

Commercial Law Developments

2013

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SECURED TRANSACTIONS

Scope Issues

1. *In re HomeBanc Mortgage Corp.*,
[2013 WL 211180](#) (Bankr. D. Del. 2013)
Article 9 does not apply to a securities repurchase agreement and thus a repo participant's sale of securities after the counter-party defaulted was not subject to a standard of commercial reasonableness.
2. *In re Purdy*,
[490 B.R. 530](#) (Bankr. W.D. Ky. 2013)
50-month leases of dairy cows were really sales with a retained security interest because 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. This conclusion was further supported by other evidence indicating that the lessee was the true owner, including that the debtor retained the proceeds of cows sold, that some the cows were selected and purchased by the lessee only to be later reimbursed by the lessor, and that some of the cows were not branded with the lessor's brand until after delivery to the lessee. As a result, lender with prior perfected security interest in debtor's existing and after-acquired livestock had priority over the lessor.
3. *GECC v. FPL Service Corp.*,
[986 F. Supp. 2d 1029](#) (N.D. Iowa 2013)
Five-year lease of two copiers was a sale and secured transaction because the lessee had no right to terminate and had an option to purchase for \$1 at the end of the lease term.
4. *In re Rodriguez*,
[2013 WL 1385665](#) (Bankr. S.D. Tex. 2013)
30-month lease of two tractors that required an up-front payment of \$24,000 and monthly payments of \$2,320, and which contained an option to purchase at the end of the lease term for \$6,000 when the tractors were estimated to be worth \$12,000–\$13,000, was a sale with a retained security interest.
5. *In re Wade*,
[501 B.R. 870](#) (Bankr. D. Kan. 2013)
Personal property lease was a true lease because it was subject to termination by the lessee.
6. *Icon Amazing, L.L.C. v. Amazing Shipping, Ltd.*,
[951 F. Supp. 2d 909](#) (S.D. Tex. 2013)
Sale-leaseback of vessel under which the seller-lessee was obligated to repurchase the vessel at the end of the lease term was really a secured financing transaction. As a result, the seller-lessee's failure to pay rent was not a failure to pay for charter of a vessel and the court had no maritime jurisdiction over the buyer-lessor's claim.

7. *In re C.W. Mining Company*,
[488 B.R. 715](#) (D. Utah 2013)

Bankruptcy court erred in concluding on summary judgment that agreements by which coal broker purported to prepay mining company for coal to be mined and expressly provided that it did not create a loan and that title to mined coal would transfer from mining company's lessor to the broker upon severance created a security interest. Case remanded for the bankruptcy court to accept parol evidence of the parties' intentions.

8. *In re Clean Burn Fuels, LLC*,
[492 B.R. 445](#) (Bankr. M.D.N.C. 2013)

Seller of corn to debtor had only a security interest, not ownership, of corn in storage bin on debtor's property and leased by the seller from the debtor because even though the agreement expressly provided that title remained with the seller until "the [corn] leaves the storage bin and moves across the weighbelt into the plant at [the debtor's] Ethanol Facility," the agreement also provided that delivery is complete when the corn is received at the debtor's facility, and thus delivery occurred when the corn arrived at the storage bin. Retention of title by a seller of goods after delivery is limited in effect to reservation of a security interest.

9. *In re Jones*,
[2013 WL 1092099](#) (Bankr. E.D. Tenn. 2013)

Bills of sale executed buyers and seller of automobiles providing that "this agreement will not remain binding if a third party finance source does not agree to purchase the installment sale contract based on this agreement" and which gave the seller the option to cancel the transaction if the financing falls through and the buyer fails to return the vehicle created a condition subsequent, not a condition precedent. Accordingly, the documents merely created a security interest and did not prevent the vehicles from becoming property of the buyers' bankruptcy estates.

10. *Long John Silver's, Inc. v. Nickleson*,
[2013 WL 1797442](#) (W.D. Ky. 2013)

Written agreement by which debtors assigned to bank "all of [their] right, title, interest in and to all legal claims, rights of action, lawsuits, settlements and judgments" relating to debtors' franchise agreements and which further provided that "[t]his assignment is absolute and unconditional" was an absolute transfer of debtors' causes of action and counterclaims, not merely an assignment for security. As a result, debtors would not be regarded as the owners of counterclaims for the purposes of venue for an action brought by the franchisor and clarifying amendment to agreement after action was brought was not relevant.

11. *In re Wilds*,
[2013 WL 2419899](#) (D. Colo. 2013)

Judgment creditor's assignment to his lawyer of right to collect judgment was excluded from Article 9 under § 9-109(d)(2), (7), and (9). Nevertheless, the lawyer's lien was perfected when the lawyer filed a notice with the court and, because that occurred during the preference period, the transfer was avoidable.

12. *In re Fine Diamonds, LLC*,
[501 B.R. 159](#) (Bankr. S.D.N.Y. 2013)

Consignment of diamonds is governed by Article 9 only for the purpose of determining the consignor's rights against creditors of the consignee or buyers of the goods; the relationship of the consignor to the consignee is governed by other law. As a result, the consignor's failure to file a financing statement had no bearing on the consignee's liability for conversion for failing to return the goods or remit the proceeds thereof.

Attachment Issues

– Existence of Security Agreement

13. *Person v. Bowman*,
[2013 WL 663726](#) (Wash. Ct. App. 2013)

Purchase agreement for horse that required buyer to: (i) make a \$300 down payment and monthly payments in an amount "to be determined" until she paid \$2,200 in total; (ii) keep the horse at a specified stable until she paid off the balance; and (iii) pay a boarding fee and all veterinary, farrier, and training expenses, and which required the seller to deliver the registration papers for the horse only after the buyer paid in full was a sale with a retained security interest. Although the buyer may have subjectively thought that she had leased the horse, judged objectively the transaction was a sale. As a result, the seller was not responsible for the actions of the horse under the Washington Equine Activities Statute.

14. *Huntington Village Dental, PC v. Rathbauer*,
[966 N.Y.S.2d 346](#) (N.Y. Sup. Ct. 2013)

Handwritten term in the promissory note executed in connection with the purchase and sale of a dental practice providing that if the buyer fails to pay and remains in default for 90 days, "ownership of the practice and assets shall revert back to the seller with credit to purchaser for all sums paid" did not create an Article 9 security interest in the absence of a pledge of property as security for the debt. The handwritten term also did not create a possibility of reverter that automatically reverted the property in the seller; at most it created a basis for rescission, which would require judicial action to enforce.

15. *In re Caffey*,
[2013 WL 3199816](#) (Bankr. N.D. Ohio 2013)

"Loan agreement" that debtor signed in favor of automotive repair facility mechanic and which stated that "[a] lien is hereby placed on the above mentioned vehicle until loan is paid in full" granted a security interest in the debtor's vehicle even though there is no evidence regarding when and where the agreement was created, the agreement did not specify what law applies, the creditor did not sign the agreement, and the creditor gave no consideration beyond previously having made repairs to the vehicle for which the debtor had not fully paid.

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16. *Crozier v. Wint*,
[736 F.3d 1134](#) (8th Cir. 2013)
Promissory note signed by married couple that stated it was “secured by a filed UCC Financing Statement,” together with a filed financing statement initialed by the husband could be sufficient to create a security interest if the husband was the sole owner of the collateral described in the financing statement or acted as an agent of the wife when he initialed the financing statement.
17. *In re Cruse*,
[2013 WL 323275](#) (Bankr. S.D. Ind. 2013)
Because timber to be cut is goods – and not real estate potentially subject to a vendor’s lien – seller of timber to be cut by buyer had no security interest in the severed timber because there was no written security agreement.
18. *In re Box*,
[2013 WL 3357871](#) (Bankr. M.D. Ga. 2013)
Vehicle seller who was listed as the first lienholder on the vehicle’s certificate of title and who obtained the debtor’s signature on promissory note but not on a security agreement had no security interest.
19. *LaVoy v. Morris*,
[2013 WL 6844770](#) (D. Nev. 2013)
Lenders who funded malpractice litigation did not have a security interest in the recovery because the loan agreement provided merely that the loan would be repaid if the suit were successful; there was no indication that the payment was to come from the recovery itself or that the borrower granted a security interest in the claim or in the recovery.
20. *Williams v. Farm Sources Intern. Capital, LLC*,
[2013 WL 6844282](#) (Ariz. Ct. App. 2013)
Tenant that granted a security interest in crops to an irrigation district and then entered into a partnership to farm the land – which partnership purported to grant a security interest in the crops to a lender in return for financing – had no basis for claiming that the lender’s security interest did not attach due to the lack of the tenant’s signature given that the tenant joined the irrigation district in signing a subordination agreement acknowledging the priority of the lender’s security interest in the crops.

– Description of the Collateral

21. *Gulf Coast Farms, LLC v. Fifth Third Bank*,
[2013 WL 1688458](#) (Ky. Ct. App. 2013)

Although debtor, which was manager and 35.45% owner of LLC, submitted evidence indicating that the secured party knew that the debtor intended to pledge as collateral only 35.45% of the LLC's assets, because the security agreement described the collateral to consist of all of the LLC's interests in specific assets, the LLC's entire interests were encumbered. There was no ambiguity that would permit introduction of parol evidence. Dissent believes that the agreement was ambiguous in part because there was no signature expressly on behalf of the LLC.

22. *In re ProvideRx of Grapevine, LLC*,
[498 B.R. 118](#) (Bankr. N.D. Tex. 2013)

Language in security agreement granting a security interest in specified patent applications along with "corresponding rights to patent and all other intellectual property protection of every kind" was limited to IP associated with the patent applications, particularly given that the other portions of the agreement addressed only patent and patent-related rights. However, because the term sheet that preceded the loan stated that the debtor "shall provide the [secured party] with a senior security interest in the IP assets owned" and the note expressly indicated that the loan was made pursuant to the term sheet, the debtor had granted a security interest in all its IP assets. It was immaterial that the security agreement and financing statement did not expressly cover non-patent IP assets. Because "general intangibles" would have been an acceptable term in a security agreement and is broader than the phrase "IP assets," use of "IP assets" was an effective description of the collateral.

23. *In re Residential Capital, LLC*,
[495 B.R. 250](#) (Bankr. S.D.N.Y. 2013) (initial ruling)
[501 B.R. 549](#) (Bankr. S.D.N.Y. 2013) (ruling after hearing)

Creditors' Committee raised a cognizable claim that certain assets initially identified as Excluded Assets, and therefore unencumbered by security agreement, remained unencumbered when the assets ceased to be Excluded Assets after the transaction with an unrelated creditor was terminated; the security agreement lacked a traditional savings clause through which previously excluded property automatically becomes subject to the security interest once the reason for the exclusion is removed.

After hearing testimony about the parties' intent, assets identified as Excluded Assets became subject to the blanket security interest after the assets ceased to be Excluded Assets.

24. *U.S. Commodity Futures Trading Commission v. U.S. Bank*,
[2013 WL 5944179](#) (N.D. Iowa 2013)

Extrinsic evidence was needed to determine whether agreement executed by futures commodity merchant granting bank a security interest in “all property in which [the merchant] has an ownership interest” to secure obligations of the merchant and the merchant’s affiliates might have encompassed its customers’ property in violation of 7 U.S.C. § 6d(b).

25. *In re Dwek*,
[2013 WL 6199259](#) (D.N.J. 2012)

Bankruptcy court correctly ruled that factual issue existed and prevented summary judgment on whether a security agreement that described the collateral as “shares of stock or other securities or certificates as listed on Schedule A” was sufficient because it was unclear whether the one page printout – containing an account number, the names of specific stocks, and the quantity held – attached to a letter dated five months after the security agreement was executed was the “Schedule A” referred to. The fact that only financing statement referred to an investment account with a company different from the one mentioned in the printout was immaterial because that goes to perfection, not to attachment, and the only issue raised on the motion for summary judgment was attachment.

26. *Collins v. Angell*,
[2013 WL 3243559](#) (N.D.N.Y. 2013)

A factual question remained about whether a security agreement and financing statement that identified collateralized cattle by name and ear tag number was effective 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, the only evidence of industry custom to identify cattle in this manner was an affidavit not stated to be based on the affiant’s personal knowledge. Case remanded for further factfinding.

27. *In re Gene Express, Inc.*,
[2013 WL 1787971](#) (Bankr. E.D.N.C. 2013)

Commercial real estate lease that purported to grant the landlord a security interest in “any personal property belonging to Tenant and left on the Premises” did not adequately describe the collateral because “personal property” is not a permissible description and because it refers to property that may be abandoned in the future, rather than property that is presently identifiable.

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28. *Johnson v. Binkley*,
[2013 WL 5593287](#) (Ariz. Ct. App. 2013)
Deed of trust that purported to grant a security interest in “Personal Property,” defined as “all equipment, fixtures, and other articles of personal property . . . attached to the Real Property,” and which further provided that it constitutes a security agreement “to the extent any of the Property constitutes fixtures,” was limited to fixtures and did not encumber non-fixtures. Even if it had covered non-fixtures, the description as “personal property” would have been inadequate. The unsigned financing statements filed by the creditor also did not create a security interest in the non-fixtures.
29. *In re Estate of Wheeler*,
[2013 WL 3440953](#) (Colo. Ct. App. 2013)
Commercial lease that purported to grant the landlord a security interest in “all property now owned or hereafter acquired by [the tenant] which shall come in or be placed upon the Premises,” was a sufficient description.
30. *In re K-V Discovery Solutions*,
[2013 WL 501721](#) (Bankr. S.D.N.Y. 2013)
Noteholders did not have a security interest in the debtor’s interest in a particular drug because the security agreement expressly excluded all of the debtor’s rights in the drug until such time as the debtor had fully paid the seller for rights in the drug and thereby discharged the seller’s lien. The exclusion was not limited to the trademark in the drug merely because the indenture, in defining the drug, used a trademark symbol after the drug’s name because that would not comport with the plain meaning of the security agreement and, in any event, the security agreement expressly controlled over anything in the indenture to the contrary. Moreover, it makes sense to read the exclusion consistently with the debtor’s contract with the seller, which required the debtor to reconvey all of the debtor’s rights in the drug – free and clear of all liens – in the event of nonpayment, and thus the whole point of the exclusion was to avoid a breach of the debtor’s agreement with the seller.
31. *FirstMerit Bank v. Presbrey and Associates, P.C.*,
[2013 WL 4840472](#) (N.D. Ill. 2013)
Inclusion of “accounts” and “general intangibles” in security agreement’s description of collateral was sufficient to encompass the debtor’s fees such as contingency fees, referral fees, and reimbursed client expense advancements.
32. *First Bancorp, Inc. v. United States*,
[945 F. Supp. 2d 802](#) (W.D. Ky. 2013)
Debtor’s rights to payment from the sale of LLC interests, corporate stock, and real estate were accounts; security agreement covering all accounts that the debtor “owns or has sufficient rights in which to transfer an interest, now or in the future,” was sufficient to cover after-acquired accounts.

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33. *California Charley's Corp. v. City of Allen Park*,
[2013 WL 1442242](#) (Mich. Ct. App. 2013)
Inclusion of “commercial tort claims” in a security agreement’s description of collateral was insufficient. As a result, the garnishors of an arbitration award resolving a commercial tort claim had priority over the putative secured party.
34. *In re Residential Capital, LLC*,
[497 B.R. 403](#) (Bankr. S.D.N.Y. 2013)
Junior secured noteholders did not have a security interest in any commercial tort claims because none were described in the security agreement with the specificity required by § 9-108(e)(1).
35. *In re Cunningham*,
[489 B.R. 602](#) (Bankr. D. Kan. 2013)
Signed credit card application in which the debtors purported to grant the card issuer a security interest “in the goods purchased with your Card,” combined with sales receipts that identified the goods so purchased was not an adequate description of the collateral, given that a description of consumer goods only by collateral type is insufficient and the receipts were not a component of the security agreement.
36. *In re Murphy*,
[2013 WL 1856337](#) (Bankr. D. Kan. 2013)
Signed credit card application in which the debtors purported to grant the card issuer a security interest “in the goods purchased with your Card,” was an adequate description of the collateral because it was not a description only by collateral type.
37. *In re Thrun*,
[495 B.R. 861](#) (Bankr. W.D. Wis. 2013)
Customer’s signed Consumer Lending Plan with credit union providing that credit union would have a security interest in “all goods, property, or other items purchased under this Plan . . . either now or in the future” was sufficient to cover motor vehicle purchased with an advance under the plan even without considering the unsigned advance receipt stating that “[t]his advance is governed by the terms of your Consumer Lending Plan” and “[y]ou are giving a security interest in . . . the collateral described on page 2,” which identified the customer was purchasing by year, make, model, and VIN number. *See also In re Cikar*, [2013 WL 4041341](#) (Bankr. W.D. Wis. 2013) (involving the same issue and decided the same day by incorporating the opinion in *Thrun*).
38. *In re LDB Media, LLC*,
[497 B.R. 332](#) (Bankr. M.D. Fla. 2013)
Lender did not have a security interest in the equipment located in the debtor’s news trucks because the security agreement merely identified the trucks and did not mention equipment located in them.

– Obligations Secured

39. *In re Duckworth*,
[2013 WL 211231](#) (Bankr. C.D. Ill. 2013)

Although security agreement that misdescribed the secured obligation as a note executed on December 13, 2008, “together with all other indebtedness . . . for which Grantor is responsible under this Agreement or under any of the Related Documents” did secure the note executed and dated December 15, 2008, it did not secure obligations incurred in 2009 because those obligations were not “Related Documents,” which was defined somewhat circularly to relate to documents executed in connection with the “Indebtedness,” which was in turn defined in reference to the “Related Documents.”

40. *In re World Imports, Ltd. Inc.*,
[498 B.R. 58](#) (Bankr. E.D. Pa. 2013)

Carrier had maritime lien on goods in its possession to secure the charges for shipping those goods but not for the charges of shipping other goods that the carrier had previously released to the debtor.

– Rights in the Collateral

41. *In re WL Homes, LLC*,
[534 F. App'x 165](#) (3d Cir. 2013)

Although parent corporation may not have had sufficient rights in the deposit account of its wholly owned subsidiary to grant a security interest in the deposit account, the subsidiary consented to the use of the deposit account as collateral because the CFO of the parent, who signed the security agreement on behalf of the parent, was also the president of the subsidiary and thus knowledge of and consent to the transaction were properly imputed to the subsidiary.

42. *In re Terrabon, Inc.*,
[2013 WL 6157980](#) (Bankr. S.D. Tex. 2013)

Subsidiary, in whose name a certificate of deposit was issued after the subsidiary's parent company deposited the funds for that purpose, and which then executed a security agreement purporting the pledge the CD, did grant a security interest because, even if the parent company owned the CD, either it consented to the subsidiary's use of the CD as collateral because the same individual serves as CEO of both entities and executed the documents, and thus acted under the apparent authority of the parent, or is estopped from denying the creation of the security interest because it allowed the subsidiary to appear as the owner.

43. *Verathon, Inc. v. DEX One Service, Inc.*,
[2013 WL 1627073](#) (S.D. Ohio 2013)

Because medical equipment dealer did not own equipment that its customers had purchased and then sent to the dealer's warehouseman for service, the warehouseman did not acquire a security interest in the equipment from the dealer. While the warehouseman may have had a statutory repairman's lien for the value of the repair services provided, the warehouseman had been paid for those services and was not entitled to a repairman's lien for unrelated warehousing charges of the dealer.

44. *United States v. Dupree*,
[919 F. Supp. 2d 254](#) (E.D.N.Y. 2013)

Bank with security interest in all assets of the borrower and certain related entities had standing to raise in a forfeiture action a superior claim to a deposit account of another related entity. The transfers, commingling, and exchanges of loan proceeds and other assets among the borrower and all its related entities gives rise to the bank's claim that it possesses a security interest in the deposited funds as collateral under the security agreement. Moreover, the bank might be able to trace the deposited funds as proceeds of collateral.

45. *Bank of England v. Rice*,
[2013 WL 427919](#) (E.D. Ark. 2013)

Bank did not have a security interest in rice that the bank argued was owned by a partnership because the joint venture agreement between spouses did not establish a partnership, and thus the rice was owned by the individuals.

46. *U.S. ex rel. Farm Service Agency v. Harvey Fertilizer and Gas Co.*,
[2013 WL 953868](#) (E.D.N.C. 2013)

Because the USDA's security agreement identified specific equipment owned by the debtor partnership and the partners, by signing the agreement, expressly certified truth of its statements under penalty of perjury, court would disregard one partner's affidavit, filed in a subsequent priority dispute, averring in a conclusory manner that the partnership never owned some of the equipment. As a result, USDA had priority over subsequent secured party regardless of whether the partnership still owned the equipment or had transferred the equipment, still encumbered, to one of the partners.

47. *Southwest Guaranty, Ltd. v. U.S. Acquisitions & Oil, Inc.*,
[830 N.W.2d 723](#) (Wis. Ct. App. 2013)

Mortgage that granted creditor a security interest in "all machinery, furnishings, equipment, fixtures . . . owned by [the debtor] . . . now or hereafter located upon the Premises" did not in fact include property owned by third parties. However, the debtor lacked standing to raise the rights of third parties that allegedly owned some of the personal property.

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48. *In re Rezykowski*,
[493 B.R. 713](#) (Bankr. E.D. Pa. 2013)
Individual debtor who, in connection with the purchase of a limited liability company, signed a security agreement purporting to grant a security interest in the assets of “the buyer” undoubtedly intended to and did grant a security interest in the assets of the LLC, as evidenced by the separate purchase agreement, which referred to the collateral as “all . . . goods and chattels used in connection with said business” and which also purported to “control” over conflicting terms in the security agreement.
49. *In re Open Range Communications, Inc.*,
[2013 WL 542471](#) (Bankr. D. Del. 2013)
Loan proceeds deposited into deposit account pledged to lender and intended for the payment of third-party contractors and “for such other purposes as may be approved by” the lender were not held in a resulting trust for the contractors.
50. *In re McKenzie*,
[737 F.3d 1034](#) (6th Cir. 2013)
Creditor did not have a security interest in the debtor’s LLC interest because the LLC operating agreement expressly provided that no member could transfer such an interest without the prior written consent of the board and that any attempted transfer without consent was void, and the creditor’s evidence of *subsequent* consent did not prove that the requisite *prior* consent was given.
51. *McDonald v. Yarchenko*,
[2013 WL 3809512](#) (D. Or. 2013)
Lender did not comply with term in LLC operating agreement requiring prior written consent of majority of the five non-transferring members to debtor’s encumbering his membership interest because fax purporting to express consent of two members was signed by at most one of them and letter that stated consent was given by another member at the time the lender made the loan was signed six years later. However, the debtor waived the right to challenge the validity of the transfer by signing the agreement to encumber his interest.
52. *Marion Blumenthal Trust ex rel. Blumenthal v. Arbor Commercial Mortgage LLC*,
[977 N.Y.S.2d 667](#) (N.Y. Sup. Ct. 2013)
Agreement that expressly prohibited assignment of interest in shares of a cooperative apartment but which did not state that an assignment was void did not prevent attachment of a security interest. However, restrictive covenant requiring the owners to offer the apartment for sale upon occupant’s death or cessation of occupancy remained enforceable and thus the secured party could not currently foreclose on the apartment.

53. *Settlement Funding, LLC v. Brenston,*

[998 N.E.2d 111](#) (Ill. Ct. App. 2013)

The failure of the buyer of rights to payment under a structured settlement to inform the court of contractual restrictions on the right to transfer – restrictions which are enforceable and meant the court lacked the authority to approve the transfer – was fraudulent and rendered the court order authorizing the sale void.

54. *State Department of Corrections v. Developers Surety and Indemnity Co.,*

[750 S.E.2d 697](#) (Ga. Ct. App. 2013)

Contractor could assign its right to payment under contract with state government agency to bonding company to secure contractor's obligation to reimburse bonding company for losses on the bond despite contractual prohibition on assignment because § 9-406 invalidated that restriction. The transaction was not excluded by § 9-109(d)(16) because the property at issue was the contractor's right to payment, not property of the state.

55. *In re Killgrove,*

[2013 WL 7018546](#) (Bankr. E.D. Mich. 2013)

Bank did acquire a security interest in dentist's patient records – effectively, a right to approach the patients and seek their consent to continuance of the relationship with another dentist – even if under 42 U.S.C. § 17935 and 45 C.F.R. 164.508 the bank could not have repossessed confidential patient information.

– Other

56. *1st Source Bank v. Wilson Bank & Trust,*

[735 F.3d 500](#) (6th Cir. 2013)

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

57. *In re Gamma Center, Inc.,*

[489 B.R. 688](#) (Bankr. N.D. Ohio 2013)

Bank that had a perfected security interest in medical provider's nuclear stress test camera, and the proceeds and products thereof, did not have a security interest in the provider's accounts or the collections on accounts because even if the accounts were generated solely through use of the camera, the accounts were not proceeds or products of the camera.

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58. *In re Tusa-Expo Holdings, Inc.*,
496 B.R. 388 (Bankr. N.D. Tex. 2013)
Although payments of accounts were deposited into lock box that was swept daily by senior secured party, the funds subsequently released to the debtor by the senior secured party were indirect proceeds of accounts and thus part of the junior secured party's collateral. The transfer of those funds to the junior secured party was therefore a transfer of collateral and could not be preferential even though the junior secured party was undersecured.
59. *In re Milton Abeles, LLC*,
2013 WL 5304014 (Bankr. E.D.N.Y. 2013)
Funds received in settlement of fraudulent transfer action brought by debtor's bankruptcy trustee were not proceeds of creditor's prepetition security interest in the debtor's deposit account, from which the fraudulent transfer was made. No discussion of § 9-332(b).
60. *Algonquin Power Income Fund v. Christine Falls of New York, Inc.*,
509 F. App'x 82 (2d Cir. 2013)
Under New York common law, 1988 agreement assigning all "rights in action . . . arising from or relating to" specified real property was sufficient to grant a security interest in a malpractice claim against engineers for failing to properly measure the property. Subsequent enactment of Article 9 had no effect because § 9-702(b) provides for the continued efficacy of the security interest. No discussion of the limitations on § 9-702 in § 9-703.
61. *Counsel Financial Services, L.L.C. v. Leibowitz*,
2013 WL 3895331 (Tex. Ct. App. 2013)
Rule of professional conduct that prohibits attorneys from sharing fees with non-lawyers did not invalidate lawyer's grant of a security interest in his rights to fees to secure a loan. There is a significant difference between sharing legal fees with a non-lawyer and paying a debt with legal fees.
62. *United States v. Drier*,
2013 WL 3306219 (S.D.N.Y. 2013)
Security interest that note buyers acquired in \$33 million of artwork of attorney who brokered the sale was effective despite the massive fraud perpetrated by the attorney. The buyers gave value by promising to pay a \$1.65 million fee to the attorney.
63. *BancInsure, Inc. v. Highland Bank*,
2013 WL 5340887 (D. Minn. 2013)
Bank's security interest in an equipment lease did not give it a security interest in the guaranty of the lessee's obligations. No citation to § 9-203(f).

Perfection Issues

– Method of Perfection

64. *In re Tobacco Square LLC*,
[2013 WL 1246794](#) (Bankr. M.D.N.C. 2013)
Secured party that did not file financing statement with secretary of state's office but did make a fixture filing had perfected security interest in the fixtures – lighting fixtures, wall sconces, ceiling fans, heating and air conditioning units, microwaves, ranges and oven units, disposals, dishwashers, and cooling units on the roof – but no security interest in the other items of personal property: refrigerators, exercise equipment, televisions, pictures, washers, dryers, and window treatments.
65. *In re Shuaney Irrevocable Trust*,
[2013 WL 6983382](#) (Bankr. N.D. Fla. 2013)
Because the collateralized bonds were certificated securities, the secured party could and did perfect by obtaining delivery of the certificate; registering the security interest on register for the bonds was not required.
66. *WFIC, LLC v. Labarre*,
[2013 Phila. Ct. Com. Pl. LEXIS 477](#) (2013)
Security interest in the proceeds of the debtor's action against a supplier of defective equipment was not a payment intangible subject to automatic perfection, but a general intangible.

– Adequacy of Financing Statement

67. *In re C.W. Mining Company*,
[488 B.R. 715](#) (D. Utah 2013)
Financing statements identifying the debtor as “CW Mining Company,” rather than as “C. W. Mining Company,” its registered name, were ineffective to perfect because under the filing office's search logic an exact match is required and a search under the debtor's correct name would not have disclosed the filings that lacked the periods and space.
68. *Monroe Bank & Trust v. Chie Contractors, Inc.*,
[2013 WL 1629300](#) (Mich. Ct. App. 2013)
Secured party remained perfected after filing an amended financing statement that purported to be both an amendment deleting a specific item of collateral and a termination statement because the incongruous nature of the error would have put a searcher on notice that further inquiry was required and thus was not seriously misleading.

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69. *Newsom v. Rabo Agrifinance, Inc.*,
[2013 WL 1682379](#) (Ark. Ct. App. 2013)
Financing statement's inclusion of "crops" in its description of collateral was a sufficient indication of collateral by type and it was not necessary to identify the counties in which such crops were growing. The fact that the financing statement listed the debtor's address as Barretville Indiana, rather than Barretville Tennessee was not material given that, because of the competing creditor's association with the debtor, his ability to inquire was not affected.
70. *In re Moore*,
[2013 WL 2154383](#) (Bankr. N.D. Miss. 2013)
Bank's Food Security Act financing statement that described the collateral as "All crops, and Farm Products whether any of the foregoing is owned now or acquired later" and then identified the two counties in which the debtor's crops were grown was adequate to perfect the bank's security interest in the portion of debtor's sweet potato crop grown in those two counties but not the portion grown in a third. The financing statement was also inadequate to perfect a security interest in sweet potatoes whose origin was unknown but which were processed in one of the counties listed; the security interest was not perfected initially because the bank could not prove that the crops came from one of the listed farms and did not become perfected merely because the potatoes were processed in one of the counties listed. As a result, buyer took free of security interest in potatoes from processing facility and from potatoes grown in the unlisted county but subject to security interest in potatoes grown in the listed counties.
71. *First Bancorp, Inc. v. United States*,
[945 F. Supp. 2d 802](#) (W.D. Ky. 2013)
Security interest in after-acquired accounts was perfected despite the fact that the financing statement did not mention after-acquired property.
72. *International Home Products, Inc. v. First Bank of Puerto Rico, Inc.*,
[495 B.R. 152](#) (D.P.R. 2013)
Financing statement signed by the secured party, not the debtor, and filed following a lapse in perfection was effective based on Puerto Rican version of old § 9-402(2).
73. *In re ProvideRx of Grapevine, LLC*,
[498 B.R. 118](#) (Bankr. N.D. Tex. 2013)
Although loan documents granted security interest in all the debtor's "IP assets," because the filed financing statement covered only specified patent applications along with "corresponding rights to patent and all other intellectual property protection of every kind," the security interest was perfected only in IP associated with the patent applications. The language used was insufficient to give a reasonable person inquiry notice of a security interest in IP assets, other than the patent applications.

74. *In re LDB Media, LLC*,[497 B.R. 332](#) (Bankr. M.D. Fla. 2013)

Even if lender had a security interest in the equipment located in the debtor's news trucks, the lender's financing statement that simply referenced the trucks would not have been sufficient to perfect. Even if the financing statement had referenced equipment in the trucks, that might not have been sufficient because a description of collateral by its location is not dependable.

75. *Bishop v. Alliance Banking Co.*,[412 S.W.3d 217](#) (Ky. Ct. App. 2013)

Filed financing statement that accurately identified the collateralized backhoe by make, model and year but that misstated the first three digits of the serial number – 1100249697 instead of JJG0249697 – was sufficient to perfect. As a result, the buyer who purchased the backhoe from the debtor took subject to the security interest.

– Authorization or Effect of Termination Statement

76. *In re Motors Liquidation Company, f/k/a General Motors Corp.*,[486 B.R. 596](#) (Bankr. S.D.N.Y. 2013)

Although agent for term loan lenders approved termination statements prepared and filed by debtor in connection with payoff of other loan, and one of those statements terminated the financing statement for the term loan, the termination statement was nevertheless not authorized and therefore was ineffective because neither the agent nor the term loan lenders knew that the termination statement related to the term loan and neither the debtor nor the lenders intended to affect the term loan in any way. Under traditional principles of agency, a person filing a termination statement on behalf of the secured party does not have actual authority to do so unless the person reasonably believes that the secured party has consented to the filing.

77. *In re Residential Capital, LLC*,[497 B.R. 403](#) (Bankr. S.D.N.Y. 2013)

Junior secured noteholders did not have a security interest in collateral released by their collateral agent and for which the collateral agent filed UCC-3 amendments because the collateral agent was the secured party and thus, even if the collateral agent acted outside the scope of its authority, it was authorized to release the loans and amend the financing statement. Cases about released and termination statements filed by an unauthorized party were not relevant.

78. *In re RAG East, LP*,[2013 WL 796616](#) (Bankr. W.D. Pa. 2013)

Although subsequent lender relied on filed termination statement when making his loan, because the secured party neither filed nor authorized the termination statement the statement had no effect on the secured party's perfection or priority.

79. *International Home Products, Inc. v. First Bank of Puerto Rico, Inc.*,
[495 B.R. 152](#) (D.P.R. 2013)

Termination statement that debtor filed without the secured party's signature or authorization after the secured party filed new financing statements following a lapse in perfection was ineffective. The security interest therefore remained perfected.

– Control

80. *In re Bressler*,
[2013 WL 5946111](#) (Bankr. M.D.N.C. 2013)

Secured party had control over the debtor's security accounts under § 9-106(c) because the secured party had control over all the security entitlements carried in the account due to the fact that the secured party was identified in the broker's records as the person having the security entitlements and thus the secured party became the entitlement holder within the meaning of § 8-106(d)(1).

– Collateral Covered by a Certificate of Title

81. *Vanderbilt Mortg. and Finance, Inc. v. Westenhoefer*,
[716 F.3d 957](#) (6th Cir. 2013)

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

82. *In re Nutgrass*,
[2013 WL 571796](#) (Bankr. E.D. Ky. 2013)

Security interest in titled manufactured home that was affixed to realty but for which no affidavit of conversion to real property was filed was not perfected by recorded mortgage; the home remained personal property and notation on the certificate of title was required to perfect.

83. *In re Cantrell*,
[2013 WL 4777172](#) (Bankr. E.D. Ky. 2013)

Security interest in titled manufactured home that was affixed to realty on or before 1982 but for which no affidavit of conversion to real property was filed was not perfected by mortgage recorded in 2008; even though the home was affixed to the real property prior to enactment of the Kentucky law dealing with perfection of security interests in title manufactured homes, that law was in effect prior to recordation of the mortgage and controlled in this case.

– Other

84. *In re Clean Burn Fuels, LLC*,
[492 B.R. 445](#) (Bankr. M.D.N.C. 2013)

Corn seller that retained a security interest in stored in bins on debtor's property and leased by the seller from the debtor was not perfected by possession because even though the seller had the right to cut the power needed for the debtor to access to the corn and the agreement obligated the debtor to place signs on the bins or in the debtor's plant to notify third parties that the bins had been designated exclusively to receive and store corn owned by the seller, the debtor never requested permission from the seller to remove the corn from the bins, was never prevented from removing the corn, and never posted signs, and thus the seller's alleged control over the corn did not provide any notice to third parties.

85. *In re Highland Construction Management Services, LP*,
[2013 WL 1336918](#) (Bankr. E.D. Va. 2013)
[497 B.R. 829](#) (Bankr. E.D. Va. 2013) (vacating initial decision)

Secured party whose filing lapsed during the debtor's bankruptcy case lost perfection and, therefore, priority to the debtor in possession, who has the status of a lien creditor.

On reconsideration, court vacated its initial decision, concluding that because a security interest is deemed upon lapse never to have been perfected as against a purchaser for value – but not a lien creditor – the security interest remains perfected and the debtor in possession takes subject to it.

86. *In re Kaushik*,
[2013 WL 4775574](#) (Bankr. N.D. Ga. 2013)

Summary judgment denied on whether secured party had perfected its security interest in certificated securities delivered to a broker because there was a factual dispute about whether the debtor or the secured party delivered the certificates and about whether, under the terms of the agreement with the broker, the debtor had access to the securities account.

– Bogus Filings

87. *People v. Cratty*,
[2013 WL 967803](#) (Mich. Ct. App. 2013)

Individual was properly convicted of filing fraudulent financing statements against judges, lawyers, and court officers.

PMSI Status

88. *In re Saxe*,

[491 B.R. 244](#) (Bankr. W.D. Wis. 2013)

Security interest in farmers' skidsteer that they purchased with loan proceeds qualified as a PMSI even though there was no separate security agreement or UCC financing statement relating to the skidsteer and neither the security agreements nor the financing statements stated that the security interest was purchase-money. PMSI status survived even though the note evidencing the original secured obligation was replaced with a new note that extended the payment term. Because there was only one secured obligation, § 9-103(e) on allocation of payments did not apply and the security interest in the skidsteer remained a PMSI until the entire secured obligation was paid.

Priority Issues**– Tax Liens**

89. *Massachusetts Port Authority v. Williams Maritime Repair Service, Inc.*,

[2013 WL 1328745](#) (D. Mass. 2013)

Perfected security interest in debtor's accounts had priority over federal tax lien only to the extent that the accounts were choate when the notice of tax lien was filed. For this purpose, the account became choate when the debtor entered into a contract for services with the account debtor. However, the secured party did not have a security interest in commercial tort claims because no such claims were described in the security agreement or existed when the security agreement was executed.

90. *First Bancorp, Inc. v. United States*,

[945 F. Supp. 2d 802](#) (W.D. Ky. 2013)

Because security interest in after-acquired accounts was perfected as soon as the debtor acquired the accounts in question, which was after the IRS filed a notice of tax lien for 2006 taxes but before its filed a notice of tax lien for 2007 taxes, the security interest was junior to the lien for 2006 taxes and senior to the lien for 2007 taxes. To the extent that the IRS levied on the accounts to satisfy the 2006 taxes, it had priority even though it later reallocated payments received to the 2007 taxes because 26 U.S.C. § 6402(a) authorizes the IRS to credit any overpayment to any outstanding tax liability of the taxpayer and makes no exception for when doing so would undermine the priority of another claimant to the funds. To the extent that the IRS levied on the accounts to satisfy the 2007 taxes, the secured party had priority.

91. *In re Alpha Protective Services, Inc.*,
[2013 WL 5636747](#) (Bankr. M.D. Ga. 2013)

Bank which perfected a security interest in security company's accounts and contract rights before the IRS filed a notice of tax lien had priority in the company's rights to payment under service contracts even though the debtor did not perform its obligations under those contracts until more than 45 days after the notice of tax lien was filed. The bank's priority extended even to the rights to payment under the extension of those service contracts pursuant to an extension option.

– Buyers of Goods

92. *State Bank of Cherry v. CGB Enterprises, Inc.*,
[984 N.E.2d 449](#) (Ill. 2013)

Because strict compliance with the direct notice rules of the Food Security Act is required for a secured party to retain a security interest in farm products sold to a buyer, a notice that failed to identify the counties in which the farm products were grown or located was ineffective even though the notice stated that it covered "farm products wherever located." As a result, grain elevator that purchased the debtor's grain took free of bank's security interest and had no liability to the bank even though the grain elevator violated the notice by sending a check for the purchase price directly and solely to the debtor.

93. *New London Tobacco Market, Inc. v. Burley Stabilization Corp.*,
[2013 WL 2112290](#) (E.D. Tenn. 2013)

Food Security Act preempts state conversion claim against buyer of crops; buyer took free of perfected security interest granted by the sellers, all of whom were engaged in farming operations.

94. *New London Tobacco Market, Inc. v. Philip Morris USA Inc.*,
[2013 WL 2112362](#) (E.D. Tenn. 2013)

Food Security Act preempts state conversion claim against buyer of crops; buyer took free of perfected security interest granted by the sellers, all of whom were engaged in farming operations.

95. *Farm Credit Services of America, PCA v. Cargill, Inc.*,
[2013 WL 12075565](#) (D. Neb. 2013)

A buyer of corn subject to a bank's perfected security interest did not take free of the security interest because the bank had complied with the Food Security Act by filing an effective financing statement in Nebraska's central registry. The buyer's claimed right to setoff against the debtor for failing to deliver all the corn called for under the parties' contract was not applicable.

96. *Arthur Glick Truck Sales, Inc. v. Stephen East Corp.*

[914 F. Supp. 2d 529](#) (S.D.N.Y. 2013)

Buyers of fire trucks took free of supplier's perfected security interest in the chassis because the buyers had constructive possession – both because they had paid in full and because the seller had possession as their agent – and were buyers in ordinary course of business.

97. *In re SemCrude, L.P.*,

[504 B.R. 39](#) (Bankr. D. Del. 2013)

Downstream buyers of oil and gas from the debtors were buyers for value who took free of unperfected security interests of the debtors' suppliers under § 9-317(b) because they gave value and lacked knowledge of the security interests. Although the buyers allegedly knew of: (i) the state lien laws that created the security interests, (ii) the identities of some of the suppliers, and (iii) the fact that the suppliers were unpaid, that was insufficient proof of knowledge of the security interests, especially since it is customary for payment not to be made until the month following deliver. Presumed or actual knowledge of the state lien laws created at most inquiry notice, not knowledge, of the security interests, especially since the debtors warranted good title. None of the buyers admitted to knowing the supplier's asserted liens, the suppliers did not provide any direct evidence that the buyers did know, and the suppliers did not directly inform the buyers of their alleged security interests or give them notice of any kind.

The buyers were also buyers in ordinary course of business who took free of the supplier's liens under § 9-320(a) even though the volume sold was abnormally large during the time in question and the buyers partially purchased on credit and partially paid in kind through cross-product netting arrangements prevalent in the oil and gas markets.

98. *Sensient Flavors, L.L.C. v. Crossroads Debt, L.L.C.*,

[2013 WL 5857604](#) (Mich. Ct. App. 2013)

Consignor that sold and delivered cherries to processor and then repurchased the cherries was a buyer in ordinary course of repurchased cherries that took free of the security interest of the processor's lender even though the consignor was the processor's major customer and offset the purchase price against the amount the processor owed it for colorings and flavorings. However, as to cherries remaining with the processor, the consignor had only an unperfected security interest that was subordinate to the lender's security interest. It did not matter that the processor was to sell the cherries back to the consignor; the transaction was a delivery for sale and thus a consignment.

– Competing Security Interests

99. *American Bank, FSB v. Cornerstone Community Bank*,
[733 F.3d 609](#) (6th Cir. 2013)

Bank that made loan to finance insurance policy and had a security interest in the unearned premiums had priority in the deposit account of the insurance broker into which the loan was deposited over the rights of the depositary that had swept the account to cover an obligation of the broker because the Tennessee Premium Finance Company Act gives a security interest in unearned premiums priority over subsequent purchasers. As a result, the depositary was liable for conversion.

100. *Caterpillar Financial Services Corp. v. Peoples National Bank*,
[710 F.3d 691](#) (7th Cir. 2013)

Lender that refinanced equipment sellers' PMSIs did not acquire a PMSI because the lender did not receive an assignment of the sellers' interests. Although the lender's financing statement was filed after the financing statement of a prior creditor that subordinated its interest to a bank, and thus the bank would normally have priority over the lender for the lesser of the debt owed to the bank or the debt owed to the subordinating creditor, the bank was unable to show that the creditor had a security agreement. Therefore, the lender had priority over the bank's own security interest, which was perfected last, and bank was liable for conversion in refusing to pay the proceeds of the collateral to the lender.

101. *In re Damon Pursell Construction Co.*,
[490 B.R. 367](#) (8th Cir. BAP 2013)

Although bank's perfected security interest in two excavators was initially junior to the interests of two creditors, each of which had a perfected PMSI in one of the excavators, when debtor sold one excavator and used the funds to pay the wrong PMSI creditor, the bank's interest became senior in the remaining excavator because the payment terminated the paid creditor's security interest and the unpaid creditor had no security interest at all in the unsold excavator. There was no basis for imposing an equitable lien in part because, presumably, the security interest of the unpaid creditor remained attached to the excavator sold.

102. *T. Gluck & Co., Inc. v Craig Drake Manufacturing, Inc.*,
[2013 N.Y. Misc. LEXIS 2384](#) (N.Y. Sup. Ct. 2013)

Consignor with PMSI priority in diamonds consigned to debtor lost that priority after five years when it failed to renew the notification to the debtor's inventory lender. Accordingly, inventory lender had priority in the consigned diamonds as the first to file or perfect. Regardless of the consignee's loss of priority in the consigned diamonds, the inventory lender had priority in the debtor's accounts. Because the inventory lender had priority, the consignee had no claim for conversion.

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103. *In re Smith*,
[2013 WL 4525175](#) (Bankr. W.D. Ky. 2013)
Bank's PMSI in 45 cattle did not have priority over earlier perfected security interest of lender because the bank never sent the PMSI notification required by § 9-324(d).
104. *Monroe Bank & Trust v. Chie Contractors, Inc.*,
[2013 WL 1629300](#) (Mich. Ct. App. 2013)
Because bank had contractually agreed to subordinate its security interest in specified equipment to equipment lender – and the lender's assignees – the finance company that paid off the equipment lender and received an assignment of the equipment lender's security interest had priority over the bank.
105. *In re HW Partners, LLC*,
[2013 WL 4874172](#) (Bankr. E.D. Wash. 2013)
First lender that acquired a security interest in mortgage notes and recorded an assignment of each mortgage but which did not take possession of the notes or file a financing statement lost priority in the proceeds of the real estate to the second lender who, after the debtor accepted replacement notes and mortgages, perfected its interest in the replacement notes by filing a financing statement and later taking possession of them. Priority is governed by Article 9, not by real estate law, and then second lender had priority as the first to file or perfect even if the replacement notes were proceeds of the original notes and thus collateral for the first lender.
106. *Westco Agronomy Co., LLC v. Wollesen*,
[840 N.W.2d 727](#) (Iowa Ct. App. 2013)
Lender with junior security interest in crop proceeds failed to raise a factual question as to the certainty of the senior secured party's recovery from other crop collateral and thus the senior secured party was entitled to summary judgment on the junior's request for a marshaling order.

– Other

107. *United Prairie Bank v. Galva Holstein Ag, LLC*,
[2013 WL 6223416](#) (Minn. Ct. App. 2013)
Hog farmer's feed suppliers, who had a statutory lien on hogs that ate the feed, had priority over a bank with a security interest in the proceeds of the farmer's hogs to the extent that the sale price of the hogs exceeded the acquisition price of the hogs. This priority did not have to be reduced by the payments the suppliers received; such payments could be allocated to other, non-priority debt.

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108. *In re Steel Stadiums, Ltd.*,
2013 WL 145628 (Bankr. N.D. Tex. 2013)
Because secured party's perfected security interest in debtor's inventory would have priority over an unpaid supplier's reclamation rights under Article 2, it similarly had priority over the supplier's equitable right of rescission.
109. *Marathon Machine Tools, Inc. v. Davis-Lynch, Inc.*,
400 S.W.3d 133 (Tex. Ct. App. 2013)
Embezzlement victim whose stolen funds were used to buy the lathe, and who became a lien creditor by virtue of its equitable right to a constructive trust on the lathe, had priority over the seller that retained a security interest in the lathe because the seller did not perfect its security interest until eight months after the sale.
110. *In re Formatech, Inc.*,
496 B.R. 26 (Bankr. D. Mass. 2013)
Bank with a perfected security interest in the debtor's investment property had priority over stock seller that had a claim for rescission based on fraud because the bank was a bona fide purchaser for value.
111. *In re Miller Brothers Lumber Co., Inc.*,
2013 WL 5755052 (M.D.N.C. 2013)
Secured party whose filing lapsed during the debtor's bankruptcy did not lose priority to the bankruptcy trustee because lapse renders the security interest retroactively unperfected against purchasers but the trustee, with the status of a lien creditor, is not a purchaser.
112. *United States v. Dupree*,
919 F. Supp. 2d 254 (E.D.N.Y. 2013)
Law firm that had received assignment from corporation of its interest in a deposit account in payment of past and future legal services to an individual criminal defendant had no standing to claim a superior claim to the funds in a forfeiture action because: (i) it received the assignment long after the criminal acts and the relation-back doctrine vests title in the United States as of the start of the conspiracy; and (ii) the law firm could not be a bona fide purchaser of the deposit account because the forfeiture claim was in the indictment of the law firm's client and the law firm must have read the indictment.
113. *BancorpSouth Bank v. Hazelwood Logistics Center, LLC*,
706 F.3d 888 (8th Cir. 2013)
Bank's perfected security interest in borrower's general intangibles extended to the borrower's right to a property tax refund and had priority over any equitable lien that might be claimed by the consulting firm that, pursuant to a contingent fee agreement, assisted the borrower in obtaining the refund, even though the bank knew of the fee agreement. Equitable considerations cannot be used to alter statutory priorities.

114. *Newsom v. Rabo Agrifinance, Inc.*,
[2013 WL 1682379](#) (Ark. Ct. App. 2013)

Lender's perfected security interest in debtor's crops had priority over any equitable lien that the individual who partnered with the debtor in producing the crops might have because the lender: (i) engaged in no egregious or fraudulent conduct; and (ii) acquired and perfected its lien before becoming aware of the individual's involvement, and thus neither encouraged the individual's efforts nor made them necessary.

115. *ACF 2006 Corp. v. Merritt*,
[2013 WL 466603](#) (W.D. Okla. 2013)

Lender with a perfected security interest in law firm's accounts had priority in firm's right to receive a portion of the recovery in contingent fee case over creditors who provided to the law firm services relating to that case but who had no security interest. Equitable considerations are not a basis for altering Article 9's priority rules.

116. *Davis v. F.W. Financial Services, Inc.*,
[317 P.3d 916](#) (Or. Ct. App. 2013)

Secured party with a perfected security interest in the debtor's accounts had priority in funds that judgment creditor had garnished and received from account debtors and a claim for conversion for the judgment creditor's refusal to turn those funds over. The secured party had not waived its security interest by not accelerating the debt or demanding payment from the account debtors.

117. *Keybank v. PAL I, LLC*,
[311 P.3d 299](#) (Idaho 2013)

Bank with a perfected security interest in equipment did not lose its security interest when, after judgment creditor levied on the collateral, it failed to comply with procedures in the state statute governing third-party claims to property subject to judicial process. As a result, the bank was entitled to the proceeds of the judicial sale from the judgment creditor.

118. *Case v. Case*,
[970 N.Y.S.2d 151](#) (N.Y. App. Div. 2013)

Creditor with a perfected security interest in proceeds of debtor's partnership dissolution action had priority over law firm with charging lien on recovery because the security interest was perfected before the law firm began work in the action. The law firm did not "create" the funds at issue because the funds were already in possession of the receiver when the law firm began work; the law firm's efforts merely helped established the debtor's rights to the funds.

119. *In re WEB2B Payment Solutions, Inc.*,
[488 B.R. 387](#) (8th Cir. BAP 2013)

Bank which, pursuant to contract, had a "possessory lien" on deposited funds, released the lien when it remitted the funds to the depositor's bankruptcy trustee without seeking adequate protection until nine months later.

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120. *Legal Asset Funding, LLC v. Cousins*,
[2013 WL 2248084](#) (N.J. Super. Ct. 2013)
Lender that had no security interest in lawyer's accounts took payment from lawyer free of secured party that had funded litigation and had a perfected security interest in the lawyer's accounts because there was no evidence that the lender acted in collusion with the debtor to violate the rights of the secured party. The lender's alleged knowledge of the security interest and failure to search for financing statements were not sufficient to raise a factual issue about collusion.
121. *Citizens Financial Bank v. Cooper*,
[985 N.E.2d 82](#) (Ind. Ct. App. 2013)
Trial court did not abuse its discretion in holding liable bank that answered garnishment interrogatories by claiming a security interest in and setoff right to the judgment debtor's deposit account and certificate of deposit but which did not attach any documents demonstrating its security interest or setoff rights and did not appear that the supplemental proceedings.
122. *Ladd v. Motor City Plastics Co.*,
[842 N.W.2d 388](#) (Mich. Ct. App. 2013)
Bank with security interest in deposit account it maintained had setoff rights that were superior to the rights of judgment creditor with writ of garnishment the account and thus had no liability to the creditor even though the bank had not in fact exercised its setoff rights but instead had allowed the debtor to access the funds. Such action was not a waiver of the bank's rights because its security interest continued in the withdrawn funds.
123. *Travelers Casualty and Surety Company of America v. Paderta*,
[2013 WL 3388739](#) (N.D. Ill. 2013)
Surety for general contractor which paid the developers and was subrogated to the developer's setoff rights had priority over the lender to the general contractors which had a perfected security interest in the general contractor's accounts. The surety stood in the shoes of the developer and the secured party stood in the shoes of the general contractor.
124. *City of Minneapolis v. RW Farms, LLC*,
[2013 WL 6839711](#) (Minn. Ct. App. 2013)
Surety that paid subcontractors of contractor on city project, and was thereby subrogated to the contractor's right to collect from the city, had priority over a lender with a security interest in the contractor's accounts because, upon paying the subcontractors, the surety's interest related back to issuance of the surety bond, which occurred before the lender perfected.

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125. *Caterpillar Financial Services Corp. v. Burroughs Diesel, Inc.*,
[125 So. 3d 659](#) (Miss. Ct. App. 2013)
If truck lease – which required the lessee to keep a truck in repair – was terminated before the lessee authorized repairs, then the mechanic who repaired the truck was not authorized to do so by the owner and would not be entitled to a mechanic's lien.
126. *Alliance Laundry Systems, LLC v. Bharaj*,
[2013 WL 1688367](#) (N.J. Super. Ct. 2013)
Secured party with perfected security interest in laundromat's washers and dryers had priority over lessor's statutory landlord's lien.
127. *Fifth Third Bank v. U.S.D.A.-Rural Development*,
[2013 WL 1787151](#) (W.D. Mich. 2013)
Secured party with control over debtor's deposit account had priority in that deposit account over garnishors.
128. *CIMC Raffles Offshore (Singapore) Ltd. v. Schahin Holding S.A.*,
[942 F. Supp. 2d 425](#) (S.D.N.Y. 2013)
Because collateral agent for senior lender group had a perfected security interest in debtors' deposit accounts and LLC interests, the funds in the deposit accounts were controlled by the collateral agent and needed to pay the senior lenders, and thus the debtors could not assign or transfer the funds of LLC interests, judgment creditor was not entitled to order requiring turnover of the funds or the LLC certificates.

Enforcement Issues

– Default

129. *Regions Bank v. Thomas*,
[2013 WL 791616](#) (Tenn. Ct. App. 2013)
Secured party did not breach the duty of good faith by declaring a default and accelerating the debt due to the debtor's failure to insure the collateralized aircraft, even though the debtor was current on payments and the secured party later force placed insurance pursuant to another clause in the agreement. The obligation of good faith and fair dealing does not create additional contractual rights or obligations and cannot be used to avoid the express terms of an agreement.

130. *Highland CDO Opportunity Master Fund, L.P. v. Citibank*,
[2013 WL 1191895](#) (S.D.N.Y. 2013)

Issuer of credit default swaps stated cause of action against counter-party for failing in good faith to value the underlying assets and then issuing excessive margin calls. Issuer did not state a claim for counter-party's failure to provide notification of sale of the collateralized securities because those securities were traded on a recognized market and threatened to decline speedily in value. Issuer did state causes of action for failing to sell the securities in a commercially reasonable manner and for not providing a post-sale accounting.

131. *In re Henderson*,
[492 B.R. 537](#) (Bankr. D. Nev. 2013)

Because newly enacted Nevada law limits default in automobile retail installment contracts to a failure to pay as required by the agreement and situations when "[t]he prospect of payment, performance or realization of collateral is significantly impaired," a default-on-bankruptcy clause in such a contract is unenforceable.

132. *FirstMerit Bank v. Presbrey and Associates, P.C.*,
[2013 WL 4840472](#) (N.D. Ill. 2013)

Debtor defaulted on secured loan when guarantor died because that death was expressly listed in the transaction documents as an event of default.

133. *Bare v. JPMorgan Chase Bank*,
[2013 WL 6073335](#) (Cal. Ct. App. 2013)

Secured party was entitled to repossess the debtor's vehicle after a payment default even though the debtor alleged that the parties had orally agreed to modify the payment terms because the written agreement, as permitted by state law, prohibited oral modifications. The debtor's claim of fraud similarly failed because, as a result of the clause prohibiting oral modifications, the debtor could not have justifiably relied on oral statements.

134. *Guarantee Ins. Co. v. Brand Management Service, Inc.*,
[2013 WL 6768641](#) (S.D. Fla. 2013)

Debtors' failure to make timely payments was a default even though the creditor had previously accepted untimely payments because the agreement contained an explicit non-waiver clause, which provides that any failure to enforce a provision of the agreement does not constitute a waiver of any rights and that the terms of the agreement may be strictly enforced at any time.

– Replevin & Repossession

135. *Bank of America v. Petty Properties, LLC*,
[2013 WL 173813](#) (W.D. Ark. 2013)

Although the security agreement described the collateral to include “all patient lists, files and records” of medical provider, as well as the provider’s receivables, because of privacy concerns the patient lists, files and records will not be included in the replevin judgment.

136. *Santander Consumer USA, Inc. v. Hahnel*,
[2013 WL 1010732](#) (Conn. Super. Ct. 2013)

Secured party did not meet its burden of showing a right to immediate possession of the collateral because the security agreement provides that “[i]f this is a consumer credit transaction . . . a notice of default is required before we exercise our remedies,” and the secured party had submitted no evidence that it had provided a notice of default.

137. *Ware v. Vanderbilt Mortgage & Finance, Inc.*,
[740 S.E.2d 691](#) (Ga. Ct. App. 2013)

Following a hearing, the trial court properly issued a pre-judgment writ awarding possession of the collateralized mobile home to the secured party. However, the court erred in also issuing a final judgment because the debtor disputed the amount of the secured obligation that remained outstanding.

138. *Manufacturers and Traders Trust Co. v. Minuteman Spill Response, Inc.*,
[2013 WL 6622929](#) (W.D. Pa. 2013)

Although the parties’ loan agreement authorized the appointment of a receiver of the collateral “without the necessity of proving either inadequacy of the security or insolvency of the [debtors],” the secured party was seeking appointment of a receiver to take possession and control of the debtors and their operations, not to manage or collect the collateral, and thus the contractual clause was inapposite. Despite the debtor’s payment default, the Commonwealth’s seizure of most of the debtor’s assets and records pursuant to a criminal investigation, and allegations that the debtor was transferring collateral without the secured party’s approval, the secured party was not entitled to the appointment of a receiver. The payment default was minor and the secured party had frozen a deposit account with a balance in excess of the arrearage. The Commonwealth had returned many of the business records and the debtor had continuously operated. The debtor’s breach of loan covenants by opening deposit accounts at another bank was not fraudulent. The only significant asset that the debtor had sold - a helicopter - was not a fire sale price and the secured party had control over the proceeds. There was insufficient evidence to show that the secured party was undersecured. And the secured party retained its legal remedies, including the right to foreclose.

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139. *Auto-Owners Ins. Co. v. Randy B. Terry, Inc.*,
[2013 WL 6583959](#) (N.D. Ala. 2013)
Issuer of performance bond that had security interest in contractor's equipment, accounts, and general intangibles to secure the contractor's indemnification obligation was entitled to a preliminary injunction requiring the contractor to deposit with the court \$263,000 (the amount already paid out by the issuer), to allow the issuer access to all its records, and to not sell or encumber any collateral.
140. *Firestone Financial Corp. v. King Amusements, Inc.*,
[2013 WL 1286665](#) (N.D. Ill. 2013)
Secured party was not entitled to a writ of replevin based solely on a contested, pre-discovery motion and before a hearing.
141. *A & N Food Market, Inc. v. New K & S Supermarket, Inc.*,
[2013 WL 6038412](#) (N.Y. Sup. Ct. 2013)
Seller of grocery that retained security interest in property sold and was lessor of premises was not entitled to a prejudgment order granting it the right to immediate possession of the inventory and business premises because it had not shown a likelihood of success on the merits given that the debtor had raised material factual dispute about whether the seller had committed fraud. However, the seller was entitled to an order enjoining the debtor from selling or otherwise disposing of the collateral outside the ordinary course of business.
142. *CIT Small Business Lending Corp. v. Advanced Dental Concepts, P.C.*,
[2013 WL 3716882](#) (E.D. Tenn 2013)
Secured party was entitled after default to partial summary judgment and to possession of the collateral even though the amount of its damages were not yet determined.
143. *Key Equipment Finance, Inc. v. Rubloff MD87-936, LLC*,
[2013 WL 6446622](#) (N.D. Ill. 2013)
The debtor's stipulation as to the amount of debt secured by airplane, which led the bankruptcy court to lift the stay and dismiss the case, did not create a basis for collateral estoppel in later replevin action, and thus the debtor was entitled to a hearing on the secured party's claim.
144. *Khepera-Bey v. Santander Consumer USA, Inc.*,
[2013 WL 3199746](#) (D. Md. 2013)
Assignee of secured party was entitled to temporary restraining order prohibiting the debtor from conveying title to the collateralized vehicle or removing it from Maryland because the debtor was in default, had no income or assets, had filed numerous frivolous pleadings, and a clean title had reissued in the debtor's name.

145. *Smith v. Prosser*,
[2013 WL 6407734](#) (D. Minn. 2013)
Even if the secured party or its representative did leave a message at night calling the debtor a “broke ass nigga,” that did not preclude the secured party from recovering the collateralized vehicle or the court from ordering replevin.
146. *Dallman v. Felt & Lukes, LLC*,
[2013 WL 6628996](#) (W.D. Wis. 2013)
While parties are free to opt into the Wisconsin Consumer Act for transactions in excess of \$25,000 and thus not otherwise covered, the mere fact that the parties’ agreement referred to: (i) “any right you have under applicable state law to cure your default”; (ii) the creditor’s right to change the terms of the agreement under the Act; and (iii) the borrower’s obligation after cancellation, “except to the extent that [this] liability is limited by” the Act, were insufficient to indicate that the parties had chosen to subject the transaction to the Act. Therefore, the secured party had no duty to notify the debtor prior to repossessing the vehicle.

– Notification of Disposition

147. *In re Reno Snax Sales, LLC*,
[2013 WL 3942974](#) (9th Cir. BAP 2013)
Sale of collateral by bankruptcy trustee was not a disposition by the secured party under Article 9 or under a state statute requiring a secured party disposing of a repossessed vehicle to notify all obligors, even though the secured party received most of the sale proceeds. Thus the secured party had no duty to notify a co-obligor of the sale.
148. *Santander Consumer USA, Inc. v. Superior Pontiac Buick GMC, Inc.*,
[2013 WL 27921](#) (E.D. Mich. 2013)
Chattel paper financier had no duty to notify the car dealer it financed of sales of repossessed vehicles because the dealer was not the debtor or a secondary obligor with respect to such transactions.
149. *GECC v. FPL Service Corp.*,
[2013 WL 6238484](#) (N.D. Iowa 2013)
Equipment lessee under a lease that was really a sale and secured transaction could not waive prior to default the right to notification of a disposition of the equipment. The lessor’s disposition notification was inadequate because it did not cover all the collateral. As a result, there is a presumption that no deficiency is owing. Because of a lack of admissible evidence, summary judgment was inappropriate on whether the sale was commercially reasonable and on whether the lessor could rebut the presumption.

150. *First Community Credit Union v. Levison*,
[395 S.W.3d 571](#) (Mo. Ct. App. 2013)

A notification of disposition sent to each of two co-debtors in a consumer transaction needed to identify the debtor to whom it was addressed but did not need to identify the co-debtor. Although the notification did not expressly state that the amount to redeem could be obtained by calling a specified phone number, it stated the amount due, instructed the debtor to call the lienholder for the cost of repossession, and listed the phone number of the secured party and the phone the number of a “Reposessed Auto Specialist.” Because there was no evidence that the redemption amount could not have been obtained by calling one of those numbers, the notification complied with this requirement. Although the notification did not expressly state that additional information concerning the disposition and the secured obligation could be obtained by using a phone number or mailing address provided, no such statement is needed as long as a phone number or address is provided, and both were.

151. *Comerica Bank v. Mann*,
[2013 WL 8213701](#) (N.D. Ga. 2013)

Despite a Cayman Islands choice-of-law clause in the security agreement covering a yacht, Florida law governed the liability of the guarantor because the guaranty so provided and the secured party so agreed during the early stages of the litigation. Thus, the guarantor’s liability required analysis of whether the secured party complied with the Article 9 rules relating to notification of a disposition of the collateral. The letters sent by the secured party to the guarantor indicating that the secured party was electing to exercise its remedies and will be taking possession of the yacht did not substantially comply with § 9-613 because they failed to state that the secured party planned to conduct a disposition, that the sale would be private, the time after which the disposition would take place, or the entitlement to an accounting of unpaid indebtedness.

152. *Boulevard Bank v. Malott*,
[397 S.W.3d 458](#) (Mo. Ct. App. 2013)

A notification of disposition in a consumer transaction stating that “[t]he collateral will be sold at a public/private sale” failed to notify the debtor of the method of the disposition and was therefore insufficient as a matter of law. The debtor was thus entitled to statutory damages even though the debtor did not challenge the commercial reasonableness of the sale.

153. *Colonial Pacific Leasing Corp. v. N & N Partners, LLC*,
[2013 WL 5880590](#) (N.D. Ga. 2013)

Secured party that sent notification that collateral would be sold at a public sale was entitled to a judgment for the resulting deficiency even though the sale was held at 8:00am and Georgia statutorily defines a public sale as one occurring between 10:00am and 4:00pm because if this nevertheless was a public sale the debtor alleged no inquiry from the early start and if this was a private sale, the error in the notice was minor and caused no damage. The fact that the notices of other sales of collateral were sent by a subsidiary of the secured party, rather than the secured party itself was immaterial because there was no evidence that this interfered with the debtor’s right to redeem the collateral.

154. *Regions Bank v. Thomas*,

[2013 WL 791616](#) (Tenn. Ct. App. 2013)

Secured party that, during lengthy dispute about the debtor's failure to insure collateralized aircraft, notified the debtor that it "may also elect to exercise its rights as a secured creditor to take possession of, store and sell the aircraft and its engines" and later that it "understands that the aircraft will require as yet unknown repairs in order to enable the aircraft to be transported to any place of sale" did not thereby comply with the requirement to notify the debtor of the time and place of a public sale or the date after which a private sale would be conducted. As a result, the sale was not commercially reasonable and the secured party is presumed not to be entitled to recover the resulting deficiency.

155. *Barclays Bank PLC v. Poynter*,

[710 F.3d 16](#) (1st Cir. 2013)

Security agreement that provided: (i) that the secured party may sell yacht "after first giving Owner notice thereof ten (10) days in advance of the time and place of sale" and, alternatively, (ii) that the secured party may exercise any "rights, privileges and remedies granted by applicable law" did not in fact require ten-days notice of the sale. The secured party was therefore entitled to the deficiency resulting from a sale two months after the secured party sent notification that the yacht "will be sold by way of private sale sometime after the date of this letter."

156. *Waithe v. Citigroup, Inc.*,

[2013 WL 6797630](#) (N.Y. Sup. Ct. 2013)

It is unclear whether § 9-611(f) – a non-uniform notification rule that creates a condition to conducting a sale of shares in a cooperative apartment – requires: (i) notification to be sent both by regular mail and by registered or certified mail; and (ii) an affidavit of service. Notification that mentioned the right to an accounting of the secured obligation but did not expressly mention the charge therefor substantially complied with § 9-613, especially given that the debtor did not request an accounting.

157. *Gardner v. Ally Financial Inc.*,

[61 A.3d 817](#) (Md. 2013)

Collateralized vehicles were sold at a private sale, not a public sale, under Maryland's Credit Grantor Closed End Credit law because even though the public was invited through weekly advertisements in the *Baltimore Sun*, non-dealers had to provide a refundable \$1,000 deposit to attend, which obscured the transparency that is the hallmark of an open, public sale. As a result, the secured party failed to send the required post-sale disclosure.

158. *Smith v. Toyota Motor Credit Corp.*,

[2013 WL 1325460](#) (D. Md. 2013)

Maryland Credit Grantor Closed End Credit law requires a secured party that repossesses automobiles to give advance notification of the time and place of a sale, regardless of whether the sale is conducted as a private or public sale.

159. *Rich v. Ford Motor Credit Company, LLC*,
[741 S.E.2d 163](#) (Ga. Ct. App. 2013)

Secured party complied with Georgia statute that requires a secured party to notify the debtor of its intent to pursue a deficiency within ten days after repossessing a motor vehicle because the ten-day period begins on actual repossession, not when the secured party places the debtor's account on "repo status."

– Conducting a Commercially Reasonable Disposition

160. *Bergene v. Community Bank of Texas*,
[2013 WL 2732681](#) (Tex. Ct. App. 2013)

There was sufficient evidence to support the trial court's determination that the price paid for two mortgaged vessels by an entity newly formed by secured party bore a reasonable relation to the fair market value of the vessels, and thus the guarantor was liable for the deficiency.

161. *Gulf Coast Farms, LLC v. Fifth Third Bank*,
[2013 WL 1688458](#) (Ky. Ct. App. 2013)

Because the debtor's security agreement covering equine collateral expressly provided that "any disposition of Collateral at a regularly scheduled auction where similar Collateral is ordinarily sold (e.g. Keeneland or Fasig-Tipton sales) with or without reserve . . . is per se commercially reasonable," the bank's sale of the collateral at a Keeneland sale was commercially reasonable and the debtors could not argue, even through expert testimony, that the bank's disposition was commercially unreasonable.

162. *Ally Financial Inc. v. Bosch Motors, Inc.*,
[2013 WL 1326479](#) (D. Nev. 2013)

Debtor/auto dealership did not raise a factual issue concerning the commercial reasonableness of the secured party's sale of the dealership's inventory merely by alleging that the sales price was below Kelley Blue Book wholesale value. The secured party sold some vehicles to the manufacturer at prices almost equal to the amount financed and sold others at dealers-only auctions and through direct sales, but the debtor did not allege that the manner of these sales was commercially unreasonable.

163. *Edgewater Growth Capital Partners LP v. H.I.G. Capital, Inc.*,
[2013 WL 1689028](#) (Del. Ch. Ct. 2013)

Foreclosure sale of entire business to shell company formed by largest holder of the senior secured debt had to be public to comply with Article 9. A sale is public when there is an opportunity to bid accompanied by presale advertising or invitations sent to interested bidders. A negotiated agreement between the secured party and the debtor that provides a structure for marketing the collateral does not necessarily make a sale private; what matters is whether the process used gave third parties a meaningful opportunity to bid for the business.

Secured party's agreement with the debtor pursuant to which the secured party allowed the debtor to market the business for 55 days (later extended to 83 days) with the assistance of a financial consultant hired by the secured party enhanced the commercial reasonableness of the ultimate sale, rather than detract from it, because it helped identify the interested parties to whom an invitation to bid was sent. Because two advertisements were placed in the *Wall Street Journal* and invitations were sent to more than 60 entities identified by the financial consultant as the parties most likely to bid, the sale was public even though no other bidders attended. The commercial reasonableness requirement did not require the secured party to extend the sale process given that the business to be sold was insolvent and losing money. The sale was commercially reasonable even though of the 36 entities that signed a nondisclosure agreement and received confidential information about the business, none made an offer or showed up at the foreclosure sale.

164. *Security Alarm Financing Enterprises, Inc. v. Parmer*,
[2013 WL 593767](#) (N.D.W. Va. 2013)

Judgment lienor stated a claim against senior secured party for conducting a commercially unreasonable disposition by alleging that the secured party conducted the sale on a Saturday morning, imposed unusual and restrictive financial conditions upon potential bidders, and refused to allow potential bidders to inspect or otherwise access the assets being sold, all in an effort to orchestrate a sale to a company owned by a related party to escape liability for its unsecured debt. The lienor also sufficiently alleged a basis for successor liability by claiming that the management and operation of the business remained the same after the sale.

165. *KeyBank v. Hartmann*,
[2013 WL 1312013](#) (E.D. Ky. 2013)

Secured party was not entitled to summary judgment in its deficiency action against guarantors despite their contractual waiver if "all defenses, legal or equitable, otherwise available" because the guarantors were "obligors" under Article 9 and could not waive the requirement that a foreclosure sale be conducted in a commercially reasonable manner, the guarantors had raised the issue of commercial reasonableness in their answer, the secured party has the burden of establishing the commercial reasonableness of the sale, and the secured party had not offered any evidence on the issue.

166. *Bank of America v. Ardelean*,
[971 N.Y.S.2d 69](#) (N.Y. Sup. Ct. 2013)

Secured party was not entitled to summary judgment in its deficiency action against debtor because the \$10,000 discrepancy between the original purchase price of the collateral, which debtor possessed for approximately one month, and the proceeds of the foreclosure sale raised the issue of commercial reasonableness, the secured party has the burden of establishing the commercial reasonableness of the sale, and the secured party had not offered any evidence on the issue.

167. *Mason Logging Co. v. General Elec. Capital Corp.*,
[746 S.E.2d 180](#) (Ga. Ct. App. 2013)

Secured party was not entitled to summary judgment on commercial reasonableness of its sale of logging equipment because the secured party has the burden of proving both that the terms of the sale were commercially reasonable and that the resale price was fair and reasonable in relation to the value of the collateral, and the debtor's lay opinion about value was sufficient to create a factual issue precluding summary judgment.

168. *Comerica Bank v. Mann*,
[2013 WL 8213701](#) (N.D. Ga. 2013)

Despite a Cayman Islands choice-of-law clause in the security agreement covering a yacht, Florida law governed the liability of the guarantor because the guaranty so provided and the secured party so agreed during the early stages of the litigation. Thus, the guarantor's liability required analysis of whether the secured party complied with the Article 9 rules relating to disposition of the collateral. The secured party's disposition of the yacht was not commercially reasonable because: the price was \$300,000 less than the next lowest offer and \$2.5 million less than the asking price; the yacht captain recommended against the sale; the broker did not market the yacht to European buyers even though the yacht was geared to the European market due to its style and European manufacture, and the European yacht market was stronger; the broker failed to market the boat aggressively; and the broker advertised the yacht as a bank repo. Because the secured party failed to rebut the presumption that a commercially reasonable sale would have yielded the amount of the secured obligation, the guarantor was not liable for the deficiency. However, pursuant to a clause in the guaranty agreement by which the guarantor promised to reimburse the secured party for the reasonable costs of preserving and liquidating the collateral, the guarantor was responsible for the dockage fees, repairs and maintenance costs, insurance premiums, and taxes incurred by the secured party after it took possession.

169. *Spizizen v. National City Corp.*,

[516 F. App'x 426](#) (6th Cir. 2013)

Secured party was entitled, after the debtors' default, to freeze the collateralized securities account containing securities entitlements valued in excess of the secured obligation. The security agreement expressly gave the secured party the right to refuse debtor access to the account and both the agreement and UCC the UCC gave the secured party the *right* to sell the entitlements but not the *obligation* to do so. Secured party's setoff against deposit account was proper regardless of who owned the deposited funds because the deposit account agreement expressly so provided and thus more restrictive common-law rules were irrelevant.

170. *Smith v. Firstbank Corp.*,

[2013 WL 951377](#) (Mich. Ct. App. 2013)

Secured party's private sales of publically traded stock in blocks of 600,000 and 450,000 shares to brokerage firms at prices below the prevailing market price per share were commercially reasonable due to the concern that sales of such large blocks on the exchange would depress the price, a concern that was reasonable given it had occurred the previous year with respect to this stock.

171. *Deer Creek Excavating v. Hunt's Trenching*,

[2013 WL 1400970](#) (Ohio Ct. App. 2013)

Trial court did not err in concluding that buyer with a security interest in a rejected machine sold the machine in a commercially reasonable manner because the sale was via an auction conducted by professional auctioneers, the sale was advertised, and that the machine was available for inspection three days prior to auction.

172. *FDIC v. Moore Pharmaceuticals, Inc.*,

[2013 WL 1195636](#) (D. Nev. 2013)

FDIC's sale of a portion of the collateral for a price equal to an independent appraiser's estimate and its decision not to sell the remainder of the collateral because it was worth less than the cost of transportation and sale was commercially reasonable.

– Collecting on Collateral

173. *First Trinity Capital Corp. v. Catlin Specialty Insurance*,

[2013 WL 6230099](#) (S.D. Miss. 2013)

Insurance premium financier had no right to collect unearned insurance premiums from the insurer because, due to the broker's fraud, the insurer never received any funds and the policies were never issued. The broker had neither actual nor apparent authority to act on behalf of the insurer.

174. *Fenway Financial, L.L.C. v. Greater Columbus Realty, L.L.C.*,
995 N.E.2d 1225 (Ohio Ct. App. 2013)

Transaction labeled as a sale of accounts by real estate agent was really a secured loan because the agent retained all risk of loss, the transaction documents refer to an advance and describe the agent as the “debtor,” granted the factor a security interest in all of the agent’s current and future accounts, deposit accounts, and general intangibles to secure the agent’s obligations, the factor filed a financing statement listing the agent as debtor, and the agent retained the right to any surplus over the amount advanced plus interest. As a result, the transaction was governed by an Ohio statute that prohibits real estate brokers from paying an agent’s commission to a creditor of the agent. Section 9-406 did not override this statute because the more specific statute prevails over the more general unless the general is later in time and manifests an intent to prevail, and § 9-406 was not later in time.

175. *Pensco Trust Co. v. Blewett*,
2013 WL 3223637 (D. Id. 2013)

The obligation to collect on collateral in a commercially reasonable manner applies only if the secured party actually seeks to collect on collateral; the secured party with a security interest in note secured by deed of trust had no duty to proceed against the maker of the note and could instead sue the debtors on the secured obligation. Idaho’s one-action rule and anti-deficiency statute were not applicable on these facts.

176. *Rolling Hills Bank & Trust v. Mossy Creek Farms Ltd. Partnership*,
828 N.W.2d 325 (Iowa Ct. App. 2013)

Maker of nonnegotiable promissory notes that the payee assigned to its lender discharged its obligation under § 9-406 by paying the payee before it received notification of the assignment.

177. *Reading Co-operative Bank v. Construction Co., Inc.*
984 N.E.2d 776 (Mass. 2013)

Account debtor that, despite agreeing to pay secured party directly, sent twelve checks to the debtor, was liable to the secure party under § 9-406 for the full amount of all those checks – \$3 million – even though the secured obligation was only \$530,000. The account debtor can seek to recover the resulting surplus under § 9-608 by establishing itself as a subordinate creditor of the debtor. Because the secured party is entitled to the full amount of the misdirected checks, not merely its actual damages, it had no duty to mitigate damages by applying a guarantor’s payment to the secured obligation. Although there was evidence that the secured party was aware of the account debtor’s misdirection of payments before the final two checks were sent, the secured party’s silence did not give rise to estoppel because there was no evidence that the account debtor was aware of or relied upon the secured party’s implicit consent.

178. *In re Haley*,

[2013 WL 5592890](#) (Bankr. N.D. Ala. 2013)

Factor with a security interest in accounts failed to prove that the debtor had in fact delivered the goods associated with several invoices and thus failed to prove that it was entitled to payment from the account debtor. As to the five invoices as to which the account debtor admitted that it received the goods and sent payment to the debtor, the factor failed to show that it had instructed the account debtor to pay the factor directly. Although the invoices identified the factor as the remittance party, that was insufficient notification under § 9-406(a). Although the debtor informed the account debtor of the factoring arrangement, that conversation did not reasonably identify the rights assigned under the factoring agreement, and thus was also insufficient under § 9-406(a).

179. *Chemical Bank v. Long's Tri County Mobile Homes, Inc.*,

[2013 WL 2227848](#) (Mich. Ct. App. 2013)

Although guarantors waived their rights to require the creditor “to proceed against the maker or against any other person or to apply any security it holds or to pursue any other remedy,” and thus the secured party would normally be entitled to enforce the guaranties without first attempting to enforce its rights to the collateral, because the creditor obtained a court order granting it possession of the collateral – a fair reading of which means that the creditor was granted control over the collateralized accounts – the creditor had a non-waivable duty to collect or sell the accounts in a commercially reasonable manner. Maintaining exclusive control over the accounts while allowing their value deteriorate was not “commercially reasonable.”

180. *Summit Financial Resources, L.P. v. Kathy's General Store, Inc.*,

[527 F. App'x 724](#) (10th Cir. 2013)

Account financier had cause of action against customer of debtor who continued to prepay the debtor for goods after the customer received notification to pay the account financier directly because even though the transactions involved prepayment, they created accounts.

– Acceptance of Collateral

181. *Nelson v. Vernco Construction, Inc.*,

[406 S.W.3d 374](#) (Tex. Ct. App. 2013)

Because bank's forbearance agreement with debtor recited that the bank “now owns” the debtor's contract and tort claims in pending lawsuit and further recited that “pursuant to applicable law, [bank] is the owner of all claims (including commercial tort claims) identified in the Litigation,” the bank had accepted the claims in partial satisfaction of the secured obligation, was now the owner of the claims, and the debtor had no standing to prosecute the claims. As a result, the judgment in favor of the debtor had to be vacated.

182. *McDonald v. Yarchenko*,
[2013 WL 3809512](#) (D. Or. 2013)

By sending a written proposal and receiving no objection thereto within 20 days, the secured party conducted an effective acceptance of the collateral – the debtor’s $\frac{1}{6}$ th interest in an LLC – in full satisfaction of the secured obligation even though the collateral was worth at least \$407,000 and possibly as much as \$1.6 million while the secured obligation was only about \$12,000.

– Statute of Limitations

183. *Cubler v. TruMark Financial Credit Union*,
[83 A.3d 235](#) (Pa. Super. Ct. 2013)

Statutory damages provided for in § 9-625(c) and (e) are remedial, not punitive, and therefore a claim for them fell under Pennsylvania’s general six-year limitations period, not the two-year period for actions for a civil penalty or forfeiture.

– Standing Issues

184. *UniCredit Bank AG v. Deborah R. Eastman, Inc.*,
[2013 WL 237810](#) (D. Kan. 2013)

Noteholder that was appointed by indenture trustee as the trustee’s agent to enforce actions against debtor of securitized obligation facially had standing to bring the claim. Noteholder also had standing in fact. The sale and servicing agreement between the loan issuer and the special purpose entity created for the securitization transferred all rights to the loan, unlike what occurs in a participation agreement, and these rights were subsequently assigned to the indenture trustee, which assigned them to the noteholder. Moreover, the noteholder was a person entitled to enforce the note even if it was not a holder of the note.

185. *PNC Bank v. Dubin*,
[2013 WL 1363917](#) (N.D. Ill. 2013)

Debtor lacked standing to raise the rights of a putative secured party in supplemental proceedings brought by judgment creditor.

186. *America Atlantic Transmission v. Nice Car, Inc.*,
[112 So. 3d 639](#) (Fla. Dist. Ct. App. 2013)

Secured party had no right under Florida Motor Vehicle Repair Act to post bond and thereby prevent mechanic lienor from selling car and receive possession of the car; only the owner has such a right. The secured party has merely a right to a hearing, at which the trial court has the authority to address secured party’s concerns and order the posting of a bond.

187. *Aidid v. Progressive Direct Insurance Co.*,
[2013 WL 3284276](#) (Minn. Ct. App. 2013)

Although medical provider that received assignment of insured's rights to payment from insurers and then filed a lien statement with the secretary of state held a security interest in the insured's claim against her automobile insurer – a health-care insurance receivable – the medical provider had no right to intervene in insured's action to confirm arbitration award her insurer after the provider failed to act on the assignment or timely challenge the award.

– Other

188. *In re Hood*,
[2013 WL 4776734](#) (Bankr. N.D. Miss. 2013)

Bank was entitled to judgment against debtor for amount of the secured obligation even though the bank had not yet disposed of the collateral. The fact that the collateral is available for sale does not prohibit entry of judgment before any such sale takes place. The debtor was, however, entitled to some credit for the repossessed collateral.

189. *Amos Financial, LLC v. Wideband Solutions, Inc.*,
[2013 WL 6916779](#) (Conn. Super. Ct. 2013)

Buyer of promissory note was entitled to judgment on it even though it had not gone after the collateral. Moreover, the proffered collateral had not been pledged because it was not owned by the borrower, but had been stolen.

190. *Guarantee Ins. Co. v. Brand Management Service, Inc.*,
[2013 WL 6768641](#) (S.D. Fla. 2013)

While a secured party is generally permitted to proceed against the collateral or to ignore the collateral and proceed against the debtor on the secured obligation – *i.e.*, its remedies are not mutually exclusive – once a secured party has chosen a remedy, it must pursue that remedy to fruition, and only afterwards may it pursue another method. Because the secured party had possession of the collateral, it was therefore not entitled to a judgment against the debtor until it foreclosed.

191. *Ross v. Rothstein*,
[2013 WL 3793585](#) (D. Kan. 2013)

Secured party to whom the debtor had, pursuant to a settlement agreement, delivered a pledged stock certificate with a legend indicating that resale was prohibited by SEC Rule 144 was entitled to an order directing the debtor to do all he could to provide a new certificate without the restrictive legend because the secured obligation was with recourse and thus the six-month holding period began when the debtor acquired the shares and had long expired.

192. *In re Shuaney Irrevocable Trust*,
[2013 WL 6983382](#) (Bankr. N.D. Fla. 2013)

The actions of a bank with a security interest in certificated securities in causing the indenture trustee, after the debtor's default, to designate the bank as the registered owner did not constitute a disposition of collateral. Accordingly, the requirements of notification before and commercial reasonableness in conducting a disposition were not applicable.

193. *SKS Investments Ltd., Corp. v. Gilman Metals Co.*,
[2013 WL 249099](#) (D. Colo. 2013)

Summary judgment granted for creditor on promissory note but not on claim for the debtor's failure to file a financing statement because it was not clear that any damage resulted from the debtor's breach of that promise given that the creditor could itself have filed.

194. *Outsource Services Management, LLC v. Nooksack Business Corp.*,
[292 P.3d 147](#) (Wash. Ct. App. 2013)

Because the tribal corporation formed to operate a casino on a reservation expressly waived sovereign immunity in the loan agreement and in several subsequent forbearance agreements, the state court had subject matter jurisdiction to hear the contract claim brought by lender. Because the waiver applied to "any dispute, claim or controversy between the parties hereto arising out of or relating in any way to this Agreement or any other Loan Document or any actions contemplated to be taken in accordance herewith or therewith," it was broad enough to waive not only the tribal corporation's sovereignty but also the sovereign protection of its property. The loan agreement was not void due to lack of approval by the National Indian Gaming Commission because it was not a Class III management contract in part because, even though the loan agreement granted the creditor a security interest in certain proceeds from the casino, it excluded revenues needed to pay operating expenses, thus ensuring that the secured party could manage the gaming facility even if the debtor defaulted.

195. *In re Strata Title, LLC*,
[2013 WL 2456399](#) (Bankr. D. Ariz. 2013)

"Self-operative" term in LLC operating agreement between two 50% owners providing that one of them would become the 100% owner if its capital contribution was not repaid by a specified date created a security interest. Although that security interest was unperfected and the date had not yet occurred when the other member filed for bankruptcy protection, the bankruptcy trustee took subject to that term because Arizona law gives LLC members the authority to adopt provisions in an operating agreement governing the relations between members, changes in classes of members, and the right to acquire other member's interests. As a result, the debtor's interest ceased to be property of the estate when the specified date passed without the other member receiving its capital contribution.

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196. *Eighth & Jackson Inv. Group v. Kaw Valley Bank*,
[2013 WL 183753](#) (D. Kan. 2013)
Interpleader action brought by buyer of pledged LLC membership interest in which buyer sought both an order about who was entitled to the purchase price and a declaration that buyer acquired the interest free and clear was proper as to the purchase price, which had been deposited with the court, but not as to the declaratory relief.
197. *Fifth Third Bank v. U.S. Department of Agriculture-Rural Development*
[2013 WL 529858](#) (W.D. Mich. 2013)
Bank against which default judgment was entered when it failed to timely respond to writ of garnishment could nevertheless bring interpleader action to determine whether garnishor's interest in deposit account was superior to the interests of prior garnishor or secured party with control.
198. *System Soft Technologies, LLC v. Artemis Technologies, Inc.*,
[837 N.W.2d 449](#) (Mich. Ct. App. 2013)
Judgment creditor could be enjoined from collection activities and its writs of garnishment against account debtors could be quashed because the judgment debtor's secured lender had priority in the debtor's assets, even though, after declaring the debtor in default and accelerating the debt, the secured lender entered into a forbearance agreement with the debtor and was allowing the debtor to operate its business by not foreclosing the security interest.
199. *CIMC Raffles Offshore (Singapore) Pte. Ltd. v. Schahin Holding S.A.*,
[2013 WL 4082973](#) (S.D.N.Y. 2013)
Creditor with judgment against entity that managed the operations of charter vessels and that could request draws for operating expenses from the administrative agent for the senior secured lenders was entitled to an order directing the administrative agent to remit all draw requests to the judgment creditor but the judgment creditor could not attach assets under the control of the senior lenders or require the judgment debtor to request draws.
200. *Helicon Partners, LLC v. Kim's Provision Co., Inc.*,
[2013 WL 1881744](#) (Bankr. S.D. N.Y. 2013)
Secured party could, under New York Law, attach by way of ex parte garnishment the deposit account of the entity to which debtor had fraudulently transferred accounts and which the debtor had operated as an alter ego.
201. *Enterprise Bank & Trust v. Lipton*,
[2013 WL 394868](#) (W.D. Pa. 2013)
Other secured creditor was not a necessary party to lender's action against the debtors for delivery of the collateral because Article 9 protects the other creditor's interests – regardless of whether its interest is senior or junior to the plaintiff's – and the debtors faced no risk of double liability or inconsistent obligations given that their personal liability had been discharged in bankruptcy.

202. *Bank of America v. Sea-Ya Enterprises, LLC*,
[2013 WL 126268](#) (D. Del. 2013)

Secured party who failed to send notification of disposition to one guarantor rebutted the presumption that guarantor was not liable for the deficiency because the secured party conducted a commercially reasonable sale and the guarantor – who never read the transaction documents – neither would nor could have affected the outcome of the sale).

203. *JPMorgan Chase Bank v. Chelsie Corp.*,
[2013 WL 2558428](#) (W.D. Mich. 2013)

Although secured party was entitled to summary judgment on its action against the debtor and guarantors on the secured obligation, because the creditor failed to address the requirements of 28 U.S.C. § 2004 regarding a judicial sale of personal property, creditor was not entitled to summary judgment on its request for a judicial sale.

204. *Crozier v. Wint*,
[736 F.3d 1134](#) (8th Cir. 2013)

Because it was unclear if the secured transaction was a consumer transaction, the trial court erred in applying on summary judgment the absolute bar rule merely because the secured party disposed of one small piece of collateral without providing notification to the debtors. There is no *de minimis* exception to the absolute bar rule.

Liability Issues

– of the Secured Party

205. *Lafferty v. Wells Fargo Bank*,
[153 Cal. Rptr. 3d 240](#) (Cal. Ct. App. 2013)

Lender that received assignment of retail installment sales contract for the purchase of a mobile home was, under the FTC Holder Rule, not merely subject to the debtors' defenses to payment but also liable for any claim that the debtors had against the dealer, limited to the amount the debtors had paid under the installment contract.

206. *International Fidelity Insurance Company v. Bank of America*,
[2013 WL 2249543](#) (Cal. Ct. App. 2013)

Even if the bank with a mortgage on a hotel and condominium development project accepted an assignment of the surety bond that the developers obtained to insure the earnest money deposits of the condominium buyers, that assignment was for security and thus the bank did not assume any of the developer's obligations on the bond, in particular the obligation to reimburse the issuer.

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207. *Peel v. Credit Acceptance Corp.*,
[408 S.W.3d 191](#) (Mo. Ct. App. 2013)
Lender that financed borrower's purchase of vehicle was liable under the Missouri Merchandising Practices Act for more than \$1 million in compensatory damages, punitive damages, and attorney's fees for collecting on borrower's obligation even though purchase of vehicle was void because the seller never provided the borrower with title to the vehicle.
208. *Midkiff v. Crain Ford Jacksonville, LLC*,
[2013 WL 2457272](#) (Ark. Ct. App. 2013)
Car seller whose agent broke into buyers' garage to retake car, thereby causing damage to the garage, after financing fell through was improperly granted summary judgment on buyers' claims for conversion, wrongful repossession, and violation of the Arkansas Deceptive Trade Practices Act. A factual issue remained about whether the "finance approval" contingency was satisfied when the buyers left the seller's showroom with the car.
209. *Bediako v. American Honda Finance Corp.*,
[537 F. App'x 183](#) (4th Cir. 2013)
Secured party that failed to provide with pre-disposition notification required by Maryland's Credit Grantor Closed End Credit law was nevertheless entitled to collect the principal amount of the debt. Because the payments made and proceeds received from the disposition totaled less than the original principal amount of the debt, the secured party had no liability to the debtor.
210. *Bassett v. Barnes Used Cars, Inc.*,
[2013 WL 4506788](#) (Ill. Ct. App. 2013)
Debtor's cause of action for wrongful repossession and conversion based on the allegedly violent conduct of the secured party's agent during repossession was properly dismissed with prejudice because it was brought under § 9-609 – which does not provide the debtor with a cause of action – rather than under § 9-625. However, the debtor's claim for wrongful repossession and conversion based on debtor's claim not to have defaulted was improperly dismissed.
211. *Finley v. First Federal Savings Bank*,
[999 N.E.2d 468](#) (Ind. Ct. App. 2013)
Bank did not commit conversion by exercising control over and selling video equipment belonging to corporation that guaranteed its sole shareholder's debts even though the corporation's own debts to the bank had been satisfied because the shareholder's debts were in default and the corporation remained liable on its guaranty despite the fact that the bank and shareholder entered into a settlement agreement. However, an issue remained for the jury about whether the equipment belonged to the corporation or to the shareholder, who had not granted a security interest in her own personal property.

212. *Tri-State Truck Ins., Ltd. v. First National Bank of Wamego*,
[931 F. Supp. 2d 1120](#) (D. Kan. 2013)

Debtors' claim against participant for damages resulting from filed financing statements in connection with loans that had been rescinded was barred by res judicata because the claim could have been raised in prior action in which the debtors sought and obtained a judgment declaring that they owed nothing to any of the participants and that all UCC filings be terminated.

213. *In re Fischer*,
[501 B.R. 346](#) (8th Cir. BAP 2013)

Bank that initially failed, pursuant to stipulated order, to file termination statement after collateral was sold and proceeds disbursed but which later did file the termination statement could not be held in contempt because the order merely approved the stipulation and did not itself impose duties on the bank and, even if it had, the stipulation placed no deadline on the bank's duty.

214. *Dealer Services Corp. v. American Auto Auction, Inc.*,
[2013 WL 2451250](#) (Conn. Super. Ct. 2013)

Floor plan financier with PMSI priority in debtor's vehicles failed to prove actual and constructive fraudulent claims against putative creditor with junior security interest because there was insufficient evidence the junior secured party had fraudulent intent – even if the debtor did – and there was insufficient evidence that the debtor was insolvent at the time of or was rendered insolvent by the payments to the junior secured party.

215. *St. Clair v. Capital One Bank (USA)*,
[2013 WL 1110810](#) (D. Minn. 2013)

Although an employee of the repossession company hired by the secured party violated the Driver's Privacy Protection Act by improperly accessing information about the debtor in the Minnesota Department of Driver and Vehicle Services database, and a secured party has a nondelegable duty not to breach the peace during repossession, the secured party was not liable for violation because it did not result in a breach of the peace.

216. *Nelson v. Santander Consumer USA, Inc.*,
[931 F. Supp. 2d 919](#) (W.D. Wis.), *vacated*, [2013 WL 5377280](#) (W.D. Wis. 2013)

Because the purchaser of a loan after the debtor's default is a "debt collector" for the purposes of the Fair Debt Collection Practices Act, entity that purchased the entire business of a creditor was a "debt collector" with respect to a loan that was already in default. Purchaser was liable for \$571,000 in statutory damages for violating the Telephone Consumer Protection Act by calling the debtor's cell phone 1,026 times.

217. *WC Capital Management, LLC v. UBS Securities, LLC*,
[711 F.3d 322](#) (2d Cir. 2013)

Broker with security interest in securities held in customers' accounts did not violate SEC Rule 10b-16(a) by not expressly disclosing the complex formulas it employed to calculate customers' collateral requirements or by not providing advance notice to customers before it changed its margin policies.

218. *Washington Square Financial, LLC v. RSL Funding, LLC*,
[418 S.W.3d 761](#) (Tex. Ct. App. 2013)

Because Texas law requires court approval of any sale of rights to payment under a structured settlement, and the buyer of such rights had not yet obtained approval, the buyer had no cause of action against another factor that persuaded the debtor to sell the rights for a higher price and who then obtained court approval.

219. *Firestone Financial Corp. v. King Amusements, Inc.*,
[2013 WL 1286665](#) (N.D. Ill. 2013)

Debtor stated causes of action for secured party's disposition of collateralized equipment at a private sale without prior notification and for repossessing property not subject to its security interest.

220. *Catahama, LLC v. First Commonwealth Bank*,
[2013 WL 5874578](#) (W.D. Pa. 2013)

Bank with a senior security interest in accounts receivable was not liable under promissory estoppel to junior secured party for allegedly agreeing to forbear from enforcing its interest because the junior secured party acted at its own risk by extending money without confirming directly with the Bank the specific details and temporal scope of the alleged subordination agreement.

221. *MBK Services, Inc. v. Cole Taylor Bank*,
[2013 WL 5436652](#) (Ill. Ct. App. 2013)

Agent that located and procured subcontractors so that debtor could bid on government printing contracts had no claim against the bank that had a perfected security interest in the debtor's assets and which seized the debtor's assets, including its receipts from the government, because even if the agent were the true owner of the government contracts, it had allowed the debtor to exercise full control over the funds received thereon and is therefore estopped from denying the bank's security interest. There was no basis for imposing a constructive trust on the receipts because the agent did not set up an escrow account or do anything else to protect its interest in the proceeds of the government contracts. Even if a constructive trust were imposed, the bank would still be entitled to priority because principles of equity cannot override the UCC's priority rules.

– of the Debtor

222. *Santander Consumer USA, Inc. v. Superior Pontiac Buick GMC, Inc.*,
[2013 WL 27921](#) (E.D. Mich. 2013)

Summary judgment denied on whether car dealer breached obligations owed to its chattel paper financier because their contract was ambiguous about whether the dealer was to repurchase the vehicle or repurchase the chattel paper if the representations and warranties were untrue and because the financier was required to use reasonable efforts to deliver the collateral and reasonableness is not something that can be decided on summary judgment. Fraud of dealer's employee in power booking car loans – misrepresenting the equipment and options on the cars – did not give rise to an independent tort because the agreement dealt with misrepresentations and thus the sole basis of recovery must be in contract.

223. *GECC v. Gary*,
[2013 WL 390959](#) (S.D.N.Y. 2013)

Neither debtor nor guarantors was entitled to set off against the secured obligation amounts that would have been received had the secured party consented to the debtor's proposed sublease the collateralized aircraft because: (i) the parties waived the right to setoff in the loan agreements; (ii) the agreements explicitly required the secured party's consent to a sublease; (iii) there was no requirement that any failure to consent be reasonable; and (iv) even if reasonableness were required, the secured party reasonably withheld consent given that the requested financial information about the proposed sublessee was not provided and the transaction would have involved relocating the aircraft to Dubai under the supervision of an Estonian company, which would have made it more difficult to repossess the aircraft.

224. *Mid-Am Building Supply, Inc. v. Schmidt Builders Supply, Inc.*,
[2013 WL 1308980](#) (D. Kan. 2013)

Debtor remained liable to the seller of goods for the purchase price despite the secured party's repossession and sale of the goods; the debtor could not claim a defense to the duty to pay based on impracticability or frustration of purpose.

225. *State v. LaPean*,
[838 N.W.2d 866](#) Wis. Ct. App. 2013)

Owner-operator of farm implements dealership was guilty of transferring encumbered property with intent to defraud even though nothing in the security agreement expressly required the debtor to remit proceeds to the secured party rather than use them to pay business expenses. The secured party's representative testified that there was such a duty to remit proceeds to the secured party.

226. *Land O'Lakes Purina Feed LLC v. Jaeger*,
[2013 WL 5526994](#) (S.D. Iowa 2013)

Credit seller of pigs that retained a security interest in the pigs sold to and accepted by the buyer had no duty to mitigate its damages under either Article 2 or Article 9 by accepting return of or repossessing the pigs, and could instead maintain an action for the unpaid purchase price.

227. *AEL Financial, LLC v. Countryside Publishing Co., Inc.*,
[2013 WL 5878435](#) (N.D. Ill. 2013)

Summary judgment denied on whether equipment lease broker that originated and sold equipment lease was liable for breach of its representations and warranties that the documents were genuine. While much of the equipment was fictitious, there was an undisclosed relationship between the seller and the lessee, and the lease included a charge for software that is free on the internet, the lessee did expressly represent that it had received the equipment and make substantial rental payments to the buyer of the lease. The lease broker was not liable for representing that the equipment had been delivered because the buyer of the lease knew that was not true when the representation was made; inclusion of that representation in the documents was a mistake. The broker did not breach its representation that the lease was enforceable because even if the equipment did not exist and hence the lease buyer did not obtain a security interest in the equipment, the lease was no dispute that the lessee entered into the transaction and was bound thereby.

– of Others

228. *Regions Bank v. Hyman*,
[2013 WL 5487035](#) (M.D. Fla. 2013)

Secured party that took ownership of collateralized aircraft through abandonment from the debtor and later resold the aircraft at a private sale was entitled to a deficiency judgment against the guarantors based in the resale price, not the value as of the date that it took ownership, because the sale was conducted in a commercially reasonable manner.

229. *Garten v. Shearman & Sterling LLP*,
[958 N.Y.S.2d 107](#) (N.Y. App. Div. 2013)

Secured party had no cause of action against his attorneys for malpractice in failing to provide him with a first-priority security interest because he knew the identity of the senior creditor and fully understood that his position would be junior when his loan was made. The fact that the debtor misled the secured party about the amount owing to the senior lienors and the debtor's own financial health were irrelevant because the secured party did not retain the attorneys to review the debtor's financial records.

230. *DG Cogen Partners, LLC v. Lane Powell PC*,
[917 F. Supp. 2d 1123](#) (D. Or. 2013)

Debtor had no cause of action against its attorneys for malpractice in connection with the execution of an unreasonably unfavorable settlement of tort and contract claims because the debtor's secured party had acquired all of the debtor's general intangibles at a foreclosure sale and thus the debtor was not a proper plaintiff. No discussion of whether the security agreement adequately described the tort claims under § 9-108(e) or whether the security interest attached to the tort claims under § 9-204(b).

231. *Bolan Textile (HK), Ltd. v. DeHaan*,
[2013 WL 1131066](#) (S.D. Ohio 2013)

Law firm's motion for summary judgment on client's malpractice claim for negligently failing to timely perfect client's junior security interest was denied because factual remained about whether the client suffered damages.

232. *Hattem v. Smith*,
[977 N.Y.S.2d 411](#) (N.Y. App. Div. 2013)

Seller's legal malpractice judgment against his attorney for failing to a perfect security interest in the assets of the business sold to a buyer, which failure led to a loss of priority, had to be reversed because an instruction on the seller's comparative negligence was warranted. There was evidence that the seller, who was experienced in commercial transactions, introduced the lender that acquired a prior security interest to the buyer for the purpose of financing the purchase and never informed the attorney of the lender's involvement in the transaction.

233. *FDIC v. Lowis & Gellen, LLP*,
[2013 WL 788188](#) (N.D. Ill. 2013)

Law firm being sued for negligence for failing to initially perfect client's security interest in chattel paper stated cause of action for contribution against client's subsequent counsel for its "overly zealous litigation tactics" that forced the debtor to file for bankruptcy protection within ninety days of when the security interest was eventually perfected, which resulted in the security interest being avoided in bankruptcy.

234. *Gutarts v. Fox*,
[961 N.Y.S.2d 101](#) (N.Y. App. Div. 2013)

Law firm being sued for malpractice related to its failure to timely perfect client's security interest had no claim or breach of contract, breach of warranty, or indemnification against company hired by law firm to file the appropriate paper work. There was no breach of contract because the company had been hired to file a UCC correction statement and a termination statement, which it did, and any negligence involved would not be actionable. There was no breach of warranty because no warranty was made. There was no right to indemnification because the invoice agreement contained a liquidated damages provision limiting liability to the cost of the services provided.

235. *Fagen, Inc. v. Exergy Devevelopment Group of Idaho, LLC*,
[2013 WL 5781473](#) (D. Minn. 2013)

Law firm was not entitled to dismissal of third-party complaint brought against it by builder that had purchased 99% of the developer, subject to a repurchase obligation, and which allegedly relied on the law firm's true sale opinion.

236. *Wells Fargo Bank v. Chesapeake Financial Services, Inc.*,
[2013 WL 3805064](#) (D. Md. 2013)

Lender that advanced funds to finance purchase of vessel but which was defrauded because the borrowers forged the purchase documents was entitled to summary judgment on its cause of action against the broker that originated the loan for breach of: (i) its representation and warranty that the "documents evidencing and securing the Obligations . . . are legally enforceable according to their terms"; and (ii) its obligation to repurchase the loan upon demand if any representation or warranty it made to lender "is false or misleading in any material respect." The repurchase obligation is not an illegal penalty clause. Broker may have a cause of action against the documentation company retained to document the transaction for breach of an alleged contractual duty to provide a valid certificate of documentation for the vessel but the documentation company did not have a contractual duty to verify the documents relating to the obligation. Lender stated a negligence cause of action against the documentation company because the company was providing processional services and knew of the lender's role in the transaction, thus making the lender a foreseeable plaintiff but the Documentation company did not have a duty to affirmatively investigate or prevent fraud in the underlying transaction.

237. *BNP Paribas Mortgage Corp. v. Bank of America*,
[949 F. Supp. 2d 486](#) (S.D.N.Y. 2013)

Bank that served as served as indenture trustee, collateral agent, depository, and custodian in connection with \$1.6 billion secured loan to corporate borrower had no duty as collateral agent under the security agreement or as indenture trustee under the indenture to follow the lenders' instructions to sue itself for breach of its duties under the depository agreement or custodial agreement because a person cannot bring an adversarial claim against itself, even when acting in different capacities. Moreover, the security agreement and indenture do not require such action because they limit the bank's obligation to those available under the law, and under the law an entity cannot sue itself. The bank also had no duty to assign the claim against itself because an assignor can assign only the rights it has and the bank had no right to sue itself. The bank was not liable for negligently failing to prevent the fraud perpetrated by the borrower's corporate parent because the bank had no duty independent of its contractual obligations and such claims were barred by the economic loss doctrine.

238. *Thermo Credit, LLC v. Cordia Corp.*,

[2013 WL 425930](#) (E.D. La. 2013)

Accounts financier stated cause of action against debtor's attorney for negligently misrepresenting that the debtor had the power and authority to perform under the agreement – which included providing a security interest in receivables – when in fact the receivables were owned by subsidiaries that were not party to the security agreement. It did not matter that the receivables had not yet been identified at the time of the attorney's representation.

239. *Wells Fargo Bank National Gasoline, Inc.*,

[2013 WL 696651](#) (E.D.N.Y. 2013)

[2013 WL 1822288](#) (E.D.N.Y. 2013) (subsequent ruling)

Because credit agreement granted bank a security interest in accounts and required the debtor to hold the proceeds of accounts in trust for the bank, individuals involved in transferring the proceeds from the Collection Account in which they were to be maintained and then using the proceeds for other purposes were liable for conversion of the proceeds. Although a conversion claim arising out of contract must have an independent basis, the claim was independent because the individuals were not signatories to the credit agreement. Although one of the individuals had guaranteed the debt, the claim against him for conversion was nevertheless proper because as the conversion claim was based on unlawful possession of funds, not a refusal to pay the debt.

240. *Medical Lien Management, Inc. v. Allstate Insurance Co.*,

[2013 WL 2450632](#) (Colo. Ct. App. 2013)

Tort victim could, prior to settling his claim against tortfeasor's insurer, assign a portion of that claim to the creditor that paid his medical bills. That creditor then stated a claim against the insurer for issuing payment directly to the tort victim despite previously receiving instructions to pay the creditor.

241. *Kissel v. Repossession Specialists, Inc.*,

[2013 WL 692119](#) (N.J. Super. Ct. 2013)

A repossession agent had no claim against the debtor's automobile insurer for injuries the debtor suffered when retrieving personal items from the vehicle after the agent had put the vehicle on a flatbed truck. The repossession agent was not a "permissive user" under the insurance policy even though the debtor had voluntarily created the security interest.

242. *Walker v. International Recovery Systems, Inc.*,

[2013 WL 3380579](#) (E.D. Pa. 2013)

Debtor could not maintain an action against repossession agent based on the alleged illegality of the secured loan because the putative secured party was an indispensable party and the security agreement required arbitration, and thus the claim against the repossession agent was not ripe for adjudication.

243. *Israel Discount Bank of New York v. First State Depository Co., LLC*,
[2013 WL 2326875](#) (Del. Ch. Ct. 2012)

Bailee of collateral – rare coins and bullion – that, despite having entered into an agreement with the secured party to honor the secured party’s instructions, refused to release the collateral to the secured party and in fact released the collateral to the debtor, was liable to the secured for breach of the bailment agreement. The secured party did not act in a commercially unreasonable manner by contacting the FBI given that the debtor and the bailee intentionally concealed from the secured party material facts regarding the loans and the collateral.

244. *Williams Tractor, Inc. v. ANB Venture, LLC*,
[2013 WL 2368803](#) (Ark. Ct. App. 2013)

Equipment buyer that took subject to perfected security interest was liable for detention damages, measured by the rental value of the equipment, after refusing secured party’s demand for possession. The buyer was not entitled to any offset for the costs of storage or the repairs it made to the equipment.

245. *Pierrard v. Wright Implement 1, LLC*,
[993 N.E.2d 1200](#) (Ind. Ct. App. 2013)

Buyer of a tractor subject to a perfected security interest was liable for conversion for thwarting the secured party’s repossession efforts even though the buyer might not have known of the security interest when he purchased the tractor and even though he may have sold the tractor prior to the repossession efforts.

246. *Kadyk v. Long*,
[2013 WL 2550742](#) (D. Or. 2013)

Debtor/mechanic had no cause of action for negligence against former employer, on whose premises the debtor had left his tools, for allowing a putative secured party to repossess the tools because the former employer owed no duty to the debtor to safeguard the tools.

247. *Lobel v. Genesis Group Intern., Inc.*,
[2013 WL 1818424](#) (S.D. Fla. 2013)

Creditors with a security interest in the shares of a corporation had no cause of action for conversion against individual who accepted an assignment of the corporation’s trademark because the creditors had no rights in the trademark.

248. *Blue Rider Finance, Inc. v. Harbor Bank Maryland*,
[2013 WL 1196204](#) (D. Md. 2013)

Lender that, before providing bridge financing for production of film, relied on allegedly fraudulent representations of bank vice president that the bank held \$13 million in escrow to secure the bridge loan stated cause of action against bank based on both *respondeat superior* and negligent supervision.

249. *In re Roden,*

[488 B.R. 736](#) (Bankr. N.D. Ala. 2013)

Manager and sole employee of LLC that originated and serviced equipment leases was liable to the bank to which the leases had been sold, even though he had not personally guaranteed payment, for damages caused by commingling the rental payments received with the proceeds of leases assigned to other lenders in an effort to spread the losses among all lenders.

250. *Amegy Bank v. Deutsche Bank Corp.,*

[917 F. Supp. 2d 1228](#) (M.D. Fla. 2013)

Secured party was, after the debtor improperly sold the collateral and used the proceeds to pay down a mortgage loan and pay off a tax lien, not entitled to be equitably subrogated to the mortgagee's lien because the mortgage loan was not paid in full but was entitled to be equitably subrogated to the tax lien. Secured party's claims for conversion against another mortgagee and a depositary based on the deposit of some proceeds with the depositary and their subsequent transfer to the mortgagee would not be dismissed because the secured party adequately alleged that the mortgagee and depositary colluded with the debtor to violate the secured party's rights.

251. *Pirrotti v. Respironics, Inc.,*

[2013 WL 321772](#) (D. Conn. 2013)

Because a disposition of collateralized intangible assets occurred after little advertising, in the absence of competitive bids or outside attendees, and to the secured party that convened the sale, material facts remained unresolved as to whether the sale established the fair market value of the property. As a result, the value of the property might have exceeded the amount of the secured obligation and the sale might have been a constructively fraudulent transfer.

252. *Healix Infusion Therapy, Inc. v. Heartland Home Infusions, Inc.,*

[733 F.3d 700](#) (7th Cir. 2013)

Fact that provider of infusion therapy services had filed a financing statement against one of its clients accounts did not provide competitor with notice of the provider's services contract with the client sufficient to support a claim for tortious interference with contract under Texas law.

253. *FUNimation Entertainment v. A.D. Vision, Inc.,*

[2013 WL 2189881](#) (S.D. Tex. 2013)

Debtor had no standing to bring an antitrust claim against competitor that bought collateral from secured party who purchased it at a public sale after the debtor's default because, even if the competitor encouraged or conspired with the secured party to foreclose on the collateral, the foreclosure was legally permissible, the debtor's injury resulted from its own default, and the antitrust laws were enacted to protect competition, not competitors, and there was no harm to competition here.

254. *Fourteen Florence Street Corp. v. Armenia Coffee Corp.*,
[2013 WL 3466540](#) (N.J. Super. Ct. 2013)

Purchase of substantially all of the debtor's assets at a foreclosure sale by a corporation controlled by the debtor's principals, which then operated the same business with the same key employees, was a fraudulent transfer intended to hinder collection efforts of the debtor's landlord, as was the grant of the security interest. In addition, the purchaser had successor liability.

255. *Tap Holdings, LLC v. Orix Finance Corp.*,
[970 N.Y.S.2d 178](#) (N.Y. App. Div. 2013)

Subordinated lenders stated claims for piercing corporate veil, successor liability, and fraudulent transfers against entity formed by senior lenders which acquired the membership interests in the debtor, reaffirmed the senior debt, and then continued the debtor's business at the same location using the same trade names, physical assets and website, and with the same executives in the same positions. The claims were not barred by a clause in subordination agreement providing that the subordinated lenders "waive any right to . . . challenge the appropriateness of any action the . . . Senior [Lenders] take with respect to the Senior Debt and hereby consent to the . . . Senior [Lenders] exercising or not exercising such rights and remedies as if no other debt existed," because intentional misconduct cannot be waived.

256. *U.S. v. Adaptive MicroSystems, LLC*,
[914 F. Supp. 2d 1331](#) (Ct. Int'l Trade 2013)

Summary judgment denied on whether buyer that purchased assets of debtor from receiver had successor liability as a mere continuation of the debtor given that one owner of the debtor holds stock in the buyer, the buyer employs substantially all of same people as the debtor to carry out a similar business under the same trade name and out of some of the same locations, and the buyer holds itself out to the public as the same entity as the debtor by boasting "Over 30 Years" of experience on its website.

257. *Alb USA Auto, Inc. v. Modic*,
[2013 WL 1697357](#) (Ohio Ct. App. 2013)

Secured party had cause of action for replevin but not for conversion against mechanic that had repaired collateralized motor vehicle and refused to release possession until payment of the repairs and storage costs.

BANKRUPTCY***Property of the Estate***

258. *In re Dixon*,

[500 B.R. 869](#) (Bankr. E.D. Mich. 2013)

Although under U.C.C. § 2-401 title to goods sold by auction normally passes when the hammer falls, the Michigan Vehicle Code trumps that rule by providing that the transfer is completed when the certificate of title application is signed. Although the hammer fell in the execution sale of the debtor's motorcycle minutes before the debtor filed his bankruptcy petition, if the application was in fact signed postpetition, the motorcycle became property of the estate and consummation of the transaction postpetition would have violated the automatic stay.

259. *In re Heath Global, Inc.*,

[492 B.R. 650](#) (S.D.N.Y. 2013)

Because the seller of a domain name had not, before the buyer filed a bankruptcy petition, terminated the sales agreement for nonpayment and termination postpetition was prohibited by the stay, the domain name was part of the buyer's bankruptcy estate. The agreement was not merely an option.

260. *In re Porter*,

[2013 WL 1702411](#) (Bankr. S.D. Ind. 2013)

Because restrictions on assignment of annuity to which the debtor was not a party and which was issued in connection with structured settlement did not prevent debtor from assigning his rights to payment under the *settlement*, and the debtor had in fact sold those rights prior to enactment of structured settlement protection legislation, the debtor owned no interest in the rights to payment when he filed his bankruptcy petition.

261. *In re Petters Co., Inc.*,

[2013 WL 8020565](#) (Bankr. D. Minn. 2013)

Bankruptcy estates of solely-owned corporation and its wholly-owned subsidiaries would be substantively consolidated – even though the subsidiaries were special-purpose entities designed to be bankruptcy remote and facilitate discrete investments – because the ostensible business purpose of the subsidiaries and their transactional structures were all a facade to conceal the Ponzi scheme operated by the sole owner, the assets of all the entities were commingled, and the lenders to the subsidiaries failed to conduct the due diligence that would have allowed them to rely on the separateness of the subsidiaries.

Claims & Expenses

262. *In re KB Toys, Inc.*,
[736 F.3d 247](#) (3d Cir. 2013)

Purchasers of claims from creditors identified on the debtor's statement of financial affairs as having received potentially avoidable preferential transfers took the claims subject to their disabilities in the hands of the original creditors, and thus subject to disallowance under § 502(d) because of the failure of the original creditors to pay back avoidable preferential transfers.

263. *In re B.R. Brookfield Commons No. 1 LLC*,
[735 F.3d 596](#) (7th Cir. 2013)

Underwater nonrecourse secured claim could not be disallowed; creditor could make § 1111(b) election to have the entire claim treated as a recourse claim.

264. *In re NobleHouse Technologies, Inc.*,
[2013 WL 6816129](#) (Bankr. N.D.N.Y. 2013)

Secured creditor's claim would not be equitably subordinated under § 510(c) because an account debtor mistakenly ignored instructions to make payment to a lockbox set up to protect an unsecured supplier and the debtor, then under the management of the secured creditor's representatives, used the funds to pay the secured creditor. As an unsecured creditor, the supplier did not suffer a particularized injury and, even if it did, the secured creditor's use of the funds, in which it had a security interest, was not unfair.

265. *In re K-V Discovery Solutions, Inc.*,
[496 B.R. 330](#) (Bankr. S.D.N.Y. 2013)

Indenture that provided for notes to be subordinated to principal and "interest, including, with respect to the Credit Facility, all interest accrued subsequent to the commencement of any bankruptcy or similar proceeding, whether or not a claim for post-petition interest is allowable as a claim in any such proceeding," did not subordinate notes to post-petition interest on later loan. Although the indenture defined "Credit Facility" to consist of a specified loan agreement "as . . . may be amended, modified, restated, renewed, replaced, refinanced or restructured," the original credit facility was amended several times and then replaced by a facility that was later paid off with cash on hand, and only several months afterwards did the debtor acquire the current senior loan. The temporal gap in the existence of a senior loan coupled with the fact that the proceeds of the current loan were not used to pay off the earlier senior loan, indicates that the current loan is not a "replacement" of the earlier credit facility and thus not entitled to priority with respect to postpetition interest. The court discussed but expressly did not base its decision on the Rule of Explicitness.

266. *In re AMR Corp.*,

[485 B.R. 279](#) (Bankr. S.D.N.Y. 2013), *aff'd*, [730 F.3d 88](#) (2d Cir. 2013)

Because prepetition transaction documents for secured financing and equipment leases made the debtor responsible for a “Make-Whole Amount” in connection with a voluntary redemption but not following a default, and the documents made the debtor’s bankruptcy petition a default that automatically accelerated the debt, the creditors were not entitled to the Make-Whole Amount even though the debtor proposed to use post-petition financing at lower interest rates to pay off the creditors in a manner that essentially effected a redemption. Any effort to decelerate the debts is barred by the automatic stay.

267. *In re Purdy*,

[490 B.R. 530](#) (Bankr. W.D. Ky. 2013)

Secured creditor’s prepetition security interest in debtor’s dairy herd extended to post-petition milk and the proceeds thereof because the milk was a product of the herd.

268. *In re PMC Marketing Corp.*,

[501 B.R. 17](#) (Bankr. D.P.R. 2013)

Electricity utility was a provider of services, not goods within the meaning of the UCC or § 503(b)(9), and thus was not entitled to administrative priority treatment for electricity provided to the debtor during the 20 days preceding the petition.

269. *In re NE Opco, Inc.*,

[501 B.R. 233](#) (Bankr. D. Del. 2013)

Electricity that the debtor received from a utility company during the 20 days before the petition was not a “good” within the meaning of UCC Article 2 and thus the utility was not entitled to an administrative expense priority for its claim.

Automatic Stay & Injunctions

270. *In re Carter*,

[502 B.R. 333](#) (8th Cir. BAP 2013)

Bank that had security interest in equipment of LLC and who knew that its sole member had filed a Chapter 13 petition did not willfully violate the stay by proceeding against the collateral because the bank did not know that the LLC had transferred the collateral to the debtor.

271. *In re Weber*,

[719 F.3d 72](#) (2d Cir. 2013)

Secured party’s refusal, upon learning of the debtor’s bankruptcy filing, to return the vehicle repossessed prepetition was a willful violation of the automatic stay even though the debtor had not yet moved for turnover and the secured party was entitled to adequate protection.

272. *In re Dean,*[490 B.R. 662](#) (Bankr. M.D. Pa. 2013)

Individual who had security interest in debtor's car and to whom the debtor had voluntarily surrendered possession prepetition but who refused to return the car postpetition for fifteen months was liable for \$2,500 in compensatory damages and \$500 in punitive damages for violating the automatic stay.

273. *In re Stephens,*[495 B.R. 608](#) (Bankr. N.D. Ga. 2013)

Secured party that, upon learning of the debtor's bankruptcy filing, refused to return the debtor's repossessed vehicle and then, two days before the emergency hearing on debtor's adversary proceeding for turnover, resold the vehicle without sending prior notification, was liable for \$1,559 in actual damages, \$4,325 in attorney's fees and \$17,890 in punitive damages.

274. *In re Vega,*[503 B.R. 38](#) (Bankr. E.D. Mich. 2013)

Automobile repair shop that had possession of a motor vehicle on which it had performed repairs, and which had a common-law possessory lien for the charge for those repairs, did not violate the automatic stay by refusing to return the vehicle after the owner filed a Chapter 13 petition because possession was necessary to maintain perfection and thus the shop's action was exempt from the stay by § 363(b)(3).

275. *In re Grewal,*[499 B.R. 736](#) (Bankr. N.D. Cal. 2013)

Bank violated the automatic stay and the discharge injunction by refusing to return some service station equipment that it repossessed under the belief that it was covered by the security interest granted by the corporation that owned the service station because the evidence established that the items were owned by the individual sole shareholder of the corporation.

276. *Credit Nation Lending Services, LLC v. Nettles,*[489 B.R. 239](#) (N.D. Ala. 2013)

Secured party that repossessed vehicle after confirmation of debtors' Chapter 13 plan under the belief that insurance on the vehicle had lapsed and which refused to promptly return the vehicle but instead required that the debtors travel to another state to retrieve it willfully violated the stay. The bankruptcy court did not abuse its discretion in awarding damages that included cancellation of the secured obligation.

277. *In re Otero*,

[498 B.R. 313](#) (Bankr. D.N.M. 2013)

Secured party that called the debtor and the debtor's relatives 134 times in one month after the debtor received a discharge violated the discharge injunction because the actions constituted efforts to collect the debt, not merely to inquire about the debtor's intentions with respect to the collateral. The secured party was liable for compensatory damages and \$10,000 in punitive damages.

Sales of Assets

278. *In re PBBPC, Inc.*,

[484 B.R. 860](#) (1st Cir. BAP 2013)

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

279. *In re USA United Fleet Inc.*,

[496 B.R. 79](#) (Bankr. E.D.N.Y. 2013)

Purchaser of Chapter 7 debtors' assets "free and clear of" of liabilities prevented the New York State Department of Labor from using debtors' prepetition unemployment insurance experience rating in calculating the postpetition unemployment insurance tax liability of purchaser.

280. *In re Tougher Industries, Inc.*,

[2013 WL 1276501](#) (Bankr. N.D.N.Y. 2013)

The state Department of Labor could not, in calculating the unemployment insurance tax liability of the entities that purchased the debtor's assets at a § 363 sale free and clear of "interests," treat the entities as successors to the debtors or use the debtors' experience rating.

281. *Ouray Sportswear, LLC v. Industrial Claim Appeals Office*,

[315 P.3d 1280](#) (Colo. Ct. App. 2013)

Section 363 sale of substantially all of the debtor's assets free and clear of all liability meant that the buyer acquired the assets free of the debtor's payroll experience for the purpose of calculating unemployment insurance premiums.

Discharge, Dischargeability & Dismissal

282. *In re Pazdzierz*,

[718 F.3d 582](#) (6th Cir. 2013)

Title company that received an assignment of promissory notes could assert that the maker's obligation was nondischargeable under § 523(a)(2)(B) based on the assignor's reasonable reliance on the maker's misrepresentations.

283. *In re Gunsteen,*[487 B.R. 887](#) (Bankr. N.D. Ill. 2013)

Bank did not act reasonably in relying on specific information listed on second page of guarantors' financial statement that was contradicted by summary on first page. Earlier financial statement that listed vacation home among property owned and correctly stated its value was not misleading even though the guarantors had already received payment in connection with an agreement to sell it to family members for one-quarter of its value.

284. *In re Bradley,*[2013 WL 486789](#) (Bankr. N.D. Ohio 2013)

Secured party did not reasonably rely on debtor's misrepresentations about location of collateralized equipment that the debtor had in fact already sold given that: (i) the security agreement granted the secured party permission to enter the debtor's property to inspect the collateral and to examine the debtor's books; (ii) the auditor who inquired about the collateral ended the inquiry after the debtor said the collateral was at another job site even though by then the secured party knew that the debtor had previously lied about selling collateral.

285. *In re Marshall,*[497 B.R. 3](#) (Bankr. D. Mass. 2013)

Consignee of stone slabs that sold them and did not use the proceeds to pay the consignor "embezzled" the proceeds within the meaning of § 523(a)(4) – which requires the fraudulent appropriation of property for a use other than which it was entrusted – and thus was not discharged of the debt owed to the consignor. No discussion of the application of Article 9 to the consignment relationship.

286. *In re Roden,*[488 B.R. 736](#) (Bankr. N.D. Ala. 2013)

Manager and sole employee of LLC that originated and serviced equipment leases willfully and maliciously injured the bank to which the leases had been sold by commingling the rental payments received with the proceeds of leases assigned to other lenders in an effort to spread the losses among all lenders. The manager knowingly and consciously took this action in violation of the bank's security agreements, wrongfully and without just cause.

287. *In re Blair,*[2013 WL 2154795](#) (Bankr. E.D. Tenn. 2013)

Individual who owned and controlled insurance agency and who guaranteed its debts willfully and maliciously injured finance company that had a perfected security interest in the agency's commissions and deposit account after receiving notice of default because she: (i) intentionally redirected commissions away from the deposit account into a newly created deposit account; (ii) did not enter into a control agreement for the new deposit account; (iii) used the deposited funds to pay personal expenses; (iv) changed the name of the agency in an effort to hide the commissions.

288. *In re Hoerr,*[2013 WL 1176081](#) (Bankr. C.D. Ill. 2013)

Farmer who, after losing his lease of farmland, sold collateralized farm equipment but failed to remit the excess proceeds to the junior secured party did not willfully and maliciously injure the secured party or its security interest. The farmer did not hide the sale and he testified credibly that his purpose in selling the equipment was to reduce his indebtedness to the senior secured party and that he did not think that the junior secured party had an interest in the equipment or a right to the excess proceeds.

289. *In re Rezykowski,*[493 B.R. 713](#) (Bankr. E.D. Pa. 2013)

Individual debtor who conducted a liquidation sale of the inventory of the LLC she purchased and then used the segregated sales proceeds to pay herself back wages instead of paying the seller of the LLC, who held a security interest in the inventory, willfully and maliciously injured the seller by converting those proceeds. The amount of the debt equal to the amount of converted proceeds was therefore nondischargeable.

290. *In re Jaynes,*[489 B.R. 315](#) (Bankr. S.D. Ga. 2013)

Summary judgment denied on whether debtors' debt to unperfected secured party was nondischargeable under § 523(a)(6) due to debtor's sale of the collateral because there was a factual dispute about whether, due to the debtors' close relationship to the secured party, the secured party knew of and, in effect, consented to the sale of the collateral or at least released its interest in the collateral.

291. *In re Wood,*[503 B.R. 705](#) (Bankr. W.D. Wis. 2013)

The obligation of an individual who owned and controlled an entity that operated two gasoline stations and who had guaranteed its debts to a supplier was not nondischargeable under § 523(a)(4) due his misrepresentation, in connection with the grant of a security interest to the supplier, that the entity owned the pumps at both locations, because the evidence indicated that the individual was simply mistaken about the entity's ownership at one of the locations. The debt was partially nondischargeable under § 523(a)(6) because the individual posted signs on the pumps directing customers not to use credit or debit cards so as to prevent sale proceeds from going to deposit account controlled by the supplier.

Avoidance Powers

– Preferences

292. *In re Stinson Petroleum Co., Inc.*,

[506 F. App'x 305](#) (5th Cir. 2012)

Trustee had failed to prove prima facie case for preference avoidance against bank that received wire transfers after it extended provisional credit based on deposited checks that were dishonored because the bank had a security interest in the checks under § 4-210(a) and therefore might have been fully secured, in which case the wire transfers would not have enabled the bank to receive more than it would have had they not been made and the debtor's assets liquidated in Chapter 7.

293. *In re LDB Media, LLC*,

[497 B.R. 332](#) (Bankr. M.D. Fla. 2013)

Lender's security interest in the debtor's vehicles that was not noted on the certificates of title until the preference period was avoidable even though the certificates did not identify the debtor as owner until then. The lender could have insisted earlier that the debtor retitle the vehicles so that the lender could be added to the certificates.

294. *In re Gulf Fleet Holdings, Inc.*,

[485 B.R. 329](#) (Bankr. W.D. La. 2013)

Because preferred ship mortgage had priority over any maritime lien held by the supplier of capstans that were installed on vessels, and the preferred ship mortgagee was undersecured, prepetition payments to supplier did have preferential effect and satisfied the elements of § 547(b). Factual issues on the applicability of preference defenses prevented summary judgment on those defenses.

295. *Capmark Financial Group Inc. v. Goldman Sachs Credit Partners L.P.*,

[491 B.R. 335](#) (Bankr. S.D.N.Y. 2013)

Allegations that lender group: (i) held positions in two widely syndicated credit facilities with the debtors; (2) one served as documentation agent for one of the credit facilities and joint lead arranger and bookrunner on the other; and (3) took part, along with other lenders, in a secured credit transaction with the debtors were insufficient to suggest that the group had a "close" relationship with the debtors or exercised anything resembling the high level of control required to be deemed non-statutory insiders.

296. *In re Agriprocessors, Inc.*,[490 B.R. 852](#) (Bankr. N.D. Iowa 2013)

Bank's provisional settlement of checks drawn by customer and which created an intraday overdraft in debtor's account did not result in a debt by the customer and thus customer's wire transfers to the bank before the midnight deadline and the bank's transfer of funds from another account to cover that overdraft was not a payment on account of an antecedent debt. However, bank was not entitled to summary judgment because factual issues remained about whether the bank had a special relationship with the customer that altered this basic rule and on what overdrafts had gone beyond the midnight deadline and thus were true debts that the customer may have repaid in a preferential manner.

297. *In re John A. Rocco Co., Inc.*,[2013 WL 5273212](#) (Bankr. D.N.J. 2013)

Wholesale insurance broker that sent payment to the debtor's clients after receiving checks from the debtor and then, after the checks were dishonored, received a wire transfer in reimbursement from the debtor was a mere conduit and thus had no preference liability for the wire transfer even though it occurred during the preference period. In an earlier decision involving a different preference defendant, the court rejected the conduit defense because the transferee had intentionally advanced funds prior to payment from the debtor. [2013 WL 1867909](#) (Bankr. D.N.J. 2013).

298. *In re Tusa-Expo Holdings, Inc.*,[496 B.R. 388](#) (Bankr. N.D. Tex. 2013)

Although payments of accounts were deposited into lock box that was swept daily by senior secured party, the funds subsequently released to the debtor by the senior secured party were indirect proceeds of accounts and thus part of the junior secured party's collateral. The transfer of those funds to the junior secured party was therefore a transfer of collateral and could not be preferential even though the junior secured party was undersecured.

299. *In re Alabama Aircraft Industries, Inc.*,[2013 WL 6332688](#) (Bankr. D. Del. 2013)

For the purpose of preference analysis, prepetition payment to insurance premium financier has no preferential effect if financier was fully secured by unearned premiums on the date the transfer was made, not the date the bankruptcy petition was filed.

300. *In re Vassau*,[499 B.R. 864](#) (Bankr. S.D. Cal. 2013)

Payments to oversecured senior lienor benefitted junior undersecured lienor and were therefore avoidable even though most trustees would – and the trustee in this case did – abandon the collateral with the result that the transfer increased the junior lienor's secured claim and reduced any distributions on its unsecured claim.

301. *In re Friedman's Inc.*,

[738 F.3d 547](#) (3d Cir. 2013)

Post-petition payments to a preferred creditor do not reduce the creditor's new value defense under § 547(c)(4).

– Fraudulent Transfers

302. *In re Fitness Holdings International, Inc.*,

[714 F.3d 1141](#) (9th Cir. 2013)

Bankruptcy courts may re-characterize debt as equity if, under applicable state law, the investment would be treated as equity. As a result of such re-characterization, repayment might be a constructively fraudulent transfer.

303. *In re Doctors Hosp. of Hyde Park, Inc.*,

[2013 WL 3779657](#) (Bankr. N.D. Ill. 2013)

Subsidiary created as bankruptcy-remote entity to facilitate securitization of accounts was truly a separate entity for fraudulent transfer purposes because corporate formalities were observed and it performed the limited purpose for which it was formed, even though the entity did not have a staff, an office, a business or stationary. The transfer of receivables to the entity was a true sale of accounts because the originator did not retain any risk of loss.

304. *In re Consolidated Meridian Funds*,

[487 B.R. 263](#) (Bankr. W.D. Wash. 2013)

Ponzi scheme investor whose loan was repaid with interest prepetition gave value only to the extent of the investor's initial investment – the amount of the loan – not as to the interest thereon, and thus the investor, if in good faith, has a defense to avoidance only to that extent.

305. *In re Tanglewood Farms, Inc. of Elizabeth City*,

[487 B.R. 705](#) (Bankr. E.D.N.C. 2013)

Trustee stated a claim for a constructively fraudulent transfer by alleging that insolvent corporation signed promissory note and granted a security interest in its harvested corn to secure a loan made to the corporation's owners. Trustee also stated a claim for a constructively fraudulent transfer with respect to subsequent payment made by the corporation because, if the obligation itself is avoided, payments on account of it cannot be in exchange for debt satisfaction since no debt would exist.

306. *Dietz v. Spangenberg*,

[2013 WL 4610530](#) (D. Minn. 2013)

Trustee stated claim for an actually fraudulent transfer in connection with purchase of secured notes by parties related to the debtor and their subsequent acquisition of the collateral at a collusive foreclosure sale. The trustee also stated a claim for a constructively fraudulent transfer because the creditors filed a proof of claim for the full amount of the debt, suggesting that they acquired the collateral at the foreclosure sale for nothing, a fact consistent with one of the two bills of sale.

307. *In re Mortgage Store*,

[2013 WL 6196004](#) (Bankr. D. Haw. 2013)

Bank that received in good faith wire transfers from a corporation in partial payment of a debt of its sole shareholder, which the shareholder orchestrated with the intent to defraud the corporation's creditors, did not give value *to the corporation* because the corporation was not liable on the debt. As a result, the bank was not entitled to a defense to liability under the Hawaii's enactment of the Uniform Fraudulent Transfer Act. No discussion of § 8(a).

– Liens Impairing Exemptions

308. *In re Nickeas*,

[503 B.R. 453](#) (Bankr. W.D. Wis. 2013)

Debtor's liquor license is not a tool of trade and thus the debtor could not avoid a security interest in the license under § 522(f)(10)(B).

309. *In re Chastagner*,

[498 B.R. 376](#) (Bankr. S.D. Ga. 2013)

Because the debtor who, prepetition, had entered into a car title pawn transaction, failed to redeem his car before the expiration of the redemption period, as extended by § 108(b), ownership of the car passed to the pawn broker. Thus, the debtor could not use § 522(f) to avoid the pawn broker's lien to the extent that it impaired the debtor's exemptions.

– Protection for Settlement Payments

310. *Grede v. FCStone, LLC*,

[485 B.R. 854](#) (N.D. Ill. 2013)

While § 546(e) does insulate from avoidance commodity broker's sale of security to a buyer it does not insulate the subsequent distribution to the sale proceeds to a customer in a redemption transaction because that would create the very type of systemic market risks that § 546(e) is intended to prevent by allowing the broker to favor some customers over others, particularly when all the customers – those favored and those not – are financial institutions whose inability to recover might cause systemic damage.

311. *In re Quebecor World (USA) Inc.*,
[719 F.3d 94](#) (2d Cir. 2013)

The purchase for \$376 million of privately placed notes shortly before bankruptcy was a “transfer . . . in connection with a securities contract,” and therefore immune from avoidance as a preference under § 546(e), because it was to a financial institution serving as trustee for the noteholders. Even if a redemption would not qualify under this provision, because the purchase was made by a subsidiary of the issuer, the transaction was a purchase, not a redemption. It was unnecessary to determine whether the transfer also qualifies as a “settlement payment.”

Equitable Subordination

312. *In re Wilson*,
[498 B.R. 913](#) (E.D. Wis. 2013)

Claim of trust controlled by debtor that prepetition released its allegedly unperfected security interest in the debtor’s life insurance policies would not be equitably subordinated merely because the release enabled the debtor to exempt the policies. The trust’s conduct did not fit within any of the general paradigms of inequitable conduct toward other creditors. Instead, it was the debtor who used his insider relationship with the Trust to gain an advantage for himself; the trust was made worse off because it went from having an arguable security interest in the life insurance policies to having an unsecured claim.

Reorganization Plans

313. *In re Thoburn Limited Partnership*,
[2013 WL 3993029](#) (Bankr. E.D. Va. 2013)

Banks with security interests in note were entitled to vote the claim against the maker and to make the § 1111(b) election in the maker’s bankruptcy case because the payee’s obligation secured by the note was in default at the time of the maker’s bankruptcy petition. No discussion of whether or how to allocate voting and election rights.

314. *In re Lower Bucks Hospital*,
[488 B.R. 303](#) (E.D. Pa. 2013)

Bankruptcy court did not err in refusing to approve as party of debtor’s reorganization plan a provision that released from liability to bondholders the indenture trustee which failed to maintain perfection of the security interest supporting the bonds because the release was inadequately disclosed and there was no evidence that the indenture trustee provided consideration to the bondholders for it.

315. *MER, LLC v. Comerica Bank*,

[2013 WL 539747](#) (D. Colo. 2013)

Clause in confirmed plan of reorganization authorizing the debtor to “investigate and prosecute or abandon all Causes of Action” belonging to the estate did not give the debtor the authority to assign any cause of action. Additional clause authorizing the debtor to “settle, discontinue, abandon, dismiss or otherwise resolve” causes of action with bankruptcy court approval was inapplicable because no such approval was requested or received. Accordingly, putative assignee of debtor’s claim against bank had no standing.

316. *In re Chickosky*,

[498 B.R. 4](#) (Bankr. D. Conn. 2013)

Chapter 12 debtors whose home and farm property cross-collateralized business and personal loans could not remove the cross-collateralization without the secured party’s consent.

Other Bankruptcy Matters

317. *In re B & M Land and Livestock, LLC*,

[498 B.R. 262](#) (Bankr. D. Nev. 2013)

Sole member of LLC who had filed for relief under Chapter 7 lacked authority to file a bankruptcy petition on behalf of the LLC because upon the filing of the member’s bankruptcy petition, the Chapter 7 trustee automatically acquired the right to manage the LLC without the need to take further specific action.

318. *In re American Roads LLC*,

[496 B.R. 727](#) (Bankr. S.D.N.Y. 2013)

The holders of \$162.5 million in senior secured bonds issued in an insured unitranche transaction did not have standing to participate in the debtor’s bankruptcy proceeding because the insurer, as the collateral agent, was the sole secured party and the financing documents included “no action” clauses that unambiguously prevent the bondholders from asserting any claims to collateral or enforcing any rights against the debtors.

319. *In re American Home Mortgage, Holdings, Inc.*,

[501 B.R. 44](#) (Bankr. D. Del. 2013)

A creditor’s contractual right to setoff its obligations to the debtor under a swap agreement against obligations owed by the debtor to an affiliate of the creditor under a repurchase agreement is not enforceable post-petition. A triangular setoff lacks mutuality and is, therefore, not authorized under the Bankruptcy Code.

320. *In re Kline*,
[2013 WL 587339](#) (Bankr. D. Or. 2013)
In part because three leases of commercial real estate and asset purchase agreement, all executed simultaneously, had severability clauses, Debtor could assume one lease while rejecting the others and without paying the balance due under the purchase agreement even though the leases and purchase agreement had cross-default clauses.
321. *In re Tires N Tracks, Inc.*,
[498 B.R. 201](#) (Bankr. N.D. Ill. 2013)
Although judgment creditor with a citation lien under Illinois law – created by serving a citation to discover asserts – initially had priority over another judgment creditor with a later citation lien, it lost that priority when, after the debtor filed for bankruptcy protection, it released the citation. The creditor’s release of the citation lien was not mandated by the automatic stay, and hence was voluntary, and the Bankruptcy Code did not fix priorities as of the petition date.
322. *In re WM Six Forks, LLC*,
[502 B.R. 88](#) (Bankr. E.D.N.C. 2013)
Secured party’s \$37 million credit bid at a § 363 sale was a “disbursement” under 28 U.S.C. § 1930(a)(6) and thus obligated the debtor to pay \$30,000 in quarterly fees.

GUARANTIES & RELATED MATTERS

323. *McLane Foodservice, Inc. v. Table Rock Restaurants, LLC*,
[736 F.3d 375](#) (5th Cir. 2013)
Guaranty agreement that covered “any and all indebtedness . . . to Creditor now or hereafter existing” and “Creditor” as a specified entity and its affiliates did cover credit extended by a second-generation assignee of the Creditor even though the guaranty agreement also provided that it shall inure to the benefit of and be enforceable by Creditor’s assigns.
324. *Webster Capital Finance, Inc. v. Newby*,
[2013 WL 3989557](#) (D. Kan. 2013)
Borrower defaulted by, among other things, failing to pay installments that guarantors later paid and by filing for bankruptcy protection. Section 365(e)(1) invalidates *ipso facto* clauses only in executory contracts and unexpired leases – a guaranty is neither – and only in contracts with the debtor.
325. *Sovereign Bank v. O’Brien*,
[2013 WL 959301](#) (D.R.I. 2013)
Guaranty agreement that required bank to “have pursued and exhausted all of its available remedies against Borrower” before seeking payment from guarantor and did not have to forbear for longer than it did to allow the borrower to reach its maximum going concern value. Forbearance is not a remedy.

326. *Series AGI West Linn of Appian Group Investors DE LLC v. Eves*,
[158 Cal. Rptr. 3d 193](#) (Cal. Ct. App. 2013)

Term in guaranty providing that the obligation “may only be collected from assets not expressly excluded” in schedule 1, which listed the guarantor’s residence in Italy, did not prevent attachment on the cash proceeds of the residence that the debtor retained after selling it.

327. *KFC Corp. v. Wagstaff*,
[502 B.R. 484](#) (W.D. Ky. 2013)

Individuals who guaranteed the full and prompt payment of franchisees’ debts to franchisor, but did not promise the full performance of all agreements, obligations, or covenants, were not bound by forum-selection clause in the promissory notes that they did not sign. This conclusion was further supported by the fact that: (i) the notes contained both a choice-of-law and choice-of-forum clause but the guarantees contained only the former; and (ii) the guarantees were signed three months before the notes.

328. *Frankford Crossing Shopping Center Dallas, Tx. Ltd. Partnership v. Pho Partners, LLC*,
[942 F. Supp. 2d 366](#) (W.D.N.Y. 2013)

Individual guarantor who, contemporaneously with the execution of a commercial lease, executed a broadly worded guaranty covering “the full and faithful performance and observance of all the covenants, terms, and conditions of the Lease” was bound by the forum-selection clause in the lease. Forum-selection clause that required disputes to be determined by “the state, county or city courts in which Owner’s principal office is located,” rather than “court in the state, county, or city in which Owner’s principal office is located” did not permit litigation in federal court.

329. *Kohner Properties, Inc. v. SPCP Group VI, LLC*,
[408 S.W.3d 336](#) (Mo. Ct. App. 2013)

Although parties to guarantor’s pledge agreement were bound by arbitration clause in the loan agreement because both the pledge agreement and the loan agreement treated the pledge agreement as a “Loan Document” covered thereby, the creditor’s claim was for ancillary remedies outside the scope of the arbitration clause.

330. *CresCom Bank v. Terry*,
[2013 WL 5495301](#) (D.S.C. 2013)

Guaranty providing that it was to be governed by “the laws of the State in which it was executed” was patently ambiguous given that it could have been – and was – signed by the guarantor in Georgia but delivered to the creditor in South Carolina. Because ambiguous agreements are construed against the drafter – in this case, the creditor – Georgia law controlled.

Although the guaranty imposed liability for attorney’s fees incurred by the creditor in enforcing the guaranty, because the creditor did not comply with the Georgia statute that requires a creditor to notify the debtor after default of the debtor’s liability for attorney’s fees and to provide ten days to repay the debt, the attorney’s fees clause was unenforceable.

331. *Westfield Ins. Co. v. Talmer Bancorp*,
[2013 WL 5812027](#) (6th Cir. 2013)
Bank with security interest in stolen inventory had no claim against insurer that sent a check to the debtor even though the bank was designated as loss payee because the debtor had fraudulently represented to the insurer that there were no liens and, pursuant to a clause in the insurance contract, that fraud voided the insurance policy.
332. *BancInsure, Inc. v. Highland Bank*,
[2013 WL 5340887](#) (D. Minn. 2013)
Bank had no claim against its insurer for forged guaranty of equipment lease because the bank knew that the putative guarantor had a negative net worth, and thus the loss did not result from the forgery.
333. *In re Brodkey Brothers, Inc.*
[2013 WL 5636484](#) (Bankr. D. Neb. 2013)
Clause in guaranty agreement by which the guarantors “subordinate[d] the debt obligations owing to them by the Company . . . to all existing and future indebtedness of the Company” did not encompass payments on the guaranty itself and thus, even if third parties had standing to raise the issue, this clause did not bar the guarantors’ right to be subrogated to the creditor’s lien. Another clause in the guaranty agreement by which the guarantors waived subrogation rights applied only until the obligations had been paid, which they now were.
334. *Republic Bank of Chicago v. 1st Advantage Bank*,
[999 N.E.2d 9](#) (Ill. Ct. App. 2013)
Because the mortgage executed by guarantors secured the principal debt, not the guaranty, the creditor’s credit bid of the full amount of the debt discharged the entire debt, leaving nothing due from the principal obligor.

LENDING, CONTRACTING & COMMERCIAL LITIGATION

335. *Weinreb v. Fannie Mae*,
[993 N.E.2d 223](#) (Ind. Ct. App. 2013)
Nonrecourse carve-out provisions in note and guaranty that made maker and guarantor liable upon the occurrence of specified events do not constitute liquidated damages provisions because they merely establish the terms and conditions of personal liability and permit the lender to recover the damages actually sustained. As a result, the carve-out provisions were enforceable.

336. *FNMA v. CG Bellkor, LLC*

[2013 WL 5820286](#) (E.D. Va. 2013)

Nonrecourse carve-out provisions in \$8.3 million note and guaranty that made maker and guarantor liable upon a transfer of the mortgaged property, defined to include the involuntary creation of a lien, were triggered when the city imposed utility liens on the property for approximately \$100,000, and thus the maker and guarantor were liable for the full amount of the deficiency following foreclosure.

337. *Bay Venture Elyria, LLC v. Advanced Plastics Reclaiming, LLC,*

[2013 WL 6568795](#) (N.D. Ohio 2013)

Note holder had a good faith belief that the prospect for payment was impaired, and therefore could accelerate the debt, because the maker lost its capital funding, had liquidated the equipment connected with its plant, and ceased operations there. The fact that the note holder waited 18 months to accelerate the debt was immaterial because the note contained a “no waiver” provision, which is enforceable under New York law. A clause in the limited guaranty providing that it would become a full guaranty if a representation that all patent applications had been disclosed was not true was enforceable. Because the guaranty agreement expressly stated that the representation was material and that the note holder had relied upon it, the parol evidence rule barred evidence of an alleged oral agreement not to list certain other patent applications.

338. *Summa Humma Enterprises, LLC v. Fisher Engineering,*

[2013 WL 57042](#) (D.N.H. 2012)

Clause in the Terms of Sale mandating that litigation occur in Maine to resolve any dispute concerning either the products sold or the Terms of Sale did not conflict with the parties’ Purchase and Security Agreement, in which the buyer merely consented to jurisdiction in Maine. As a result, even though the Purchase and Security Agreement expressly controlled in the event of conflict with the Terms of Sale, the mandatory choice-of-forum clause applied.

339. *Ralls Corp. v. Terna Energy USA Holding Corp.,*

[920 F. Supp. 2d 27](#) (D.D.C. 2013)

Although security agreement contained no choice-of-forum clause, because the purchase agreement and guarantees executed in the same transaction selected New York as the forum to litigate all disputes, it would be unreasonable not to apply that choice of forum to the debtor’s action to enjoin enforcement of the security interest based on its claim that entire transaction was void *ab initio*.

340. *Speedemissions, Inc. v. Bear Gate, L.P.,*

[404 S.W.3d 34](#) (Tex. Ct. App. 2013)

Action by lessee against lessor, to whom leased realty was transferred one month before the lessee purchased all the stock in the prior owner, was not subject to arbitration clause in the stock purchase agreement because the lease and stock purchase agreements were separate transactions between different parties and did not even reference each other.

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341. *Brennan v. Brennan*,
[2013 WL 6502497](#) (5th Cir. 2013)
Because stockholder entered into a credit sale of his stock with the corporation, rather than a redemption, the stockholder did not retain the right to vote the shares until final payment.
342. *CIT Group/Equipment Financing, Inc. v. Shapiro*,
[2013 WL 1285269](#) (S.D.N.Y. 2013)
Terms in equipment lease that, upon default, allow the lessor to sell the equipment and retain the sale proceeds while also obligating the lessee to pay all future rent and a sum designed to compensate for the drop in value of the equipment was duplicative and unconscionable.
343. *Community Shores Bank v. Rimar Development, Inc.*,
[2013 WL 6690672](#) (Mich. Ct. App. 2013)
Lenders that agreed with bank that the debtor could make payments on the investors' loan as long as the payments were not from the sale of the collateral could not retain the \$260,000 paid to them because the evidence indicated that the funds were proceeds from the debtor's sale of collateral. The bank was not required to apply payments it did receive to the senior indebtedness because the subordination agreement allowed the bank to "take or omit any and all actions with respect to the [bank's loan] . . . without affecting whatsoever" its rights under the agreement and the debtor had instructed the bank to apply the funds to other debt.
344. *Gaia House Mezz LLC v. State Street Bank and Trust Co.*,
[720 F.3d 84](#) (2d Cir. 2013)
Clause in loan agreement providing that time is of the essence made deadlines material and thus the borrower's failure to obtain a temporary certificate of occupancy on the date specified in the agreement was a material breach. As result, the borrower was not entitled to the contractual waiver of \$4 million in accrued interest, even though the lender had waived previous defaults.
345. *Vargas v. Sai Monrovia B, Inc.*,
[157 Cal. Rptr. 3d 742](#) (Cal. Ct. App. 2013)
Arbitration provision in automobile retail sales contract satisfied the two elements of procedural unconscionability – oppression and surprise – because: (i) the buyers were presented with the form on a nonnegotiable, take-it-or-leave-it basis; (ii) the form was a single two-sided page; (iii) the arbitration provision, which was printed on the back, was unnoticeable to buyers who were told where to sign on the front side and were not given an opportunity to see that the form had provisions on the back; and (iv) even though the arbitration provision was referenced on the front, that reference was inconspicuous. The provision was drafted to benefit the seller and was substantively unconscionable because: (i) the losing party could appeal an award in excess of \$100,000 or injunctive relief; (ii) the appealing party must pay in advance the filing fee and both parties' costs while permitting but not requiring the appellate arbitration panel to apportion those costs; and (iii) the provision exempts repossession from arbitration while requiring that other requests for injunctive relief be submitted to arbitration.

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346. *York v. Dodgeland of Columbia, Inc.*,
[749 S.E.2d 139](#) (S.C. Ct. App. 2013)
Arbitration clause in a consumer auto purchase agreement was unconscionable because the agreement was an adhesion contract to which the buyer lacked meaningful choice and the clause was oppressively one-sided because it prohibited the arbitrator from awarding punitive or multiple damages – thereby causing the buyer to waive statutory remedies – and it allowed the seller to exercise judicial remedies even while the buyer was compelled to arbitrate the buyer’s claims. A separate installment agreement that contained an arbitration clause lacking these oppressive terms was not unconscionable even though it banned class actions.
347. *Kolber Properties, LLC v. Evan*,
[2013 WL 3097174](#) (D.N.J. 2013)
Entity that was a lender to and agent of a partnership was not bound by the arbitration clause in the partnership agreement to which it was not a signatory.
348. *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass’n*,
[291 P.3d 316](#) (Cal. 2013)
The fraud exception to the parol evidence rule is not limited and can include fraud directly at variance with a promise in the writing.
349. *Adelaar v. Sprout Foods, Inc.*,
[2013 WL 3168663](#) (S.D.N.Y. 2013)
Even though written agreement under which corporation issued shares lacked the allegedly agreed-to “full ratchet anti-dilution” protection and contained a merger clause, the stockholder could admit evidence of mutual mistake to reform the agreement.
350. *DZ Bank AG Deutsche Zentral-Genossenschaftsbank v. Choice*,
[918 F. Supp. 2d 1156](#) (W.D. Wash. 2013)
[2013 WL 2627080](#) (W.D. Wash. 2013) (denying motion for relief from judgment)
Even though loan agreement provided that the lender may, “upon written notice to Borrower, declare Borrower to be in default,” notification of default was not required because the promissory note, which was expressly incorporated into the loan agreement, waived any right to notice of default by stating that the lender was not required to “give notice that amounts due have not been paid” and because the loan agreement stated that, to the extent its terms conflicted with those of the promissory note, “the provision which provides [the lender] most protection and grants [the lender] the greatest rights shall control.”
351. *Tri-State Truck Ins., Ltd. v. First National Bank of Wamego*,
[535 F. App’x 653](#) (10th Cir. 2013)
Loan agreement in which the borrower expressly consented to the lender’s sale of participation interests and to allow the buyers thereof to enforce the debt could be enforced by a buyer of a participation that also became the administrative agent for the loan. However, a related loan agreement that lacked such express consent could not be enforced by the new administrative agent that lacked a participation interest.

352. *Buffets, Inc. v. Leischow*,

[732 F.3d 889](#) (8th Cir. 2013)

Restaurant company that lost \$3.5 million when utility bill processor ceased operations had no claim against processor's banks under the Minnesota version of the Uniform Fiduciaries Act because the bank accounts were titled in the processor's individual name and therefore the banks were not required to inquire whether the processor was breaching an obligation as fiduciary.

353. *St. Luke's Magic Valley Regional Medical Center v. Luciani*,

[293 P.3d 661](#) (Idaho 2013)

Although legal malpractice claims are normally not assignable, they may be transferred to an assignee in a commercial transaction, along with other business assets and liabilities of the client.

354. *White Mountains Reinsurance Company of America v. Borton Petrini, LLP*,

[164 Cal. Rptr. 3d 912](#) (Cal. Ct. App. 2013)

Although legal malpractice claims cannot normally be assigned, assignment is permitted when, as in this case: (i) the assignment of the legal malpractice claim is only a small, incidental part of a larger commercial transaction between insurance companies; (ii) the larger transfer is of assets, rights, obligations, and liabilities and does not treat the legal malpractice claim as a distinct commodity; (iii) the transfer is not to a former adversary; (iv) the legal malpractice claim arose under circumstances where the original client insurance company retained the attorney to represent and defend an insured; and (v) the communications between the attorney and the original client insurance company were conducted via a third party claims administrator.

355. *Oppenheimer & Co., Inc. v. Trans Energy, Inc.*,

[946 F. Supp. 2d 343](#) (S.D.N.Y. 2013)

Consultant's breach of contract claim against client for whom consultant helped obtain capital financing could not be resolved on summary judgment because the amount of the fee depended on the type of financing obtained and the phrase "equity linked obligations" in the consulting agreement was ambiguous as to whether it meant only a loan whose interest is determined by the percentage of increase or decrease in the market price of the issuer's common stock or also includes a loan accompanied by the issuance of warrants by the borrower to the lenders.

356. *In re Lee's Famous Recipes, Inc.*,

[2013 WL 432480](#) (Bankr. N.D. Ga. 2013)

Lender with senior liens on both real estate and promissory notes could be compelled by the creditor with a junior lien on the real estate to marshal its assets by collecting first from the notes even though that would delay collection by the creditors with junior liens on the notes because those junior lienors remained fully secured.

357. *Middleton v. First National Bank*,

[399 S.W.3d 463](#) (Mo. Ct. App. 2013)

Bank did not have contractual right to setoff certificate of deposit against debt guaranteed by one of the certificate owners because even though the deposit agreement signed by the certificate owners expressly incorporated the terms on Addendum A, and Addendum A expressly provided that the bank had the right to set-off the funds in the CD account against any indebtedness owed by either or both certificate owners, Addendum A was conditioned on the certificate owners “signing this form” which they never did. Because Addendum A expressly referred to the “deposit agreement,” the reference to “this form” must be to something different, and thus was to Addendum A itself.

358. *In re Weinberg*,

[2013 WL 4758220](#) (Bankr. D.N.J. 2013)

Bank did not have right to exercise setoff against escrow account containing insurance proceeds of real estate on which the bank had a mortgage to satisfy an unrelated debt of the depositor to the bank.

359. *Avenue CLO Fund Ltd. v. Bank of America*,

[709 F.3d 1072](#) (11th Cir. 2013)

Clause in credit agreement providing that its provisions were “binding upon and inure to the benefit of the parties hereto and their respective successors and assigns” did not evidence an intent to make the Term Lenders third-party beneficiaries of the Revolving Lender’s promise to lend. Clause giving Term Lenders a security interest in deposit account into which Revolving Lender’s loan was to be placed made the Term Lenders incidental beneficiaries of the Revolving Lender’s promise to lend, not intended or third-party beneficiaries. Thus, the Term Lenders lack standing to enforce the Revolving Lender’s promise.

360. *Avenue CLO Fund, Ltd. v. Sumitomo Mitsui Banking Corp.*,

[723 F.3d 1287](#) (11th Cir. 2013)

Pursuant to terms of Disbursement Agreement, disbursing agent had no duty to investigate or verify the borrower’s certification that the requirements or conditions to the disbursement of funds were fulfilled, even if the agent had information inconsistent with the borrower’s certification. However, the disbursing agent could not rely on a certificate if the agent had actual knowledge to the contrary and had a duty to determine whether conditions not covered by the borrower’s certificates were satisfied. Trial court erred in granting summary judgment for disbursing agent on lenders’ claim for breach of the Disbursement Agreement because material facts were in dispute about whether events could reasonably be expected to have a Material Adverse Effect and whether the disbursing agent had actual knowledge of this fact when it disbursed funds. For the same reason, summary judgment was not appropriate on the lenders’ claim against the disbursing agent for gross negligence.

361. *Nassau Beekman, LLC v. Ann/Nassau Realty, LLC*,
[960 N.Y.S.2d 70](#) (N.Y. App. Div. 2013)

Pursuant to NY Gen. Oblig. Law § 15-301, a term in a written agreement providing that the agreement cannot be modified except by a writing signed by the party against whom enforcement is sought is enforceable. As a result, an agreement for the sale of real estate containing such a clause could not have been modified by an alleged oral promise to extend the closing date. While partial performance of an alleged oral modification can circumvent the requirement of a writing, such partial performance must be unequivocally referable to the modification, and that was not the case here. Moreover, the parties' history of agreeing to mutually acceptable written modifications did not justify reliance on an assumption that they would be able to agree on the necessary written modification in the future.

362. *Hyde & Hyde, Inc. v. Mount Franklin Food, LLC*,
[523 F. App'x 301](#) (5th Cir. 2013)

Lessor's assignment of "all of its rights and interests" in specified equipment did not include claim for conversion of the equipment.

363. *Mayfair Wireless LLC v. Celico Partnership*,
[2013 WL 4657507](#) (D. Del. 2013)

Putative owner of patent could not enforce it because there were two unsubstantiated links in the chain of title. First, there was no bill of sale demonstrating that a secured party purchased the patent application at a public sale, and thus no one taking from that secured party could prove ownership. Second, a subsequent secured party (who also allegedly purchased the patent at a public sale after default) purportedly received its security interest when the parent company of the putative owner authenticated a security agreement, but even if state law permits a parent company to encumber the assets of its subsidiary, the Patent Act requires written evidence of assignment from the patent holder, and there was none.

364. *California Bank & Trust v. Piedmont Operating Partnership*,
[161 Cal. Rptr. 3d 167](#) (Cal. Ct. App. 2013)

Because landlord's claim for future rent of lessee bank was cut off by FIRREA once the FDIC took over the bank and disaffirmed the lease, the landlord had to repay to the FDIC's assignee amounts the landlord later received by drawing on secured letter of credit to cover the future rent.

365. *VLM Food Trading Intern., Inc. v. Illinois Trading Co.*,
[2013 WL 816103](#) (N.D. Ill. 2013)

Term in invoice from potato wholesale to buyer providing for interest and attorney's fees on unpaid amounts became part the parties' agreement under § 2-207(2) even though wholesaler sent the invoice after the buyer sent a purchase order, wholesaler responded with a confirmation, and the wholesaler shipped the goods, because the term was not a material addition. No discussion or recognition of the fact that the agreement was formed prior to sending the invoice.

366. *Sikorsky Financial Credit Union, Inc. v. Butts*,
[75 A.3d 700](#) (Conn. Ct. App. 2013)

Lender on car loan was entitled in post-judgment interest at the legal rate, not the much higher default rate under the contract, because the contract did not expressly provide for post-judgment interest at that rate.

367. *Tricon Energy Ltd. v. Vinmar Intern., Ltd.*,
[718 F.3d 448](#) (5th Cir. 2013)

While arbitrators may award post-judgment interest at a rate higher than the federal judgment rate, they must do so expressly and an award of “post-award” interest at 8.5% “until paid” was not sufficiently to require post-judgment interest at anything other than the federal rate.

368. *In re Pilgrim’s Pride Corp.*,
[706 F.3d 636](#) (5th Cir. 2013)

Promissory estoppel claim brought by chicken growers against poultry company for terminating contractual relationship after growers had invested substantial sums to upgrade their own facilities in reliance on statements by the poultry company that it “was committed to [the] growers for the long run” was barred by the existence of a contract between the parties covering the same subject

369. *Hunt v. Kadlick*,
[2013 WL 4659772](#) (D. Md. 2013)

Creditor was not entitled to summary judgment on promissory note that called for payment in installments beginning thirty days after the borrowers opened their nightclub because the nightclub had not yet opened. The debtor was not entitled to summary judgment because default can be triggered if payment is not made in a reasonable time after failure of the specified event, and factual issues existed on the reasonableness of debtor’s efforts to open and whether a reasonable amount of time of time had passed.

370. *Davis v. Carroll*,
[937 F. Supp. 2d 390](#) (S.D.N.Y. 2013)

Summary judgment granted to consignor of artworks in action against dealer who purchased them from the consignee because the dealer did not qualify as a buyer in ordinary course of business. Despite red flags to the dealer – including mixed signals about ownership of the artworks, pricing at less than one-third of fair market value, and the unusualness of a clearance sale in consigned goods – the dealer’s limited due diligence of inspecting the consignee’s provenance, conducting a physical exam of the artworks, and searching for filed financing statements was not a commercially reasonable response to those red flags.

371. *Alabama Powersport Auction, LLC v. Wiese*,
[2013 WL 5966771](#) (Ala. 2013)

Auctioneer that was a merchant could be held liable for a breach of the implied warranty of merchantability if the auctioneer failed to disclose the owner for whom the auctioneer was selling the go-cart.

372. *Challenger Gaming Solutions, Inc. v. Earp*,
402 S.W.3d 290 (Tex. Ct. App. 2013)

State's proportionate responsibility statute does not apply to fraudulent transfer claims because the fraudulent transfer act enumerates defenses and authorizes both equitable relief and money damages without allowing for the apportionment of responsibility based on fault. Accordingly, the recipient of a fraudulent transfer could not have her liability reduced by the portion of fault allocated by the jury to the payor.

373. *Columbia Community Bank v. Newman Park, LLC*,
304 P.3d 472 (Wash. 2013)

Bank that made \$1.5 million loan to LLC and in return received a deed of trust signed by a member that lacked authority to bind the LLC – but which in doing so had relied on forged operating agreement showing that member to be the only stakeholder – was entitled to be equitably subrogated to the deed of trust of a prior lender whose \$400,000 loan was paid off with the proceeds of the bank's loan. The "volunteer rule" does not apply; equitable subrogation is when the potential subrogee's payment is induced by deceit or fraud.

374. *Teed v. Thomas & Betts Power Solutions, L.L.C.*,
711 F.3d 763 (7th Cir. 2013)

Company that acquired employer's assets as a going concern in sale conducted by receiver was liable as a successor of the employer for overtime pay under the Fair Labor Standards Act.

375. *In re Dayton Title Agency, Inc.*,
724 F.3d 675 (6th Cir. 2013)

Title company did not receive "reasonably equivalent value," within meaning of Ohio fraudulent transfer law, for the payment that it had made from its escrow account without waiting for incoming forged check to clear. The title company did not hold in trust the provisional credits it received to its escrow account from depositing the forged check; although the title company established the escrow and intended to create trust relationship, there was no actual conveyance from client and the credits were the result of the company's contracts with the bank, which did not convey them in trust. As a result, the payments that the title company using the provisional credit from the forged check qualified as a transfer of property of the debtor, which could be avoided.

376. *PNC Bank v. Gator Piqua Partners, LLLP*,
2013 WL 4008807 (S.D. Ohio 2013)

Language in loan agreement by which the lender waived "any right of setoff or recoupment with respect to all assets of Borrower" did not make the secured loan nonrecourse.

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377. *Antioch Co. Litigation Trust v. Morgan*,
[2013 WL 3989575](#) (S.D. Ohio 2013)
Provision in lease between corporation and entity controlled by some of its directors waiving the right to sue for breach of fiduciary duty was not enforceable because the corporation's board of directors did not review the lease or receive a copy of it when it approved the transaction.
378. *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*,
[73 A.3d 934](#) (Del. Ch. 2013)
Amendment to bylaws of publically traded corporation selecting a forum for (i) any derivative action brought on behalf of the corporation or (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the corporation to the corporation or the stockholders was valid.
379. *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*,
[62 A.3d 62](#) (Del. Ch. 2013)
Reverse triangular merger, which leaves target intact but under new ownership, does not constitute an assignment "by operation of law or otherwise" prohibited by the target's patent licenses.
380. *Shao v. Li*,
[975 N.Y.S.2d 710](#) (N.Y. Sup. Ct. 2013)
Assignment of LLC interest in violation of term in LLC operating agreement was a breach but nevertheless valid because the agreement did not state that assignments in violation of the clause were void or invalid.
381. *M & M Investment Group, LLC v. Ahlemeyer Farms, Inc.*,
[994 N.E.2d 1108](#) (Ind. 2013)
State could, without violating due process, issue a deed to a tax sale purchaser even though the mortgagee was not notified of the sale because the mortgagee did not, pursuant to state statute, annually request a copy of any notice of tax sale.