt because they were documented and treated as such and the parties reasonably projected that the debtor's revenues would increase and be sufficient to repay the notes. Although the recipients of 1996 junior PIK notes were also issued common stock and granted the right to elect a majority of the debtor's board, the notes are nevertheless better treated as debt because they were for a fixed term at a stated interest rate, were supported by the grant of a security interest, and a lender's participation on the board of a distressed company after its loan is in jeopardy does not support re-characterizing the investment as equity.

239. *In re Lightsquared, Inc.*,
2014 WL 5488413 (Bankr. S.D.N.Y. 2014)
Claim of secured creditors against the borrower's affiliates, which had guaranteed the debt, was not contingent because debt was unquestionably due. The claim was liquidated even though the creditors might, at some future time, receive or realize upon the collateral. As a result, there was no basis for estimating the claim.

240. *In re Biovance Technologies, Inc.*,
2014 WL 2861003 (Bankr. D. Neb. 2014)
Secured creditor that received partial payment from third parties was not required to amend its proof of claim to reflect that payment. Although the creditor is entitled to only one recovery of the full amount, until it has received full recovery, the creditor is entitled to assert the entire indebtedness against each party who is liable, including the debtor.

241. *In re C & K Market, Inc.*,
2014 WL 1377573 (Bankr. D. Or. 2014)
Although term sheet for DIP loan created an enforceable contract subject to the condition subsequent of court approval, and thus the lender had a claim for the $250,000 breakup fee when the debtor chose to use another lender for DIP financing, the claim was not entitled to administrative expense priority under § 503(b)(1)(A) because the contract was with the prepetition debtor, not the debtor in possession, and there was insufficient evidence that the contract benefitted the estate (by leading to better financing terms). The creditor was also not entitled to administrative expense priority under § 503(b)(3)(D) because the fee was not an expense or expenditure at all.

242. *In re Parker*,
2014 WL 6545025 (Bankr. E.D.N.C. 2014)
Secured creditor was not entitled to prepetition or postpetition interest at the default rate because the default rate was an unenforceable penalty given that: (i) the base rate was 15% and the default rate was 25% plus a 4% late charge, making the differential more than what is normally permitted; (ii) the creditor withheld substantial fees from the loan to reimburse itself for costs it might incur, making the effective rates 29% and 39%, respectively; and (iii) the creditor was oversecured by real property.

243. *In re Residential Capital, LLC*,
508 B.R. 851 (Bankr. S.D.N.Y. 2014)
Even though the debtor was insolvent, the trustee failed to rebut the presumption in favor of allowing the oversecured creditor to receive post-petition interest at the default rate.

244. *In re World Imports, Ltd.*,
511 B.R. 738 (Bankr. E.D. Pa. 2014)
Claims of Chinese sellers of goods were not entitled to administrative expense priority under § 503(b)(9) because even though the debtor (or, in the case of drop shipments, the debtor's customers) obtained physical possession of the goods less than 20 days before the bankruptcy petition was filed, the sellers delivered the goods to the carrier more than 20 days before the petition, the sales contracts provided for shipment FOB China, and under the CISG and Incoterms, the debtor therefore "received" the goods when the carriers did.

245. *In re PMC Marketing Corp.*,
517 B.R. 386 (1st Cir. BAP 2014)
Bankruptcy court erred in concluding that electricity utility was not entitled to administrative priority under § 503(b)(9) because it focused on the relationship of the parties and the regulation of the utility, rather than the appropriate question: whether electricity is a good.

246. *In re Khalil*,
2014 WL 1725811 (Bankr. C.D. Cal. 2014)
Individual who provided 80% of the funds to acquire property with the debtor as tenants in common was not entitled to 80% of the proceeds of the sale of the property by the bankruptcy trustee or to reimbursement for his larger contribution because the deed did not indicate that the individual and the debtor owned different percentages of the property.

247. *In re SW Boston Hotel Venture, LLC*,
748 F.3d 393 (1st Cir. 2014)
Oversecured creditors are entitled to postpetition interest only during the period that they are oversecured, and that period need not commence on either the petition date or the confirmation date. The debtors failed to rebut the presumption in favor of using the default rate of interest provided for in the agreement by showing it was inequitable, however monthly compounding was not required because the agreement did not clearly provide for it.

248. *In re O & S Trucking, Inc.*,
514 B.R. 296 (Bankr. W.D. Mo. 2014)
Undersecured creditor with a security interest in the debtor's trucks had a secured claim for the value of the trucks plus the post-petition proceeds generated from renting the trucks. As a result, the amount of adequate protection payments reduced the total claim, but not the secured claim. However, because the rents were not segregated and the creditor, by agreeing to adequate protection payments (rather than requiring the debtor to pay all rents to the creditor), essentially agreed to allow the debtor to spend some rents to maintain the collateral, the expenses the debtor incurred to generate the postpetition rents reduced the amount of the secured claim.

249. *In re 804 Congress, LLC*,
756 F.3d 368 (5th Cir. 2014)
The expenses incurred by a secured creditor in foreclosing on the collateral after the creditor obtained relief from the stay, and the creditor's prepetition and postpetition attorney's fees, were subject to the reasonableness limitation in § 506(b) even though the sale was conducted outside the bankruptcy process and the fees and expenses might have been recoverable under state law. No decision on whether the remainder of the fees and expenses are an allowable unsecured claim under § 502.

250. *In re Conqueror Marine Logistics, LLC*,
518 B.R. 368 (W.D. La. 2014)
Administrative expense claimants lack standing to assert a derivative claim for surcharging collateral in a Chapter 7 case. Even if they had standing, there was no basis for surcharging the proceeds of the collateralized vessels because the claimants provided labor, supplies, and services to maintain the debtor's operations while the case was in Chapter 11 and while the ongoing operation of the vessels might have benefitted the estate as a whole, it did not primarily and directly benefit the creditors with a lien on the vessels, which is required to surcharge collateral.

251. *In re Headlee Management Corp.*,
519 B.R. 452 (Bankr. S.D.N.Y. 2014)
Fees paid to professionals while the case was pending in Chapter 11 were not subject to disgorgement after the case was converted to Chapter 7 even though there were insufficient assets to pay the remaining Chapter 11 administrative expenses, and thus the professional received a disproportionate recovery.

252. *In re Susanek*,
2014 WL 4960885 (Bankr. W.D. Pa. 2014)
Oversecured creditor was entitled to recover for attorney's fees incurred preparing a notice of post-petition fees and expenses pursuant to Rule 3002.1 because the creditor's agreement with the debtor expressly provided for reimbursement of the creditor's reasonable attorney's fees and expenses "for bankruptcy proceedings."

253. *In re Holtslander*,
507 B.R. 779 (Bankr. N.D.N.Y. 2014)
Undersecured creditor whose claim was stripped down pursuant to a confirmed Chapter 13 plan was entitled only to the amount of the stripped-down claim even though the collateral was destroyed post-confirmation and the insurance proceeds exceeded that amount.

254. *In re Johnson*,
2014 WL 6953306 (9th Cir. BAP 2014)
Creditor that financed the debtor's acquisition of a new car did not have a PMSI to the extent that the obligation financed negative equity in the debtor's trade-in vehicle, GAP insurance or a service contract. Because the creditor filed an amended proof of claim that excluded those amounts entirely, the amended claim was allowable in full as a secured claim that the debtor could not modify.

Automatic Stay & Injunctions

255. *In re Mwangi*,
764 F.3d 1168 (9th Cir. 2014)
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.

256. *In re Parker*,
2014 WL 35913 (Bankr. S.D. Miss. 2013)
2014 WL 1407315 (Bankr. S.D. Miss. 2013)
Vehicle seller who retained a security interest in the vehicle and who, despite the buyer's bankruptcy, refused to release the title certificate or submit an application for a new certificate in the debtor's name, which caused the debtor not to be able to renew the registration or insurance for the vehicle, willfully violated the automatic stay. In subsequent decision, the court ruled that the debtor was entitled to damages, attorney's fees, and costs totaling $8,148.00.

257. *In re Adams*,
516 B.R. 361 (S.D. Miss. 2014)
Creditor with 10 years of experience in collection and bankruptcy matters who arranged for post-petition repossession of Chapter 13 debtors' automobile and refused to return the automobile for 25 days willfully violated the automatic stay and was liable for $18,834.67 in actual damages and $6,600 in punitive damages.

258. *In re Caffey*,
2014 WL 3888318 (Bankr. N.D. Ohio 2014)
Secured party that repossessed automobile pre-petition and refused to return the vehicle during the period that the stay remained in effect with respect to the vehicle was liable but because this was a Chapter 7 case, the trustee, not the debtor, was entitled to possession. Thus, even if the debtor had proved damages, those damages cannot be attributed to the secured party's violation of the stay.

259. *In re Owen*,
519 B.R. 869 (Bankr. N.D. Ala. 2014)
Because the Chapter 7 debtor had not claimed his vehicles as exempt and the trustee had not abandoned the vehicle, the debtor had no standing to seek damages from the secured party for its postpetition repossession of the vehicle.

260. *In re Banks*,
521 B.R. 417 (M.D. Ga. 2014)
Car seller violated the automatic stay by repossessing the car that a Chapter 13 debtor bought post-confirmation. The car was property of the estate even without regard to the language in the plan providing that all property of the estate will remain property of the estate for the duration of the plan.

261. *In re Manuel*,
2014 WL 7405471 (Bankr. E.D. Mich. 2014)
Creditor that postpetition received funds pursuant to prepetition garnishment and then refused to return the funds willfully violated the stay even though the garnishment lien was perfected prepetition because, even if the funds were not property of the estate, the creditor's actions constitute continuation of a prepetition proceeding against the debtor.

262. *In re Settlers' Housing Service, Inc.*,
505 B.R. 483 (Bankr. N.D. Ill. 2014)
Mortgagee was not entitled to relief from the stay merely because it was undersecured, absent evidence that the collateral was declining in value.

263. *In re Bluejay Properties, LLC*,
512 B.R. 390 (10th Cir. BAP 2014)
Bank whose claim was oversecured by the debtor's real property that was not likely to depreciate was adequately protected by that equity cushion and was not entitled to additional adequate protection for its interest in rents.

264. *In re Kuzniewski*,
508 B.R. 678 (Bankr. N.D. Ill. 2014)
Judgment creditor with an Illinois citation lien on the debtor's deposit account did not violate the stay by refusing to dismiss the citation proceeding – which would terminate its lien – upon receiving notice of the debtor's bankruptcy filing. The state court stayed the proceeding pending bankruptcy and even though the bank maintaining the deposit account froze it, thereby denying the debtor access to funds she claimed as exempt, that preserved the status quo until the bankruptcy court could determine the rights of the parties to the deposit account.

265. *In re Gil de laMadrid*,
524 B.R. 7 (Bankr. D.P.R. 2014)
Secured party that repossessed a vehicle after obtaining relief from the stay did not violate the stay merely because its motion misidentified the vehicle model and year because the motion did correctly indicate the vehicle identification number.

Sales of Assets

266. *In re Fisker Automotive Holdings, Inc.*,
510 B.R. 55 (Bankr. D. Del. 2014)
Entity that bought $168.5 million claim for $25 million would be allowed to credit bid up to $25 million because, pursuant to stipulation between the debtor and the creditors' committee: (i) if the buyer's ability to credit bid were not capped, there was no realistic possibility of conducting a successful auction, whereas there was if credit bidding were capped; and (ii) the assets offered for sale included material assets in which the buyer did not have a properly perfected lien and material assets as to which there was a dispute as to whether the buyer had a properly perfected lien.

267. *In re The Free Lance-Star Publishing Co. of Fredericksburg, VA*,
512 B.R. 798 (Bankr. E.D. Va. 2014)
Entity that bought the debtors' secured loan after default with a loan-to-own strategy and then, after learning that certain key assets were not covered and after the debtors rebuffed requests to encumber those assets: (i) unilaterally filed financing statements covering assets that it knew were unencumbered; (ii) failed to disclose those filings at the contested cash-collateral hearing, during which it requested the court to grant it liens on those assets; and (iii) pressured the debtors to shorten the marketing period for a sale of their business and to put language in the marketing materials conspicuously advertising its right to credit bid, thereby engaged in inequitable conduct designed to depress the sales price. The entity's right to credit bid was therefore limited to $1,200,000 for assets relating to the debtors' radio business on which it has a perfected lien and $12,700,000 for assets relating to the Debtors' newspaper and printing business on which it has a perfected lien.

268. *In re Hill Wine Co.*,
2014 WL 2795169 (Bankr. N.D. Cal. 2014)
Creditor with a security interest in the debtor's wine inventory was not entitled to prevent the debtor from selling the wine free and clear of liens given that the creditor is junior to several other secured creditors, the secured note is almost assuredly usurious, and the creditor's delayed perfection makes it almost certain that his security interest can be avoided.

269. *In re Ice Management Systems, Inc.*,
2014 WL 6892739 (9th Cir. BAP 2014)
Creditor with a security interest in the debtor's assets that the trustee proposed to sell subject to the security interest was not entitled to a share of the sale proceeds because the sale proceeds are not in substitution for the creditor's interest in the collateral and thus are not "proceeds" within the meaning of UCC Article 9.

270. *In re Wilson*,
2014 WL 3700634 (Bankr. N.D. Tex. 2014)
Term in LLC operating agreement providing that any member who wishes to transfer his or her interest must notify the other members, whereupon they will each have the right to purchase the interest at the lesser of book value or the proposed purchase price was generally effective in the Chapter 7 bankruptcy proceeding of one member. The bankruptcy trustee could auction the debtor's economic rights but the other members will have the right to buy at the highest price bid. The other members will not have the right to buy for book value because that would undermine the bankruptcy trustee's ability to realize fair value for the debtor's interest.

271. *In re Elk Grove Village Petroleum*,
510 B.R. 594 (Bankr. N.D. Ill. 2014)
Although a statutory right of a state department of revenue to assess its claims against a purchaser of the taxpayer's assets is an "interest" in those assets for the purposes of § 363, because that interest was junior to the rights of a secured claimant, whose claim exceeded the value of the assets to be sold, the department of revenue was not entitled to adequate protection and the assets could be sold free and clear of all claims and interests.

272. *In re KVN Corp.*,
514 B.R. 1 (9th Cir. BAP 2014)
While carve-out agreements by which a secured creditor has the trustee sell fully encumbered collateral in return for the estate's retention of a portion of the sale proceeds are generally improper, there is no *per se* ban and each proposed carve-out must be reviewed to determine whether: (i) the trustee fulfilled his or her basic duties (by scrutinizing the secured claim to determine if there is a basis for avoiding the lien); (ii) there was a benefit to the estate through a meaningful distribution to unsecured creditors; and (iii) the terms of the carve-out agreement had been fully disclosed. The first and third standards were met in this case; the bankruptcy court needed to determine whether $5,000 from the lien proceeds would result in a meaningful distribution to unsecured creditors.

273. *In re NE Opco, Inc.*,
513 B.R. 871 (Bankr. D. Del. 2014)
Buyer that purchased assets of the debtor free and clear of all liens and encumbrances could not be liable to disabled employee of the debtor for employment discrimination based on conduct of the buyer that occurred after the purchase agreement was signed but before the sale closed. The buyer could, however, be liable for its conduct after the sale closed.

274. *In re Fielding*,
522 B.R. 888 (Bankr. N.D. Tex. 2014)
Chapter 13 debtors who proposed to sell their exempt home and pay the proceeds to the IRS were entitled to allocate the proceeds to their unsecured obligation rather than their secured obligation.

Discharge, Dischargeability & Dismissal

275. *In re Bradley*,
507 B.R. 192 (6th Cir. BAP 2014)
Obligation of individual who guaranteed the debt of his company and who arranged the sale of collateral out of trust was not nondischargeable embezzlement under § 523(a)(4) because both the collateral and its proceeds were property of the company and a person cannot embezzle from itself. However, the obligation was nondischargeable under § 523(a)(6) because the individual knew that the loan documents authorized the company to sell collateral only if it remitted the proceeds to the secured party.

276. *In re Tardugno*,
510 B.R. 12 (Bankr. D. Mass. 2014)
Secured party's claim under guaranty against owner of used car dealership was not nondischargeable under § 523(a)(2), (4) or (6) due to sales made out of trust because each such sale was done with the knowledge of the secured party's agent, who released the title certificate to facilitate the sale.

277. *In re Obara*,
2014 WL 2211768 (9th Cir. BAP 2014)
Individual debtors who guaranteed car dealership's debt to floor plan financier was not nondischargeable under § 523(a)(2)(A) as a result of their misrepresentation of their net worth because that fact relates to their financial condition. Their misrepresentations during floor plan audits about the status of missing vehicles did make a portion of the debt nondischargeable, but only the amount of the debt relating to the 49 vehicles that the dealership sold out of trust after the misrepresentations were made. However, the entire debt was nondischargeable under § 523(a)(6) because the dealership sold 170 vehicles out of trust and the debtors were motivated not by a desire to preserve their business but by a desire to extract as much money as possible from a failing business.

278. *Cohen v. Third Coast Bank*,
2014 WL 2729608 (E.D. Tex. 2014)
The debt of an individual who owned and operated the corporate borrower and who guaranteed its debt to a bank was nondischargeable under § 523(a)(2)(A) because the bank justifiably relied on his false borrowing base certificates and undisclosed diversion of corporate assets. The certificates were not statements about the borrower's "financial condition" because they did not cover the borrower's overall financial health because they did not list whole classes of assets (*e.g.*, equipment and cash) or provide any information about liabilities.

279. *In re Pegler*,
518 B.R. 536 (Bankr. C.D. Cal. 2014)
Although the debtors, in connection with the renewal of a loan, fraudulently concealed that their business owed substantial back rent and fraudulently misrepresented their financial condition, and the lender justifiably and reasonably relied on the debtor's statements, the lender failed to submit evidence that it was damages thereby, such as by foregoing valuable collection rights. Thus, the debtor's were entitled to summary judgment on the lender's nondischargeability claims under § 523(a)(2).

280. *In re Yerges*,
512 B.R. 916 (Bankr. W.D. Wis. 2014)
Individual debtor with 20 years of experience in the grocery business and who applied for and held PACA licenses for himself and his businesses committed defalcation under § 523(a)(4) by working out a liquidation plan with his secured lender that failed to provide for payment to a produce supplier. The debtor's claim that he thought the purpose of PACA was to protect the quality of produce was not credible.

281. *In re Lehmann*,
511 B.R. 729 (Bankr. M.D. Pa. 2014)
Lender stated a claim under § 523(a)(6) against an individual who was the officer and majority shareholder of the borrower corporation that organized conference events, and who guaranteed its debt to the lender, by alleging that the individual formed a new entity and transferred the corporation's assets to the new by, among other things: (i) employing the employees of the corporation; (ii) using the corporation's computers to run the new entity; (iii) creating a website for the new entity and having visitors to the corporation's website automatically redirected to the new website; (iv) instructing employees of the new entity to contact customers of the corporation to continue business relationships; (v) entering into new contracts with customers of the corporation and crediting them payments they had previously made to the corporation; (vi) having the new entity produce some events that the corporation had originated; and (vii) redirecting to the new entity payments made by customers to the corporation.

282. *In re Trujillo*,
2014 WL 3051319 (Bankr. D.N.M. 2014)
Debt of individual who, after becoming ill, loaned his collateralized vehicle to a friend who promised to make the payments but who absconded with the car was not excepted from the discharge by § 523(a)(6) even he covenanted in the security agreement not to transfer the vehicle to anyone else.

283. *In re Shelmidine*,
519 B.R. 385 (Bankr. N.D.N.Y. 2014)
Debt of debtor who, over a two-year period and without the secured party's knowledge or consent, sold 113 cattle covered by the security interest and used the $84,600 in proceeds to pay debts other than the secured obligation was nondischargeable under § 523(a)(6). The security agreement expressly prohibited sale of the collateral without the secured party's permission and thus the debtor's actions were in knowing disregard of the secured party's rights.

284. *In re Bilfield*,
2014 WL 1323185 (Bankr. N.D. Ohio 2014)
Lawyer who guaranteed the debts of his law firm and granted a security interest in the firm's accounts committed conversion by depositing the proceeds of two accounts in his personal deposit account. Moreover, his bankruptcy discharge would be revoked under § 727(d) because he failed to disclose the existence of the accounts in his schedules or amend the schedules to indicate the existence of the receivables after he received payment during the pendency of this case.

Avoidance Powers

– Preferences

285. *In re LGI Energy Solutions, Inc.*,
746 F.3d 350 (8th Cir. 2014)
Preferential payments made by payment processor to utility companies on behalf of processor's clients could be offset not merely by subsequent new value provided the utilities but also by the subsequent new value provided by the clients.

286. *In re Welch*,
511 B.R. 99 (Bankr. E.D. Mich. 2014)
Claim financier that acquired a portion of the debtor's workers' compensation claim two years before the debtor's bankruptcy petition was filed and received payment on that claim from the debtor's attorney one month before the filing did not receive an avoidable transfer because the debtor sold the claim portion, rather than merely granted a security interest in it, and thus the payment to the financier was not a transfer of the debtor's interest in property.

287. *In re Proliance International, Inc.*,
514 B.R. 426 (Bankr. D. Del. 2014)
New value provided by a creditor need not remain unpaid to qualify for the § 547(c)(4) defense.

288. *In re Circuit City Stores, Inc.*,
515 B.R. 302 (Bankr. E.D. Va. 2014)
Creditor cannot use the same shipments of goods to the debtor during the 20 days preceding the petition date as new value for purposes of the § 547(c)(4) preference defense and as an administrative claim under § 503(b)(9).

289. *In re Spodris*,
516 B.R. 196 (Bankr. D. Mass. 2014)
Although the bankruptcy trustee could avoid as a preferential transfer the mortgage on the debtor's interest in jointly owned property, the trustee was not entitled to a money judgment against the mortgagee, even though the mortgage remained on the joint-owner's interest and the trustee had no way to effectively extract value from the debtor's interest.

290. *In re Pritchett*,
515 B.R. 656 (Bankr. N.D. Ga. 2014)
Security interest in automobile that attached in 2008 but was not perfected until 22 days before the debtor filed for bankruptcy in 2012, was avoidable as a preference.

291. *In re Tenderloin Health*,
2014 WL 4827103 (N.D. Cal. 2014)
Bank that had a security interest in deposit account it maintained for the debtor did not receive an avoidable preference when the debtor, shortly before the bankruptcy petition, sold property and used the proceeds to pay off the secured obligation and deposit the balance into the deposit account. The payment did not satisfy § 547(c)(5) because the bank had setoff rights against the deposit account and, after the deposit, the balance credited to the account exceeded the secured obligation.

292. *In re Medcorp, Inc.*,
521 B.R. 259 (Bankr. N.D. Ohio 2014)
Deposit of check into a collateralized deposit account could be a preferential transfer but the subsequent payment of those funds – now part of the collateral – to the secured party could not be.

293. *In re Tenderloin Health*,
2014 WL 4827103 (N.D. Cal. 2014)
The bankruptcy trustee could not avoid a prepetition payment that the debtor made to the bank that maintained the debtor's deposit account because, on the same day as the payment, the debtor also deposited sufficient funds into the account to more than cover the entire obligation owed to the bank, but for the payment the bank would have had setoff rights against the deposit account, the trustee did not seek to avoid the deposit as a preferential transfer, and § 547 would not limit the bank's setoff rights.

– Strong-Arm Powers

294. *In re Lloyd*,
511 B.R. 657 (Bankr. D. Ariz. 2014)
The bankruptcy trustee could not avoid a PMSI in a vehicle, which the secured party perfected postpetition by filing an application for a certificate of title on the 30th day after the purchase, because although UCC § 9-317 provides for perfection of a PMSI to relate back 20 days, the Arizona certificate of title statute, Ariz. Rev. Stat. § 28-2133, allows perfection to relate back 30 days, that statute controls, and Bankruptcy Code § 546(b)(1) subjects the trustee's avoiding powers to such a relation-back rule.

295. *In re Feliberty*,
2014 WL 173525 (Bankr. D. Mass. 2014)
Because the medical services providers' failure to comply with the Massachusetts Medical Lien Statute undermined the creation of their statutory lien for the reasonable and necessary charges, not merely the perfection of the lien, the trustee's power to preserve avoided liens for the benefit of the estate did not enable the trustee to use the providers' rights to take priority over the debtor's exemptions.

296. *In re Bonner*,
2014 WL 890477 (9th Cir. BAP 2014)
Even if secured party's claim was nondischargeable under § 523(a)(2), her unperfected security interest was nevertheless avoidable under § 544(a). Even if the secured party were entitled to an equitable lien because of the debtor's representations that perfection was unnecessary, such a lien would be inferior to the debtor in possession's status as a lien creditor.

297. *In re Traverse*,
753 F.3d 19 (1st Cir. 2014)
Although the bankruptcy trustee could avoid an unrecorded mortgage on the debtor's home and preserve the lien for the benefit of the estate, because the debtor was not in default and the value of the home was less than the total of the mortgage debt and the debtor's homestead exemption, the trustee could not sell the property.

– Fraudulent Transfers

298. *In re Pfister*,
749 F.3d 294 (4th Cir. 2014)
Transfer of wife's interest in real estate for nominal consideration to corporation owned by husband was a constructively fraudulent transfer even though the corporation was created when the couple acquired the real estate for the purpose of leasing the property and the corporation had made all the mortgage payments on the property because, given the parties' intent for the corporation not to be the owner, there was no basis under state law for imposition of a constructive trust and thus the wife did not receive reasonably equivalent value.

299. *In re Taneja*,
743 F.3d 423 (4th Cir. 2014)
Bank that received loan repayments from warehouse lender that had engaged in fraudulent conduct acted in good faith in accordance with § 548(c) because it neither knew nor should have known of the warehouse lender's fraud. It was unnecessary for the bank to prove that each and every act taken and belief held by the bank constituted reasonably prudent conduct and the bank's good faith could be established by the testimony of its own employees, rather than by expert witnesses.

300. *In re Ferguson*,
2014 WL 1044897 (Bankr. E.D. Va. 2014)
Because a creditor provides value for collateral given to secure an antecedent debt, bank gave reasonably equivalent value for deposit made to secure an outstanding obligation on a promissory note even though the debtor was an accommodation party and did not receive any of the original loan.

301. *Noranda Aluminum, Inc. v. Golden Aluminum Extrusion, LLC*,
2014 WL 4803149 (Tenn. Ct. App. 2014)
Because the secured party did not release its lien on the debtor's equipment until after the sale was conducted, and the secured obligation fair exceeded the proceeds of the sale, the equipment was not an asset of the debtor within the meaning of the Uniform Fraudulent Transfer Act and thus the sale could not be avoided as a constructively fraudulent transfer.

302. *Ritchie Capital Management, LLC v. Stoebner*,
2014 WL 1386724 (D. Minn. 2014)
Security interest granted by a legitimate business to secure a debt owed by the owners and incurred to pay off other investors in a Ponzi scheme was an avoidable fraudulent transfer because, even though the business was not involved in the scheme, the transfer was in furtherance of it.

303. *In re The Brown Publishing Co.*,
2014 WL 1338102 (Bankr. E.D.N.Y. 2014)
Prepetition payments that debtor made to a critical service supplier in satisfaction of an obligation of a subsidiary was not an avoidable fraudulent transfer for less than reasonably equivalent value even though the subsidiary was insolvent – and thus the debtor did not receive an indirect benefit of increased equity – because the debtor and its subsidiaries operated as a single entity, commingling all cash, the payment increased the debtor's borrowing base, and when the debtor later sold the subsidiary, the price paid was based on the subsidiary's receivables and goodwill, which would have been much less if it had ceased operations.

304. *In re Equipment Acquisition Resources, Inc.*,
742 F.3d 743 (7th Cir. 2014)
Although § 106(a)(1) abrogates the federal government's sovereign immunity with respect to § 544, it does not remove the requirement of § 544(b) that there be an actual creditor who can avoid the transfer under applicable law. Accordingly, while a bankruptcy trustee can use § 548 to recover a fraudulent transfer to the IRS made within two years before the petition, the trustee cannot use § 544(b) and state fraudulent transfer law to recover an earlier transfer if sovereign immunity would have prevented a creditor from avoiding the transfer.

305. *In re Blixseth*,
514 B.R. 871 (Bankr. D. Mont. 2014)
Debtor was insolvent at the time she executed a guaranty – and hence the guaranty was avoidable as a fraudulently incurred obligation – because she was separated from her husband at the time and, although she would later become entitled to receive substantial community property in the couple's divorce proceeding, at the time she did not control that property and her creditors could not reach that property to collect her separate debts, and thus such property was not properly considered in determining whether she was solvent.

– Post-Petition Transfers

306. *In re C.W. Mining Co.*,
749 F.3d 895 (10th Cir. 2014)
Chapter 7 trustee could not avoid bank's unauthorized post-petition liquidation of a certificate of deposit and exercise of setoff because avoidance would revive the bank's secured claim and thus provide no benefit to the estate.

– Protection for Settlement Payments

307. *In re Lyondell Chemical Company*,
503 B.R. 348 (Bankr. S.D.N.Y. 2014)
Section 546(e)'s protection for settlement payments applies only to actions brought by the bankruptcy trustee and did not affect the ability of a creditors' trust, as the assignee of individual estate creditors, to pursue state-law constructive fraudulent transfer claims against stockholders who received payment in a leveraged buyout.

308. *In re D.E.I. Systems, Inc.*,
996 F. Supp. 2d 1142 (D. Utah 2014)
Prepetition payments made to corporate debtor's shareholders in connection with a stock purchase agreement were settlement payments exempt from the trustee's avoidance powers because the payments were wired from the buyer's bank to a trust account held by another bank, and then transferred to one shareholder's account with different bank via wire transfer and to other shareholder via check.

– Other

309. *In re Godley*,
505 B.R. 192 (Bankr. E.D.N.C. 2014)
The power under § 545(3) to avoid the fixing of a statutory lien for rent applies only to liens that still exist when the bankruptcy case commences, not if, prepetition, the encumbered property was sold and the proceeds used to pay the lien debt.

Equitable Subordination

310. *United States v. State Street Bank and Trust Co.*,
520 B.R. 29 (Bankr. D. Del. 2014)
Claim of series A junior PIK noteholders would be equitably subordinated due to the inequitable conduct in colluding with debtors' management to convert their subordinated unsecured debt – which at the time was valueless – into secured debt for the purpose of enabling the noteholders to gain an unfair advantage over the IRS by preventing collection of the capital gains tax that all parties knew would arise when the assets of the company were sold. Moreover, they did so in the context of a Chapter 11 plan process in which the IRS received no direct notice, merely clues scattered throughout a myriad of sections of the proposed plan, in a case in which the IRS was not even a claimant.

Reorganization Plans

311. *In re Meridian Sunrise Village, LLC*,
2014 WL 909219 (W.D. Wash. 2014)
Because loan agreement prohibited the creditor from assigning the right to payment to anyone other than an "eligible assignee," the non-eligible assignees to whom the creditor assigned the loan postpetition were not entitled to vote on the debtor's plan. Even if the assignees could vote, they would be collectively entitled to only one vote.

312. *Mercury Companies, Inc. v. Comerica Bank*,
2014 WL 561993 (D. Colo. 2014)
Because a plan must be specific and unequivocal for a debtor to retain claims, and the plan in this case merely included the general statement that "any and all Causes of Action accruing to the Debtor, . . . not released or compromised pursuant to this Plan, . . . shall remain assets of the Estate, and the Debtor shall have the authority to prosecute such Causes of Action for the benefit of the Estate," the debtor lacked authority to prosecute a claim against its lender for breach of the credit agreement.

313. *In re Prior*,
2014 WL 585284 (Bankr. S.D. Ga. 2014)
Bank with a PMSI in engagement rings that the debtor had given to his fiancée – who later broke off the engagement and absconded with the rings – had a secured claim for the full amount of the debt under the hanging paragraph of § 1325(a). The debtor's proposed surrender of his property rights in the rings – but not the rings themselves, which the former fiancée refused to return – did not satisfy § 1325(a)(5).

314. *In re Copeland*,
742 F.3d 811 (8th Cir. 2014)
Debtor's proposed Chapter 13 plan unfairly discriminated by proposing to pay 97% of their nonpriority, nondischargeable tax debt while paying nothing on other nonpriority, unsecured claims.

315. *In re Lanois*,
516 B.R. 680 (Bankr. D.R.I. 2014)
Undersecured mortgagee whose claim was subject to modification in Chapter 13 proceeding was not entitled to reimbursement for mortgage insurance despite language in agreement providing for it because such insurance protected the unsecured portion of the mortgagee's claim, not the secured portion.

316. *In re LightSquared Inc.*,
513 B.R. 56 (Bankr. S.D.N.Y. 2014)
Claims acquired by an entity controlled by the debtor's competitors could be separately classified because the competitors had manifested an intent to further their own strategic and competitive interests, which are different from the interests of creditors. The debtor could not, however, designate the vote in favor of the plan because: (i) the claimant did not acquire the claims above par or after the plan was proposed; and (ii) the plan did not propose to pay the claim in or almost in full, but instead to deprive the claimant of its first priority lien and provide it with consideration that is virtually indistinguishable from equity interests. While it might be permissible to designate the claim of a creditor that votes against a plan that compensates the creditor in full, it is quite another to designate the claim when doing so would circumvent the cramdown protections of § 1129(b).

317. *In re Hyatt*,
509 B.R. 707 (Bankr. D.N.M. 2014)
Individual Chapter 11 debtor could separately classify his unsecured liability on a guarantee of the debt of his wholly owned corporation that was current on its payments and had provided collateral to secure the debt.

318. *In re Howe Farms*,
2014 WL 6911395 (Bankr. N.D.N.Y. 2014)
Debtor's plan, which proposed to pay creditor's claim, undersecured by accounts, livestock, and farm equipment, at 6% interest over 12 years, with a balloon payment after 7 years, could not be crammed down under § 1225(a)(5)(B) because the interest rate and length of the payments were not commercially reasonable. Given that the longest original payment term was 12 months, feasibility problems with the plan, and valid concerns about depreciation and risk of loss of the collateral, the proposed repayment term was well outside acceptable parameters. Evidence also established that the interest rate was below market for this type of loan.

Other Bankruptcy Matters

319. *In re Interstate Bakeries Corp.*,
751 F.3d 955 (8th Cir. 2014) (en banc)
Prepetition agreement by which Chapter 11 debtor granted to a perpetual, royalty-free, exclusive license to its trademarks in a specified geographic area, but which was only one part of an integrated asset-purchase transaction, was not an executory contract subject to assumption or rejection in bankruptcy because the remaining obligations of the parties are relatively minor and, if not performed, would not result in a material breach.

320. *In re Crumbs Bake Shop, Inc.*,
522 B.R. 766 (Bankr. D.N.J. 2014)
Trademark licensees may, pursuant to § 365(n), retain the rights given to them under their trademark licenses even though trademarks are not included in the definition of "intellectual property" under § 101(35A). Because the license agreements were not included in the debtor's § 363 sale, even though the debtor's trademarks were, postpetition royalty payments by the licensees who elect to retain their rights belong to the debtor.

321. *In re Lower Bucks Hospital*,
571 F. App'x 139 (3d Cir. 2014)
Bankruptcy and district courts did not err in refusing to enforce a provision of the confirmed plan purporting to prohibit bondholders from bringing claims against their indenture trustee for allowing the security interest to become unperfected after the debtor's name change because the release was not adequately disclosed and was not necessary to the debtor's reorganization.

322. *In re Shapiro*,
739 F.3d 1198 (9th Cir. 2014)
Because § 542(a) expressly authorizes recovery of "the value" of estate property in a person's "possession, custody, or control," a bank that post-petition honored checks drawn by the debtor prepetition was liable for the amount of the checks even though the bank lacked possession, custody, or control at the time the action was brought.

323. *In re Denman*,
513 B.R. 720 (Bankr. W.D. Tenn. 2014)
Operating agreement for LLC of which the debtor was a member was not an executory contract. Such agreements might lack mutual assent, consideration, and privity among the parties. Moreover, a member's failure to perform under an LLC operating agreement does not excuse the other members of their performance obligations under the agreement. Term in operating agreement that gave each member the right to purchase the interest of a member who files a bankruptcy petition was invalid under § 541(c)(1)(B).

324. *In re Delta Produce, LP*,
2014 WL 4443414 (W.D. Tex. 2014)
521 B.R. 576 (W.D. Tex. 2014)
Despite the provisions in a bankruptcy court order appointing a special counsel to adjudicate and pay PACA claims, the special counsel was not entitled to an award of fees because the PACA trust lacked sufficient assets to pay all the PACA claims and PACA does not permit trust assets to be used to pay other creditors of the produce buyer ahead of the PACA claimants. The special counsel was, in essence, performing a duty of the produce buyer.

GUARANTIES & RELATED MATTERS

325. *Hawkins v. Community Bank of Raymore*,
761 F.3d 937 (8th Cir. 2014)
Bank that required wives to join their husbands in guarantying a loan to a limited liability company in which their husbands had interest did not violate the Equal Credit Opportunity Act because guarantors are not "applicants" under the Act. Regulation to the contrary promulgated by the Federal Reserve Bank was not entitled to deference.

326. *RL BB Acquisition, LLC v. Bridgemill Commons Development Group, LLC*,
754 F.3d 380 (6th Cir. 2014)
Wife who joined her husband in guarantying a loan to the husband's business was an "applicant" under the Equal Credit Opportunity Act, and thus could assert as defense to liability under the guaranty the bank's violation of the Act by requiring the wife to guaranty the debt.

327. *Peyton Building,, LLC v. Niko's Gourmet, Inc.*,
323 P.3d 629 (Wash. Ct. App. 2014)
Buyer of leased real estate that did not receive an assignment of the lease or the supporting guaranty could enforce the lease against the tenant because a lease runs with the land, but could not enforce the guaranty because a guaranty does not run with the land.

328. *Southern Wine and Spirits of Illinois, Inc. v. Steiner*,
8 N.E.3d 1065 (Ill. Ct. App. 2014)
The personal guaranty provided by corporate officers of a wine retailer to a wine distributor was not assignable to the wine wholesaler that purchased assets of the distributor, and thus, the wholesaler could not enforce guaranty with respect to the retailer's debt for wine subsequently purchased from the wholesaler; the guarantors were not aware of the assignment of the guaranty.

329. *RCJV Holdings, Inc. v. Collado Ryerson, S.A. de C.V.*,
18 F. Supp. 3d 534 (S.D.N.Y. 2014)
Judgment could be entered against a guarantor who promised full and complete payment of all of the debtor's obligations under a note, "as and when due" even though the creditor entered into a debt subordination agreement that arguably prevented it from collecting from the debtor. The note had matured and thus the obligation was "due."

330. *HSBC Realty Credit Corp. (USA) v. O'Neill*,
745 F.3d 564 (1st Cir. 2014)
Lender was entitled to summary judgment against guarantor despite the guarantor's claims of fraudulent inducement because, even if the lender stated that it would proceed against the collateral before seeking payment from the guarantor, the guaranty expressly waived any such right of the guarantor, expressly indicated that the lender made no representations to the guarantor, and contained a merger clause. Therefore, evidence of the alleged inducement was inadmissible. The fact that the guaranty was limited to $8.1 million did not make it ambiguous as to whether it was the first $8.1 million or last $8.1 million of the principal obligation.

331. *RBS Citizens Bank v. Purther*,
22 F. Supp. 3d 747 (E.D. Mich. 2014)
Guaranty of debt that was limited to 50% of the outstanding balance was ambiguous as to whether the proceeds of the collateral should be deducted before or after calculating the guarantor's liability.

332. *In re Gentry*,
2014 WL 4723879 (D. Colo. 2014)
Because the guaranty agreement signed by the sole shareholders of a corporation defined the indebtedness as all obligations of the corporation and any advances or transactions that "modify, refinance, consolidate or substitute" those debts, whether "voluntarily or involuntarily incurred," the obligation of the guarantors was modified and reduced by the confirmed Chapter 11 plan of the corporation, which effectively eliminated the unsecured portion of the creditor's claim.

333. *CP III Rincon Towers, Inc. v. Cohen*,
13 F. Supp. 3d 307 (S.D.N.Y. 2014)
The creation of a mechanic's lien on the borrowers' property did not trigger liability under a clause of the nonrecourse note and guaranty that provided for liability if the borrower failed to obtain the lender's consent to any "voluntary lien" because mechanic's liens are involuntary, even if the owner had the funds to pay the lien claimants. The creation of the liens also did not trigger liability pursuant to a clause that provided for liability if the borrower failed to obtain the lender's consent to any transfer of the collateral because a contrary ruling would render the limitation of the lien clause to voluntary liens meaningless.

334. *Cooperative Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*,
978 N.Y.S.2d 186 (N.Y. Sup. Ct. App. Div. 2014)
Director of corporation who unconditionally guarantied its obligations to bank and waived all defenses could not escape liability merely because the bank's default judgment against the corporation was entered after the bank had effectively seized control over the corporation through appointment of a receiver and had the director removed from his position. Collusion was a defense that the guarantor had waived, it did not go to the existence of the bank's claim.

335. *JPMorgan Chase Bank v. East-West Logistics, LLC*,
9 N.E.3d 104 (Ill. Ct. App. 2014)
Because the guaranty agreement provided that the guarantor waived "all rights and benefits under any laws or statutes regarding sureties," the guarantor had waived the affirmative defense that the warranty was extinguished when the lender continued to loan funds despite the borrower's default. A waiver that is clear and unambiguous must be given effect according to its language, even when that language consists of broad statements.

336. *Wells Fargo Bank v. Osprey Commerce Center, LLC*,
2014 WL 1271460 (M.D. Fla. 2014)
Term in guaranty agreements providing that the guarantors "expressly waive[]to the extent permitted by law any and all rights and defenses" was unambiguous and sufficient to waive their suretyship defenses.

337. *Bank of America v. Yang*,
2014 WL 2208951 (N.D. Ill. 2014)
Statement in guaranty agreement that the "Guarantor has no defense (including without limitation, suretyship and those defenses arising if the Obligations are secured by real or personal property)" was an enforceable waiver of the right to assert any defenses, although the facts alleged did not rise to such a defense anyway.

338. *Moayedi v. Interstate 35/Chisam Road, L.P.*,
438 S.W.3d 1 (Tex. 2014)
Clause in guaranty agreement providing that "this Guaranty shall not be discharged, impaired or affected by . . . any defense (other than the full payment of the indebtedness hereby guaranteed" was sufficient to waive the guarantor's statutory right of offset following the creditor's nonjudicial foreclosure. The right of offset is a defense that reduces the deficiency to an amount based on the value of the collateral, rather than the amount of the foreclosure sale price.

339. *SecurAmerica Business Credit v. Schledwitz*,
2014 WL 1266121 (Tenn. Ct. App. 2014)
Guarantors who waived all suretyship defenses, including impairment of collateral, presumptively remained liable on their guaranties even though, after they sold their interest in the borrower, the lender continued to fund the loan knowing that the new owners had submitted false borrowing base certificates and diverted the proceeds of the collateral. The lender's action did not constitute a breach of the duty of good faith so as to discharge the guarantors. However, whether the lender's conducted amounted to a civil conspiracy – through a violation of the Tennessee Consumer Protection Act – was an issue for further factual findings on remand.

340. *Park & Flanders, LLC v. Brewster*,
2014 WL 5148445 (D. Or. 2014)
Guarantor remained obligated for debt despite conversion of the interest rate from variable to fixed by the debtor's confirmed plan because: (i) the debt had been accelerated prior to bankruptcy and the confirmed plan actually reduced the interest rate; (ii) the plan was confirmed over the creditor's objection; (iii) the guarantor waived this defense both in the guaranty and because it was the guarantor, as the manager of the debtor's managing member, who proposed the plan; and (iv) the confirmation order stipulates that it has no affect in the guarantor's obligations.

341. *Berger v. Wade*,
2014 WL 1337587 (Ohio Ct. App. 2014)
Guarantor was not fraudulently induced to execute a guaranty that incorrectly stated it was secured by a first-priority security interest because the guarantor knew that the borrower had previously granted security interests in the collateral and the guaranty agreement expressly provided that the guarantor waived the right to require the creditor to proceed first against the collateral.

342. *American Chartered Bank v. Cameron*,
2014 WL 5307466 (Ill. Ct. App. 2014)
Guarantor who had waived the right to have the creditor proceed against the collateral had no valid defense for fraud based on the creditor's alleged statement that the value of the collateral exceeded the amount of the guaranteed debt.

343. *In re Cook*,
504 B.R. 496 (8th Cir. BAP 2014)
Fact that guaranty agreement stated that it was unsecured, which was true when signed, did not render the dragnet clause in a subsequently created deed of trust latently ambiguous or prevent the deed of trust from securing the guaranty obligation.

344. *Legendary Investors Group No. 1, LLC v. Niemann*,
169 Cal. Rptr. 3d 787 (Cal. Ct. App. 2014)
Lender whose right to payment was supported by both a letter of credit and a guaranty did not extinguish the debt and thereby release the guarantors by certifying, as required to draw on the letter of credit, that the amount of the draw "represents and covers the unpaid indebtedness" because the amount of the draw was for substantially less than the outstanding debt and because the letter of credit permitted multiple draws, making it clear that the required statement could not mean that every draw was for the entire indebtedness. Moreover, the guarantors waived defenses based on acts by the lender that released either the debt or the borrower.

345. *Stuart v. Summers Group, Inc.*,
2014 WL 172519 (Tex. Ct. App. 2014)
Guarantors raised a factual issue sufficient to avoid summary judgment by submitting affidavit that, prior to the sale of their interests in the principal obligor, they informed the creditor of the sale and the creditor twice promised to release them from liability for future extensions of credit to the principal obligor.

346. *CoastalStates Bank v. Hanover Homes of South Carolina, LLC*,
759 S.E.2d 152 (S.C. Ct. App. 2014)
Lender that released borrower and one guarantor in return for their assistance in conducting short sales of mortgaged property thereby released a second guarantor who had promised full and final payment of the borrower's debts because the borrower no longer owed a debt. It did not matter that the release expressly provided that the lender did "not release or discharge any obligations, liabilities or guaranties of any other guarantor" or that, in the guaranty agreement, the second guarantor waived any defense arising out of any release or discharge of the borrower or any other guarantor.

347. *U.S. Bank v. Long*,
2014 WL 2050662 (E.D. Wis. 2014)
In calculating a guarantor's liability, the creditor that accepted a deed in lieu of foreclosure was required to credit the debt for the "fair value" of the property, not the property's "fair market value," and thus could take into account the forced nature of the transaction. Because the guarantor offered no evidence of the property's fair value to rebut the evidence provided by the creditor, summary judgment for the creditor was appropriate.

348. *JP Morgan Chase Bank v. Winthrop Properties, LLC*,
94 A.3d 622 (Conn. 2014)
Connecticut statute barring deficiency actions against persons who were or could have been parties to the foreclosure action did not prevent a mortgagee that had obtained a foreclosure judgment from seeking payment from guarantors.

LENDING, CONTRACTING & COMMERCIAL LITIGATION

349. *White Winston Select Asset Funds, LLC v. Intercloud Systems, Inc.*, 2014 WL 4105492 (D.N.J. 2014)

Although term sheet signed by prospective lender and prospective borrower expressly provided for a breakup fee and reimbursement of the lender's expenses if the borrower obtained financing elsewhere, the lender had no cause of action for such amounts because the parties agreed that the term sheet was not an enforceable agreement under New York law and the term sheet was not an enforceable agreement to agree because it also expressly provided that "does not constitute a commitment letter, an agreement to enter into a commitment letter, or an offer to enter into a commitment letter and shall not be deemed to obligate the [lender] to close the financing under any terms or circumstances." Even if the term sheet were an agreement to agree, that would still not entitle the lender to the break-up fee because the sole obligation under such an agreement is the obligation to negotiate in good faith. Because there was no enforceable contract, there could also be no claim for breach of the duty of good faith and fair dealing. The lender's claim for promissory estoppel also failed as a matter of law because it was based on the term sheet, which was contingent on the signing of a future agreement, and thus the lender could not reasonably rely on any promise therein.

350. *Zacadia Financial Limited Partnership v. Fiduciary Trust International of California*, 2014 WL 69618 (Cal. Ct. App. 2014)

Lender could not accelerate loan to trust and demand payment of all future, unaccrued interest – which would amount to a forfeiture – because the trust's breaches of the loan agreement were not material. Although the trust did make an unauthorized distribution of 14% of its assets, which were worth about $40 million and served as collateral for the loan, failed to respond to a request for information, and failed to pay a $1,648 bill from the creditor, none of these actions was material. The loan was heavily oversecured and became more so during the litigation, when the trust's assets appreciated and the distributed assets were reacquired.

351. *Hunt v. Stalians*, 2014 WL 1008085 (Cal. Ct. App. 2014)

Promissory note made in connection with the sale of a business which provided that in the event of prepayment, an extra $1 million – in addition to principal and all future interest – would be due was not an invalid penalty for breach even though the clause referred to the situation as a default, but an alternative mode of performance by the borrower, designed to compensate the lender for interest lost through prepayment and additional tax liability and to allow the seller to recapture lost value given that the sale price was below the appraised value of the assets.

352. *Charles R. Tips Family Trust v. PB Commercial LLC*,
2014 WL 4085496 (Tex. Ct. App. 2014)
Because written words control over numerals, a promissory note, deed of trust, and guaranty agreement that all described the principal obligation as "one million seven thousand and no/100 ($1,700,000.00) dollars" were not ambiguous, and thus extrinsic evidence that the amount advanced was $1.7 million was inadmissible.

353. *Mercury Companies, Inc. v. Comerica Bank*,
2014 WL 561993 (D. Colo. 2014)
Even if the reorganized debtor had standing to assert a claim against its lender for breach of the credit agreement, because the debtor failed to provide audited financial statement that was contractually required, the lender acted within its rights in declaring a default and accelerating the debt, even if the debtor's breach was immaterial and even if the debtor substantially performed its contractual obligations. The lender did not by its silence waive its rights or create a basis for estoppel.

354. *Bank of America v. Sport Collectors Guild, Inc.*,
2014 WL 173516 (Ariz. Ct. App. 2014)
Corporate borrower did not waive right to arbitrate dispute because individual who initially answered the creditor's complaint allegedly on behalf of the borrower was not a lawyer and did not have authority to file the answer, and the first pleading filed by a lawyer for the borrower did raise arbitration.

355. *Damon v. StrucSure Home Warranty, LLC*,
338 P.3d 123 (N.M. Ct. App. 2014)
Home buyers who sued the company that provided a home warranty to the previous owners were bound by the arbitration clause in the warranty agreement even though they were unaware of the clause because the doctrine of equitable estoppel prevents the buyers from claiming the benefits of the warranty agreement while simultaneously repudiating one of its provisions.

356. *Medivas, LLC v. Marubeni Corp.*,
2014 WL 2531968 (S.D. Cal. 2014)
Clause in 2007 security agreement providing the venue for any action concerning the interpretation or enforcement of the agreement did not supercede the arbitration clause in the 2004 promissory note evidencing the secured obligation, and thus matters relating to enforcement of the note remained arbitrable.

357. *Nissan Motor Acceptance Corporation v. Superior Automotive Group*,
2014 WL 185718 (Cal. Ct. App. 2014)
Debtors were entitled to admit parol evidence that the creditor fraudulently entered into a forbearance agreement, under in which the debtors offered additional collateral, by promising additional financing which the creditor did not intend to provide. The California Supreme Court's decision in *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n*, 291 P.3d 316 (Cal. 2013), ruling that the fraud exception to the parol evidence rule is not limited and can include fraud directly at variance with a promise in the writing, is not prospective only but also applies retrospectively.

358. *Lyon Financial Services, Inc. v. Illinois Paper and Copier Co.*,
848 N.W.2d 539 (Minn. 2014)
Proof of reliance was not needed to maintain a contract action for breach of a contractual promise of future legal compliance, specifically that future lease transactions would be "valid and fully enforceable.

359. *FS Financial Services Corp. v. Williams*,
84 U.C.C. Rep. Serv. 2d 594 (Ill. Ct. App. 2014)
Illinois Credit Act, which requires promises to extend credit to be in writing, does not conflict with the Illinois Commercial Code, which normally permits claims and defenses based on promissory estoppel. Thus, a debtor who claimed that the lender orally promised to extend the maturity date had no claim or defense based on the alleged promise.

360. *PNL Pomona, L.P. v. Meruelo*,
2014 WL 280401 (Cal. Ct. App. 2014)
A married couple who created a revocable inter vivos family trust with themselves as trustors, trustees, and beneficiaries, caused the trust to take out a loan secured by a deed of trust, and personally guaranteed the loan, were not liable for the deficiency after a nonjudicial foreclosure because they were the primary obligors.

361. *Justinian Capital SPC ex rel. Blue Heron Segregated Portfolio v. WestLB AG*,
981 N.Y.S.2d 302 (N.Y. Sup. Ct. 2014)
Champerty defense prevented investor's assignee from prosecuting contract and fraud actions against manager of portfolio of mortgage-backed securities because the assignee did not acquire or pay for the notes themselves but instead merely promised to remit to the seller 85% of any recovery.

362. *Charge Injection Technologies, Inc. v. E.I. DuPont de Nemours and Co.*,
2014 WL 891286 (Del. Super. Ct. 2014)
89 A.3d 476 (Del. 2014) (denying interlocutory review)
The defendant in action was entitled to conduct discovery relating to the plaintiff's litigation financing to ascertain whether the plaintiff was engaged in champerty or maintenance. Even though the state statute making champerty a criminal offense was repealed, the doctrines remain valid defenses in civil proceedings.

363. *Ventura County Business Bank v. California Bank & Trust*,
2014 WL 540473 (Cal. Ct. App. 2014)
Buyer of loan participation had no right to rescind purchase due to mutual mistake even though the bank that originated the loan had falsely represented and warranted that the debtor was not in default because the participation agreement expressly indicated that the buyer had reviewed the loan document and had made an independent investigation and evaluation of borrower's financial condition, the value of the collateral, and the priority of the lien, and thus put the risk of mistake about the borrower's default on the buyer.

364. *CRE Venture 2011-1, LLC v. First Citizens Bank of Georgia*,
756 S.E.2d 225 (Ga. Ct. App. 2014)
Loan participant had right to assume the administration of the loan pursuant to clause in the participation agreement that allowed the participant with the largest share to do so if the originator was declared insolvent or taken over by a regulatory agency because the originator and all the other participants had been taken over by the FDIC and their assets sold. The assignees from the FDIC were bound by the terms of the participation agreement and could not benefit from the FDIC's rights under 12 U.S.C. § 1821(e)(13)(A) to enforce any contract notwithstanding a provision providing for termination or rights solely upon insolvency or the appointment of a receiver.

365. *Sumitomo Mitsui Banking Corp. v. Credit Suisse*,
998 N.Y.S.2d 308 (N.Y. Sup. Ct. 2014)
The buyer of a loan participation had no right to payment from the seller when the debtor refinanced the original unsecured bridge loan with a secured loan because, even though the transaction was structured as a new loan, the economic reality of the transaction was merely a replacement of unsecured debt with an equal amount of secured from the same lenders; no new money was loaned to the debtor and there was no reduction in the lenders' exposure, and thus the transaction was not a "cash distribution" within the meaning of the participation agreement. The buyer was entitled only to a proportionate share of the secured loan.

366. *In re Lyondell Chemical Co.*,
505 B.R. 409 (S.D.N.Y. 2014)
Hedge fund had no cause of action against investment banker for tortious interference with contract based on banker's alleged wrongful conduct in denying the hedge fund the opportunity to participate as lender in a bankruptcy debtor's exit financing because the "Confidential Information Memorandum for Public Investors" sent by the debtor was not an offer that, upon acceptance, would lead to a binding agreement. The memorandum stated that it was solely for informational purposes and that it created no legal obligation unless and until a definitive agreement was executed.

367. *Mill Financial, LLC v. Gillett*,
992 N.Y.S.2d 20 (N.Y. App. Div. 2014)
Creditor stated cause of action against another lender for breach of intercreditor agreement by alleging that the other lender failed to provide required notification of its enforcement actions against the debtor by which the lender acquired a right to approve a new chairman of the debtor's board of directors. Although the intercreditor agreement precluded consequential damages, the creditor alleged that the lack of notice prevented the creditor from protecting its position and led to a sale of the debtor's business at a price that wiped out the creditor's security interest, and the court could not concluded as a matter of law that such losses were an indirect loss that did not flow naturally from the lender's breach.

368. *Wells Fargo Bank v. Webster Business Credit Corp.*,
979 N.Y.S.2d 298 (N.Y. App. Div. 2014)
Because the clause in a credit agreement providing for each lender to indemnify the agent applied only to the extent that the borrower failed to satisfy its indemnification duty, and the clause dealing with indemnification by the borrower contemplated third-party litigation against the lenders, the lenders had no duty to indemnify the agent for the costs the agent incurred in successfully defending an action brought by some lenders.

369. *Diversified Realty Services, Inc. v. Meyers Law Group, P.C.*,
2014 WL 547034 (N.D. Cal. 2014)
Term in loan agreement for DIP financing which stated that "the liens and security interest of Lender, . . . shall be subordinated . . . to the prior payment of or provision for such fees and expenses of professionals retained by the Debtor or the Committee" provided not merely for lien subordination but also for debt subordination, and as a result the lender could be required to disgorge payments received from the debtor to compensate the unpaid professionals.

370. *In re MPM Silicones, LLC*,
2014 WL 4436335 (Bankr. S.D.N.Y. 2014)
Intercreditor agreement that excepted from debt subordination clause "any Indebtedness . . . that by its terms is subordinate or junior in any respect to any other Indebtedness" did not except senior notes that were subject to lien subordination because subordination of the lien did not subordinate the debt and interpreting the agreement to except such debt would make the exception swallow up the whole rule.

371. *Clemmer v. Columbia Group, Inc.*,
2014 WL 7429436 (W.D. Okla. 2014)
Junior creditor remained subject to subordination agreement even though the senior debt was acquired by an entity apparently related to the debtor in part because the subordination agreement granted the senior creditor the right to exchange, sell, or surrender its security interest without impairing or affecting the agreement.

372. *In re MPM Silicones, LLC*,
518 B.R. 740 (Bankr. S.D.N.Y. 2014)
The first-lien lenders have no claim against the second-lien lenders under the intercreditor agreement for supporting the debtors' objection to the first-lien lenders' claim for a make-whole payment or for supporting the debtors' efforts to cram down a plan of reorganization because the intercreditor agreement prohibited the second-lien lenders from taking actions with respect to the shared collateral – not from exercising their rights or remedies as unsecured creditors – and unsecured creditors are entitled to provide such support. The first-lien lenders also had no claim against the second-lien lenders for receiving and retaining a $30 million payment under the Backstop Agreement despite a clause in the intercreditor agreement mandating that proceeds of the shared collateral be applied to the first-lien lenders' claims until they are paid in full in cash because such payment would not be on account of the second-lien lenders' secured claim but rather, on account of a separate, unsecured obligation undertaken by the debtors for backstopping exit financing for the debtors. Finally, the first-lien lenders had no claim against the second-lien lenders for receiving and retaining stock in the reorganized debtor because that stock is not proceeds of the shared collateral. The stock is proceeds of the second-lien lenders' liens and claims, but not the proceeds of the debtors' assets.

373. *ML Manager, LLC v. Pinsonneault*,
2014 WL 222833 (Ariz. App. Ct. 2014)
Because promissory note had a severability clause, and the clause providing for unreasonable late charges was grammatically severable from the remainder of the note, the trial court properly eliminated the late charges under the "blue pencil" rule.

374. *In re Denver Merchandise Mart, Inc.*,
740 F.3d 1052 (5th Cir. 2014)
Although the default clause in promissory note provided for acceleration of "all sums, as provided in this Note," and the note also contained a clause providing for a prepayment penalty, that prepayment penalty did not become due upon default and thus was not part of the bank's claim in the note maker's bankruptcy because the note did not clearly make the prepayment penalty due upon acceleration.

375. *Regions Bank v. Sabatino*,
2014 WL 644758 (Ohio Ct. App. 2014)
Credit agreement that required the lender to provide notification of default before suspending or reducing the line of credit, but said nothing about notification before termination of the line of credit and acceleration of the debt did not require notification before the lender could exercise those rights. Language in the agreement suggests that the reason for requiring notification of suspension or reduction was so that the lender "can restore [his] right to credit advances," a situation inapplicable to termination of the line of credit and acceleration of the entire balance due.

376. *U.S. Commodity Futures Trading Commission v. RFF GP, LLC*,
2014 WL 491639 (E.D. Tex. 2014)
Recommendation of court-appointed receiver, for entity that fraudulently deceived investors, to distribute money to investors pro rata but ahead of any distributions to the bank that loaned funds to the entity was equitable and appropriate. The class of fraud victims takes priority over the class of general creditors with respect to proceeds traceable to the fraud (although the court did not expressly indicate from where the recovered funds came).

377. *PNC Bank v. Presbyterian Retirement Corp.*,
2014 WL 6065778 (S.D. Ala. 2014)
Although a lender's mortgage expressly provided that the lender was entitled to the appointment of a receiver during a foreclosure proceeding, the appointment of a receiver in a federal action is governed by Fed. R. Civ. Proc. 66, under which consent is merely one non-dispositive factor and the lender failed to demonstrate that appointment of a receiver was appropriate in this case.

378. *U.S. Bank v. Grayson Hospitality, Inc.*,
2014 WL 7272842 (E.D. Tex. 2014)
Secured lender was not entitled to the appointment of a receiver for hotel properties owned by the debtors despite a clause in the mortgages providing for a receiver upon default because the lender could use – indeed, had twice begun but abandoned – the "less drastic" remedy of foreclosure.

379. *Nativi v. Deutsche Bank National Trust Company*,
167 Cal. Rptr.3d 173 (Cal. Ct. App. 2014)
Pursuant to the federal Protecting Tenants at Foreclosure Act of 2009, trustee bank for mortgage-backed securities that foreclosed on a deed of trust and purchased the property at the foreclosure sale, takes the property subject to a bona fide lease and, therefore, becomes the landlord to the lessee. Consequently, the lessee might have claims against the bank for breach of the covenant of quiet enjoyment or wrongful conviction.

380. *In re Fisher*,
433 S.W.3d 523 (Tex. 2014)
Forum-selection clause in both a stock purchase agreement and the buyer's promissory note providing that the state and federal courts in Tarrant County, Texas were the exclusive forum for "any proceeding arising out of or relating to this Agreement" covered the seller's action against the buyer's principals for breach of fiduciary duty and fraud because those actions were essentially efforts to collect on the promissory note and thus arose out of the contracts.

381. *VFS Financing Inc. v. Elias-Savion-Fox LLC*,
2014 WL 6765827 (S.D.N.Y. 2014)
Because the guaranty agreement provided that it "shall be governed by, and construed in accordance with, the laws of the State of New York," New York law determined whether the SRA/IRA account that the guarantor owned jointly with his wife was exempt from garnishment by the creditor.

382. *Berent v. CMH Homes, Inc.*,
2014 WL 813874 (Tenn. Ct. App. 2014)
Arbitration clause in retail installment sales contract for a mobile home was unconscionable because it required the buyer to arbitrate all of his claims but permitted the seller or its assignee to use judicial process to enforce its security interest and to seek preliminary injunctive relief.

383. *Washington Federal Bank v. Gentry*,
319 P.3d 823 (Wash. Ct. App. 2014)
Creditor that conducts a nonjudicial foreclosure of collateral securing a commercial loan may obtain a deficiency judgment against a guarantor provided the property secured the borrower's obligation, not the guarantor's obligation. The fact that the deeds of trust in this case secured "any and all obligations under the Note, [and] the Related Documents" and defined Related Documents to include all guaranties was not sufficient to demonstrate that the deeds of trust secured the guaranties because the "Payment and Performance" provision of the deeds of trust, which stated that the deed of trust secured the obligations of the Borrower and Grantor. *See also Washington Federal v. Harvey*, 2014 WL 646746 (Wash. Ct. App. 2014) (same).

384. *First Bank v. S&R Grandview, LLC*,
755 S.E.2d 393 (N.C. Ct. App. 2014)
Judgment creditor that obtained a charging order against the judgment debtor's LLC interest did not thereby effect an assignment of the LLC interest and could not enjoin the debtor from exercising management rights or require that those rights lie fallow.

385. *Clark v. Absolute Collection Service, Inc.*,
741 F.3d 487 (4th Cir. 2014)
The Fair Debt Collection Practices Act does not require a consumer who wishes to dispute a debt to contact the debt collector in writing, and thus a debt collector's letter stating that the debt would be presumed valid unless disputed in writing might have violated the act.

386. *In re Late Fee and Over-Limit Fee Litigation*,
741 F.3d 1022 (9th Cir. 2014)
Because substantive due process principles that limit jury-awarded punitive damages do not apply to liquidated damages clauses in private contracts, banks were not liable for charging allegedly excessive late fees and over-limit fees to credit card holders.

387. *Brewer Corporation v. Point Center Financial, Inc.*,
167 Cal. Rptr. 3d 555 (Cal. Ct. App. 2014)
Construction lender must make available to stop notice claimants those amounts the lender has already disbursed to itself for interest and fees on the construction loan because under California Civil Code § 3166, stop notice claimants have priority over any assignment of the funds loaned.

388. *Joyce Farms, LLC v. Van Vooren Holdings, Inc.*,
756 S.E.2d 355 (N.C. Ct. App. 2014)
Principles of successor liability, which were meant to respond to fraudulent transfers, do not apply after a court-ordered sale by a receiver subject to statutory safeguards.

389. *Norris v. R & T Manufacturing, LLC*,
338 P.3d 150 (Or. Cr. App. 2014)
Trial court did not err in concluding that the judgment debtor transferred its business assets to an entity created and controlled by the debtor's principles with intent to defraud the debtor's creditors. Although the equipment transferred might have been fully encumbered, and thus not an "asset" of the debtor for the purposes of the Uniform Fraudulent Transfer Act, the debtor transferred all its business assets, not merely its equipment, and there was evidence to support the trial court's finding that the total value exceeded the amount of the secured obligation.

390. *Call Center Technologies, Inc. v. Grand Adventures Tour & Travel Pub. Corp.*,
2 F. Supp. 3d 192 (D. Conn. 2014)
Entity formed by secured creditors to acquire the assets of the debtor at a foreclosure sale and which, after the sale, operated the same business at the same locations with mostly the same employees under mostly the same management and which assumed some liabilities of the debtor by honoring the vacation time of the debtor's employees, giving discounts to customers who had lost deposits, and paying the reservation deposit of one customer, has whatever liability the debtor had for breach of contract under the continuity of enterprise theory of successor liability even though there was no fraud or continuity of ownership.

391. *In re Brosio*,
505 B.R. 903 (9th Cir. BAP 2014)
Debtor who objected to the portion of a creditor's claim seeking $425 for attorney's fees was not a prevailing party under Cal. Civil Code § 1717, which makes contractual provisions on attorney's fees reciprocal, after the creditor withdrew that portion of its request by filing an amended proof of claim because the court did not adjudicate anything and the amended claim was akin to a voluntary dismissal.

392. *Scher v. Stendhal Gallery, Inc.*,
983 N.Y.S.2d 219 (N.Y. App. Div. 2014)
Because an artist's contract with a gallery provided that the gallery was the artist's exclusive agent for exhibition and sale of the artist's paintings and limited edition prints thereof, the unsold prints commissioned and paid for by the gallery belonged to the artist. If the Gallery did not wish to finance the production of prints that it would not own, it could have sought an agreement making the prints the Gallery's property. If the Gallery wished to protect itself from being abruptly terminated as the artist's agent before it had a fair chance to sell the prints, it could have sought an agreement on a minimum time-period to sell the prints during which the agency could not be terminated without cause.

393. *Quadrant Structured Products Co., Ltd. v. Vertin*,
23 N.Y.3d 549 (N.Y. 2014)
"No-action" clause in indenture providing that "[n]o holder of any Security shall have any right by virtue or by availing of any provision of this Indenture to institute any action or proceeding at law or in equity" unless specified conditions were satisfied was limited to contractual claims arising out of the indenture; the language did not – as many similar clauses do – apply to common-law and statutory securities-based claims.

394. *Biotronik A.G. v. Conor Medsystems Ireland, Ltd.*,
11 N.E.3d 676 (N.Y. 2014)
Distribution agreement that limited liability to "general damages" and disclaimed liability for "indirect, special, consequential, incidental, or punitive damage" did not exclude damages for lost profits because, in the context of this type of agreement in which the price paid by the distributor was tied to the price at which it later resold the goods, lost profits were the direct and probable result of the breach of the parties' agreement.

395. *Safeco Insurance Co. of Oregon v. Federated Mutual Insurance Co.*,
2014 WL 1493172 (D. Or. 2014)
Even though the sales agreement between a car dealer and a buyer expressly provided that the transaction was subject to financing approval and, until such acceptance, buyer "shall have absolutely no right, title and interest in the vehicle," the buyer was the owner of the vehicle, not the seller, on the following day, before financing approval was obtained, when the buyer was in an accident. Accordingly, the seller's insurer had no duty to defend or provide contribution to buyer's insurer in action brought by injured third party.

396. *Green Tree Servicing, LLC v. ICA Wholesale, Ltd.*,
439 S.W.3d 657 (Tex. Ct. App. 2014)
Dealership that could not obtain a certificate of title for a used mobile home that it purchased had no cause of action against the seller for breach of the warranty of title because the dealership was able to obtain a judgment that it was the rightful owner of the mobile home. In Texas, breach of the warranty of title requires disturbance of the buyer's quiet possession, not merely an asserted colorable claim of ownership.

397. *Nissan World, LLC v. Market Scan Information Systems, Inc.*,
2014 WL 1716451 (D.N.J. 2014)
Despite (i) a hell-or–high-water clause in finance leases, (ii) a clause indicating that the supplier was not the lessor's agent, and (iii) a merger clause, the lessor was not entitled to summary judgment against the lessee for breach for failing to make a required balloon payment because material facts remained in dispute about whether the supplier was the agent of the lessor and breached an option agreement with the lessees which somehow modified the leases.

398. *Too Marker Products, Inc. v. Creation Supply, Inc.*,
84 U.C.C. Rep. Serv. 2d 271 (D. Or. 2014)
Buyer of goods that, after being sued for trademark infringement, brought a third-party complaint against its seller for breach of the warranties of title and noninfringment, was not entitled to the attorney's fees it incurred either in the defending the infringement action or in seeking indemnification from the seller.

399. *Healthcare I.Q., LLC v. Chao*,
986 N.Y.S.2d 42 (N.Y. App. Div. 2014)
Agreement by which health care services company provided coding, billing, and collection services to physician by collecting, scanning, and uploading patient records and then making those records available to the physician through proprietary software was subject to N.Y. Gen. Oblig. Law § 5-903, covering automatic renewal of contracts for service, maintenance or repair to or for personal property, regardless of who owned the patient records. Thus, the automatic renewal clause in the agreement was unenforceable because the health care services company did not timely notify the physician of the renewal.

400. *Bluebonnet Hotel Ventures, L.L.C. v. Wells Fargo Bank*,
754 F.3d 272 (5th Cir. 2014)
Interest rate swap that prospective borrower entered into with a bank in anticipation of also contracting for the bank to issue a letter of credit and underwrite some tax-exempt bonds for the borrower could not be rescinded when negotiations concerning the letter of credit broke down. The swap agreement expressly provided that the borrower's inability to obtain any loan or other extension of credit would not affect the borrower's obligations under the swap agreement and in executing the swap agreement the borrower affirmed that the agreement created an obligation "separate and apart" from any existing or future loan or financing, and that its obligations under the swap agreement would "not be contingent on whether any loan or other financing closes, is outstanding or is repaid."

401. *In re Campbell*,
513 B.R. 846 (Bankr. S.D.N.Y. 2014)
Creditor was not entitled to interest at the default rate even though the promissory note provided for default-rate interest "after any stated or accelerated maturity hereof" because the creditor never accelerated the debt or provided notification of default.

402. *NAMA Holdings, LLC v. Related WMC LLC*,
2014 WL 6436647 (Del. Ch. Ct. 2014)
Custodian of securities breached the implied covenant of good faith and fair dealing in the custodian contract by releasing the securities to one claimant in order to facilitate a transaction between the claimant and the custodian's parent company. The custodian's parent company tortiously interfered with the custodial contract by causing the custodian to take this action for the parent's benefit.

403. *Dameron Hospital Association v. AAA Northern California, Nevada and Utah Ins. Exch.*,
176 Cal. Rptr. 3d 658 (Cal. Ct. App. 2014)
176 Cal. Rptr. 3d 851 (Cal. Ct. App. 2014) (on rehearing)
Although a medical services provider is permitted in its contract with a health insurer to preserve its right to seek recovery of its customary billing rates from third-party tortfeasors who injure the insured patients it treats, the provider did not do so in this case because the contract did not expressly reserve the provider's right to recover its customary billing rates for emergency room services from anyone, did not mention liens, third party tortfeasors, or liability insurers for third party tortfeasors, and expressly stated that the provider's acceptance of the insurer's payment would constitute "payment in full for Covered Services."