

# **Commercial Law Developments**

**2017**

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## SECURED TRANSACTIONS

### *Scope Issues*

1. *In re Jeff Benfield Nursery, Inc.*,

[565 B.R. 603](#) (Bankr. E.D.N.C. 2017)

Grow contracts pursuant to which a wholesaler of nursery stock delivered trees to the debtor for planting and cultivation on the debtor's leased property were disguised financing arrangements. Although the agreements purported to reserve the nursery's title to the trees and gave the nursery the unilateral right to select the type and number of trees, determine when they would be delivered to the debtor, direct their maintenance and cultivation, and access the debtor's leased property, the arrangements were financing transactions because all of the planting and maintenance costs that the nursery advanced to the debtor were to be repaid in the form of credits when the trees are finally harvested and sold to the nursery and the nursery ultimately purchases trees from the debtor at the lesser of a capped price for the particular variety or the trees' market cost, less all amounts advanced to the debtor as planting and maintenance fees. This formula provides the nursery with the equivalent of interest under a more traditional financing agreement. Additionally, at the end of the agreed term, the debtor is required to repay the nursery all costs advanced for any trees the nursery elects not to purchase. As a result, the nursery recoups all of its advanced costs, in the form of credits or cash payments, for the trees it does not purchase, while the debtor bears all the risk of loss must pay all related insurance costs, fees, and taxes.

2. *In re TSAWD Holdings, Inc.*,

[565 B.R. 292](#) (Bankr. D. Del. 2017)

Because there was a factual issue about whether a retailer was generally known by its creditors to be substantially engaged in selling the goods of others, summary judgment was not appropriate on whether a transaction by which sporting goods were delivered to a retailer for sale was a "consignment" within the meaning of Article 9, and therefore whether the retailer had the power to grant a security interest in the sporting goods. Although the security agreement purported to cover only property owned by the retailer, that limited language would not necessarily prevent the security interest from attaching if the consignment was an Article 9 transaction.

3. *Mellen, Inc. v. Biltmore Loan and Jewelry-Scottsdale, LLC*,

[247 F. Supp. 3d 1084](#) (D. Ariz. 2017), *appeal filed*, (9th Cir. Apr. 4, 2017)

The transaction by which the owner of a 4-carat diamond left the diamond "on memo" with a jeweler was not a consignment within the meaning of Article 9 because the agreement expressly provided "only for examination and inspection by prospective purchasers," and that the jeweler "acquire[d] no right or authority to sell, pledge, hypothecate or otherwise dispose of" the diamond. Consequently, the pawn broker that bought the diamond could not obtain title under § 9-319. Even if the transaction had been a consignment, the pawn broker purchased the diamond not from the jeweler, but from another person who claimed that the jeweler was his agent.

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4. *Silver Creek Farms, LLC v. Fullerton*,  
[2017 WL 8944641](#) (S.D. Fla 2017)  
An agreement for the sale of a stallion, which expressly allowed the seller to reclaim the horse upon the buyer's default in payment and to retain any payments previously made, did not create a security interest because there was no security agreement and the buyer had possession of the horse. The bill of sale was not a security agreement because it does not mention the words "security" or "attachment." Even if the transaction did create a security interest, the seller would still be entitled to reclaim the horse.
  5. *Holland v. Sullivan*,  
[2017 WL 3917142](#) (Tenn. Ct. App. 2017)  
A transaction structured as a sale of an automobile for \$30,000 with an option to repurchase, with the putative seller retaining possession and the buyer receiving the certificate of title was really a loan and a secured transaction with the automobile as collateral.
  6. *In re Kittusamy, LLP*,  
[2017 WL 957152](#) (9th Cir. BAP 2017)  
Equipment leases under which the lessee had the option to purchase the equipment for \$1.00 at the end of the lease term were sales with a retained security interest. Consequently, the assignee of the lessor had no administrative expense claim for postpetition rent.
  7. *In re Price*,  
[577 B.R. 643](#) (Bankr. E.D.N.C. 2017)  
The debtor's four trailer leases, each of gave the debtor no right to terminate but an option to buy the trailer at the end of the lease term for \$1, were sales and secured transactions.
  8. *Cozzetti v. Madrid*,  
[2017 WL 6395736](#) (Alaska 2017)  
A 53-month lease of a mobile home pursuant to which the lessee would become the owner if he made all the payments was a sale and secured transaction. Accordingly, the putative lessor, by representing in a forcible detainer action that the debtor had only a leasehold interest violated the Unfair Trade Practices Act.
  9. *Lyon Financial Services, Inc. v. Illinois Paper and Copier Co.*,  
[247 F. Supp. 3d 923](#) (N.D. Ill. 2017)  
A six-year lease of copier equipment with an option to purchase at the end of the lease term for fair market value was a sale with a security interest, not a true lease, because the value of the equipment at the end of the lease term would be nominal, indicating that the lease term equaled or exceeded the economic life of the goods and that the option price would be nominal consideration. Even if the value of the equipment would not be nominal at the end of the lease term, it would still be less than the cost of relocating the equipment, which the lessee was obligated to pay. Although the lessee, a public entity, had a right to terminate pursuant to a non-appropriation clause, a factor suggestive of a true lease, that right was available only in extremely limited circumstances.

10. *In re Lasting Impressions Landscape Contractors, Inc.*,  
[2017 WL 4127833](#) (Bankr. D. Md. 2017)

The debtor's five truck leases were sales with a retained security interest because the lease agreements provided that upon expiration of a lease, if either the lessor or the debtor sells the goods, the lessor must receive the Assumed Residual, with the debtor entitled to any surplus and liable for any deficiency. Although the master lease was unclear, the same apparently applies if the debtor terminates the lease early or retains the trucks after expiration of the leases. Consequently, the lessor did not retain a meaningful reversionary interest in the trucks. Moreover, these provision effectively gave the debtor the right to purchase the trucks at the end of the lease term – at which time they would have a useful life of 5-10 years – by paying rent equal to 5½ months.

11. *In re Johnson*,  
[571 B.R. 167](#) (Bankr. E.D.N.C. 2017)

The debtor failed to prove that his 57-month lease of a storage shed that remained unattached to the land was a sale. Although the debtor had the right to purchase the shed at any time for 65% of the remaining rental payment, because the debtor had the right to terminate the agreement at any time the transaction failed the bright-line test for a sale and retained security interest under § 1-203(b). Because the debtor provided no evidence about the value of the shed, the court could not conclude that the option price was nominal or that the debtor was building up equity in the shed

12. *Stanley v. Pawnee Leasing Corp.*,  
[2017 WL 2686294](#) (Ind. Ct. App. 2017)

A finance lease of a screen printer would be treated as a true lease, not a sale and security interest, given that the lessee made no effort to apply § 1-203, such as by arguing that the lease term exceeded the economic life of the goods or that the purchase option was for nominal consideration. Consequently, the lessor was not subject to the stricter notification requirements in Article 9 before selling the printer after the lessee defaulted.

13. *In re Jack*,  
[2017 WL 3225977](#) (Bankr. M.D. Fla. 2017)

A rental-purchase agreement for home furniture with an initial term of two months and an option to renew was a true lease because the Florida Rental–Purchase Agreement Act expressly states that an agreement of an individual to lease personal property for household use for an initial period of four months or less is a true lease and is exempt from Article 9, even if the lease is automatically renewed with each rental payment.

14. *In re Voboril*,[568 B.R. 797](#) (Bankr. E.D. Wis. 2017)

The debtor's assignment of his right to receive renewal commissions was not the assignment of a single account in satisfaction of a preexisting indebtedness, excluded from the scope of Article 9 under § 9-109(d)(7), because the agreement was expressly to provide "collateral security" for the debtor's existing and future debts to the secured party, not an outright sale of the account. Accordingly, filing a financing statement was necessary to perfect and, because the secured party did not file, the security interest was unperfected.

15. *Hemmy v. Midland Funding LLC*,[2017 WL 1078632](#) (D. Haw. 2017)

A consumer debtor had no cause of action under Article 9 against the debt collector that sought to enforce the debt because the assignment to the debt collector was for the purpose of collection only, and thus excluded from Article 9 by § 9-109(d)(5).

16. *Department of Transportation v. United Capital Funding Corp.*,[219 So. 3d 126](#) (Fla. Dist. Ct. App. 2017)

A non-uniform provision excepting from the scope of Article 9 a transfer by a governmental entity applies when the transfer is such that it would otherwise be within the scope of Article 9 – that is, when the governmental entity would be the debtor in a secured transaction – not when the transfer is a payment by a governmental entity that is an account debtor. Accordingly, a state department of transportation that paid the debtor after it received notification that the account owed by the department had been sold and an instruction to pay the factor that had bought the account did not discharge its obligation and remained liable to the factor. Sovereign immunity did not bar the factor's action against the department.

***Attachment Issues*****– Existence of Security Agreement**17. *Jipping v. First National Bank Alaska*,[568 B.R. 321](#) (D. Alaska 2017)

Although the debtor's first security agreement with a bank granted the bank a security interest in the debtor's deposit accounts and expressly stated that the security interest would "continue in effect even though all or any part of the Indebtedness is paid in full," because that secured obligation was paid off and the debtor's subsequent security agreement with the bank did not list deposit accounts as collateral and contained a merger clause stating that the subsequent agreement, "together with Related Documents, constitutes the entire understanding and agreement" of the parties, the bank's later loan was not secured by deposit accounts. The original security agreement was not a Related Document because it was not executed in connection with the subsequent loan.

18. *Patterson v. Rough Road Rescue, Inc.*,  
[2017 WL 3138002](#) (Mo. Ct. App. 2017)

Although the adoption agreement for a dog provided that any noncompliance by the owner “may void this contract” and “could” immediately give the rescue service “the authority to take possession” of the dog, that conditional language rendered the agreement ambiguous as to whether full ownership was transferred to the owner. Because the agreement would be interpreted against the drafter, which was the rescue service, the rescue service retained no interest in the dog.

**– Description of the Collateral**

19. *In re Wharton*,  
[563 B.R. 289](#) (9th Cir. BAP 2017)

A promissory note signed by the debtor and stating that “[t]his note is partially secured by 1965 Corvette automobile,” was sufficient to grant the creditor a security interest in the debtor’s corvette.

20. *In re Escoto*,  
[2017 WL 1075046](#) (9th Cir. BAP 2017)

A promissory note that granted a security interest in a dental practice and further pledged “any and all personal possessions holdings and items of value” and granted the lender “the right to remove any and all possessions . . . and to effect garnishment of any paycheck, settlement monies, or other assets without the need of a court order” covered only tangible assets and provided for self-help remedies with respect only to those tangible assets; the collateral did not include the debtor’s rights under a settlement of a lawsuit that the loan was obtained to finance.

21. *In re Edwards*,  
[2017 WL 6754026](#) (Bankr. E.D.N.C. 2017)

A security agreement that described the collateral as a mobile home and “all accessions, attachments, accessories, replacements and additions, . . . whether added now or later” but which also provided that “Lender is not granted, and does not have, a non-purchase money security interest in household goods,” did not encumber the stove, refrigerator, washer, dryer, and air conditioning unit that the debtor purchased separately and installed after delivery of the mobile home.

22. *In re Gracy,*[689 F. App'x 590](#) (10th Cir. 2017)

A manufactured home that was anchored to piers and slabs by metal strips and connected to utilities through underground supplies was a fixture under the common law even though the certificate of title for the home had not been surrendered; the state statute providing that a manufactured home becomes a fixture if placed on a permanent foundation and the certificate of title is surrendered does not prevent a manufactured home from becoming a fixture in other ways.

23. *In re Smith,*[2017 WL 6372471](#) (Bankr. W.D. Ky. 2017)

Two pole barns that the debtor had constructed on his property and which were constructed using pole barn nails, which have rings shanks making removal impossible, were permanent fixtures and thus the mortgagee of the real property had a lien on the insurance proceeds resulting from the destruction of the barns; the barns were not personal property and thus the proceeds were not encumbered by security interests in the debtor's equipment.

24. *The Mostert Group, LLC v. Mostert,*[2017 WL 4700343](#) (Ky. Ct. App. 2017)

Although the term "software" might, in other contexts, include source code, the term did not do so in the security agreement that a newly formed limited liability company executed in favor of one of its members because the parties had differentiated "software" from "source code" in a contemporaneously executed agreement under which the individual contributed "software programs and source codes" to the company.

25. *In re Gabriel Technologies Corp.,*[2017 WL 6016287](#) (Bankr. N.D. Cal. 2017)

The lenders that provided financing for the debtor's unsuccessful tort action against a company did not have a security interest in the subsequent proceeds of a settlement of a malpractice claim against the debtor's counsel because a malpractice claim is not assignable under California, Nevada, and New York law and because even though the security agreement purported to cover "any successor claim or any claim related to [the funded tort claim], derived therefrom or arising thereunder," the malpractice claim was not covered by that language and, even if it were, such language does not satisfy the specificity requirement of § 9-108(e).

26. *In re Life Enhancement Products, Inc.,*[2017 WL 6329696](#) (9th Cir. BAP 2017)

A creditor that had a security interest in the debtor's shares of stock in a corporation, which constitute 99.2% of all the shares, did not have a security interest in the assets of the corporation.

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### – Obligations Secured

27. *Ehrlich v. Commercial Factors of Atlanta*,  
[567 B.R. 684](#) (N.D.N.Y. 2017)

A security agreement covering “all . . . obligations of ours to you, however and whenever created, arising or evidenced, . . . now or hereafter existing or due to become due” was sufficient to cover the debtor’s obligations to the secured party resulting from the phony invoices the debtor sold to the secured party.

28. *Zuklie Investment Firm, LLC v. JDMN, LLC*,  
[2017 WL 1484171](#) (Conn. Super. Ct. 2017)

Because the limited liability company that purchased the assets of a business and authenticated the security agreement did not sign the promissory note, only its member signed as an individual, the LLC had no debt to the seller and the security agreement was void.

29. *South Lafourche Bank & Trust Co. v. M/V NOONIE G*,  
[2017 WL 2634204](#) (E.D. La. 2017)

Although federal law requires that a preferred ship mortgage state “the amount of the direct or contingent obligations,” it is sufficient if the mortgage states the maximum amount that may be secured. Because the mortgage indicated that secures a line of credit up to a maximum principle amount of \$900,000, the mortgage was effective.

### – Rights in the Collateral

30. *United States v. Myers*,  
[2017 WL 412623](#) (D.S.C. 2017)

A lender that purported to receive and perfect a security interest in specified farm equipment and crops grown on leased land was not entitled to summary judgment on its action to obtain the equipment, which as owned by the lessor, because the lessor was not the borrower, had not authenticated the security agreement, and the evidence was conflicting as to whether the lessor had permitted the borrower to use the equipment as collateral.

31. *In re Leonard*,  
[565 B.R. 137](#) (8th Cir. BAP 2017)

Although the bill of sale provided by the seller of cattle to the debtor did not comply with Colorado law because it was not signed by the debtor and it did not list the address for either party, the debtor acquired ownership of the cattle because passage of title is governed by the Colorado UCC, and under the UCC that occurred when the cattle were delivered. Consequently, a lender’s security interest in the debtor’s after-acquired cattle attached to the cattle sold.



32. *United States v. NextGear Capital, Inc.*,  
[677 F. App'x 366](#) (9th Cir. 2017)

Although a secured party had a floating lien on all of the debtor's after-acquired collateral, that security interest did not attach to a vehicle that someone else purchased using the debtor's license to avoid sales taxes. Although the certificate of title identified the debtor as the owner, the debtor did not purchase the vehicle in the ordinary course of the debtor's business, did not receive delivery of the vehicle, and never held the vehicle on its lot for sale.

33. *Lapalco Village Joint Venture v. Pierce*,  
[223 So. 3d 691](#) (La. Ct. App. 2017)

The trial court erred in awarding summary judgment to secured party that sold a walk-in freezer and a walk-in refrigeration that the debtor removed from leased premises and turned over to the secured party. Although the debtor had purchased the freezer to replace a unit that existed at the time the premises were leased, and had replaced the cooling system in the refrigerator, factual issues remained about whether the items were immovable property that belonged to the landlord.

34. *In re Climate Control Mechanical Services, Inc.*,  
[570 B.R. 673](#) (Bankr. M.D. Fla. 2017)

A secured party with a perfected security interest in the accounts of the debtor, a general contractor, encumbered the debtor's right to the amounts withheld but now due under a construction contract. The amounts had not been earmarked for payment of a subcontractor.

#### – Other

35. *In re Delano Retail Partners, LLC*,  
[2017 WL 3500391](#) (Bankr. E.D. Cal. 2017)

A lender with a perfected security interest in the debtor's claims, accounts, general intangibles, chattel paper, deposit accounts, leases, inventory, furniture, fixtures, and equipment did not have a security interest in the proceeds of fraudulent transfer claims because the lender had admitted that the claims were unencumbered in the hands of the trustee and that only the trustee had standing to prosecute those claims. The lender did not have a security interest in funds deposited into the trust account of the debtor's lawyer and then transferred to the bankruptcy trustee because, even if the funds were originally proceeds of inventory, the trustee took free of the security interest under § 9-332. Moreover, because the funds had been commingled with non-proceeds in the lawyers' trust account, they were not identifiable proceeds. The lender did not have a security interest in an account debtor's post-petition payments on a prepetition lease of equipment because even though the lease itself was chattel paper, the payment stream was not; it was a payment intangible that was not proceeds of prepetition collateral. Finally, the lender did not have a security interest in the proceeds of the debtor's liquor license because a liquor license is not property of the licensee under California law, and hence no security interest can attach to it.

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36. *Magnolia Financial Group v. Antos*,  
[2017 WL 4286126](#) (E.D. La. 2017)  
A lender had a security interest in the debtor's right to payment under a settlement agreement even though the settlement agreement had language purporting to prohibit assignment without the consent of the counter-party because § 9-406 invalidates that restriction on assignment.
37. *GEOMC Co. v. Calmare Therapeutics, Inc.*,  
[2017 WL 3585337](#) (D. Conn. 2017)  
A corporation's CEO had both actual and apparent authority to enter into a security agreement on behalf of the corporation, and thus the security agreement was not *ultra vires*. Although two years later the corporation's board of directors declared that the CEO might have acted contrary to the best interests of the corporation and that the security agreement was retroactively "rendered unauthorized, rejected, and void," that declaration did not affect the validity of the security agreement.
38. *Outsource Services Management, LLC v. Nooksack Business Corp.*,  
[2017 WL 1315490](#) (Wash. Ct. App. 2017)  
A corporation that operated a casino on tribal land could and did grant a security interest in revenue of the facility to a lender that financed construction of and improvements to the facility without approval of the Secretary of the Interior. Such approval is required for agreements that encumber tribal land but the security interest did not encumber the land. The security interest covered not merely gaming revenue, but all revenue from operation of the facility, even after the casino was closed.
39. *Bowling v. Appalachian Federal Credit Union*,  
[515 S.W.3d 686](#) (Ky. Ct. App. 2017)  
A credit union's mortgages on a married couple's land did not encumber the couple's manufactured home situated on the land because the mortgages did not list the home and the home remained personal property due to the fact that the couple had not filed an affidavit of conversion and surrendered the certificate of title for the home.
40. *Boling v. Prospect Funding Holdings, LLC*,  
[2017 WL 1193064](#) (W.D. Ky. 2017)  
The agreements by which an individual borrowed money at 5% per month, to be repaid out of the proceeds of the individual's pending tort claim, was illegal champerty under Kentucky law. Although the agreements stated that the funds advanced were for "the necessities of life or medical care," they also recognized that the funds were needed so the individual would have "time to seek justice through the courts or negotiations," and the money was explicitly intended to sustain the individual during litigation. The agreements were also usurious.

41. *Group One Development, Inc v. Bank of Lake Mills*,  
[2017 WL 2937709](#) (S.D. Tex. 2017)

Although the borrowers claimed to have been fraudulently induced to enter into a loan agreement by oral representations that the loan was unsecured, the borrowers could not, as a matter of law, have reasonably relied on those representations because they were directly contradicted by the terms of the agreement.

42. *In re Johnson*,  
[2017 WL 2399453](#) (6th Cir. BAP 2017)

The bankruptcy court did not err in concluding that a security agreement purporting to encumber “the payment, proceeds, and rights under and related to” the debtor’s contract to play hockey for the Columbus Blue Jackets, failed to comply with California Labor Code § 300(b), governing assignments of wages, because the security agreement failed to state that there was no other assignment in connection with the transaction and because there was a pending garnishment order covering the wages. Accordingly, no security interest attached.

43. *Cornelius v. Bank of Nova Scotia*,  
[2017 WL 3412202](#) (V.I. 2017)

Although the secured party mistakenly: (i) filed a termination statement; (ii) informed the debtor that the loan was paid off; and, apparently, (iii) had its lien released on the certificate of title for the debtor’s car, that debt indisputably remained and the security interest survived. Accordingly, the secured party could not be liable in conversion for repossessing the car after the debtor admittedly defaulted.

44. *Walhof & Co., Mergers and Acquisitions, LLC v. MCB Holdings I, LLC*,  
[2017 WL 5661589](#) (Minn. Ct. App. 2017)

A bank which initially had a security interest in the debtor’s membership units in an entity and which, after default, obtained a judgment and entered into a cash management agreement with the debtor that purported to assign to the bank all rights to membership units, no longer had only a security interest in the membership units. It did not matter that the cash management agreement also required the bank to transfer the membership units back to the debtor upon payment of the debt. Accordingly, the bank had no obligation to act in a commercially reasonable manner when selling membership units.

## ***Perfection Issues***

### **– Choice of Law**

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

[864 F.3d 280](#) (3d Cir. 2017)

The security interests of the debtor's oil suppliers were unperfected because: (i) even though the U.C.C. of the suppliers' states – Texas and Kansas – contained non-uniform language purporting to provide the suppliers with an automatically perfected security interest, the law of the jurisdiction where the debtor was located governs (even pursuant to the choice-of-law rules in the suppliers' jurisdictions); (ii) that law did not provide for automatic perfection, and (iii) the suppliers did not file a financing statement in the state where the debtor is located. The exception from the scope of Article 9 in § 9-109(c)(3) for security interests “created” by the government did not apply because the non-uniform language merely enabled the debtor to create the security interest by buying the oil.

46. *Element Financial Corp. v. Marcinkoski Gradall, Inc.*,

[215 So. 3d 1252](#) (Fla. Dist. Ct. App. 2017), *review granted*, (Fla. Oct. 10, 2017)

A lender that financed a California debtor's acquisition of equipment, and which perfected that security interest by filing in California, remained perfected when the guarantor moved the equipment to Florida and sold it because the lender re-filed in Florida less than one year thereafter. A security interest perfected under the law of the jurisdiction in which the debtor is located remains perfected until four months after the debtor moves to a new jurisdiction or one year after the secured goods are moved to a new jurisdiction. In this case, the debtor did not move. Instead, the guarantor moved with the secured property. When the guarantor moved the goods from California to Florida, the guarantor became a debtor and triggered the one-year grace period in § 9-316(a)(3).

47. *Fishback Nursery, Inc. v. PNC Bank*,

[2017 WL 6497802](#) (N.D. Tex. 2017)

Because under § 9-302 the law of the jurisdiction where farm products are located governs the perfection and priority of an agricultural lien on the farm products, the law of Michigan, Tennessee, and Oregon governed, respectively, the priority of the agricultural liens of the farm products shipped to those states, even though the debtor's contracts with the agricultural lienholders purported to select only Oregon law.

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– **Method of Perfection**

48. *In re Westby*,  
[2017 WL 1365999](#) (Bankr. D. Or. 2017)

A creditor's security interest in a promissory note secured by a deed of trust was unperfected because the creditor neither filed a financing statement nor took possession of the note. Although the creditor's security interest attached to the real property that the debtor received by quitclaim deed after the maker of the note defaulted, that interest too was unperfected.

– **Adequacy of Financing Statement**

49. *In re Nay*,  
[563 B.R. 535](#) (Bankr. S.D. Ind. 2017)

A filed financing statement that misstated the debtor's middle name as it appeared in the debtor's driver's license – "Ronald Mark Nay" instead of "Ronald Markt Nay" – was ineffective to perfect because the middle name is part of the debtor's name and a search under that name using the filing office's standard search logic would not produce the filing. It does not matter that a search could be conducted without using a middle name.

50. *SEC v. ISC, Inc.*,  
[2017 WL 3736796](#) (W.D. Wis. 2017)

A secured party's financing statement, which erroneously had a space between the "Inc" and the period that follows it, was insufficient to perfect because a search against the debtor's correct name using the filing office's standard search logic did not reveal the filing.

51. *Fishback Nursery, Inc. v. PNC Bank*,  
[2017 WL 6497802](#) (N.D. Tex. 2017)

The financing statements filed by agricultural lienholders in Michigan and Tennessee were ineffective to perfect agricultural liens in farm products located there because they identified the debtor as "BFN Operations, LLC abn Zelenka Farms" instead of simply as "BFN Operations, LLC," and an official search in each of those states would not have disclosed the filings. Consequently, a bank's perfected security interest in those farm products had priority. The lien notice that one agricultural lienor filed in Oregon was also ineffective because such a notice expires 45 days after final payment is due and while the effectiveness of notice can be extended, the lienholder's extension was filed after the notice became ineffective. Moreover, the financing statement the lienholder filed in Oregon is not a substitute for a proper lien notice because it lacks some of the required information.

52. *In re Reckart Equipment Co.,*[2017 WL 943909](#) (Bankr. N.D.W. Va. 2017)

A financing statement that a secured party submitted by mail to the filing office with the appropriate fee was effective from the moment the filing office received it even though the filing office failed to index the financing statement for almost 20 months. The fact that the secured party submitted the financing statement along with another financing statement but with the fee for only one of them did not matter because the memo line on the check provided by the secured party indicated that payment was for financing statement that the office failed to index. The secured party's security interest therefore had priority over the security interest of another creditor that searched and filed during the period that the financing statement was not properly indexed. While the secured party might also have been perfected by the naked assignment from an insider of a different and earlier financing statement, a factual issue remained about whether the debtor had authorized that earlier filing.

53. *In re Voboril,*[568 B.R. 797](#) (Bankr. E.D. Wis. 2017)

A financing statement that listed the name for an individual debtor in the box for an organizational debtor was ineffective to perfect a security interest in an instrument because a search under the debtor's name would not disclose the filing.

54. *In re Lexington Hospitality Group, LLC,*[2017 WL 5035081](#) (Bankr. E.D. Ky. 2017)

A lender's mortgage on the debtor's hotel did not extend to the rents, which are personal property. The lender's perfected security interest in accounts did not extend to the cash paid by hotel guests because cash is money, for which possession is the only method to perfect unless it is proceeds of other collateral, and guests' payment up front in cash did not create an account. The lender's security interest in credit card receivables generated by hotel guests was not perfected because such receivables are payment intangibles, not accounts, and while the security agreement covered both accounts and general intangibles, the lender's financing statement covered only accounts. Although the financing statement referenced the security agreement, a reference to a document does not describe what is in the document.

55. *Farmer's and Miner's Bank v. Lee,*[2017 WL 4707457](#) (E.D. Ky. 2017)

An amended financing statement on which the "collateral change" and "delete" boxes were checked, and which then listed one of the three items of equipment specified in the original filed financing statement, referred to the deleted item, not the remaining item, and thus remained effective with respect to the remaining items of collateral described in the initial financing statement. Although the amendment states "[t]his financing statement covers the following collateral," that language refers to the amendment, not the original financing statement.

56. *In re Tam of Allegheny LLC*,  
[575 B.R. 131](#) (Bankr. W.D. Pa. 2017)  
A security interest in a Pennsylvania liquor license – which is a general intangible– was not perfected by the secured party’s fixture filing. To be perfected, a financing statement had to be filed with the Secretary of the Commonwealth.
57. *In re Carr*,  
[2017 WL 6016215](#) (Bankr. D.C. 2017)  
A secured party’s security interest in a closet system, which became a fixture to the debtor’s home, was perfected by the filing of a financing statement.
58. *In re Hard Rock Exploration, Inc.*,  
[2017 WL 6507836](#) (Bankr. S.D.W. Va. 2017)  
Recorded deeds of trust and financing statements that described the land involved and included in the collateral all “Gas System and all Gas Contracts and accounts resulting therefore” and “now owned or hereafter acquired . . . equipment, general intangibles, accounts, contract rights, inventory, fixtures, as extracted collaterals, instruments, [and] proceeds of collateral” were sufficient to create and perfect a security interest in the debtor’s existing and after-acquired contracts relating to the extraction of oil and gas, and the cash proceeds thereof.

**– Authorization or Effect of Termination Statement**

59. *First Guaranty Bank v. Republic Bank*,  
[2017 WL 5564582](#) (D. Utah 2017)  
[2017 WL 8777420](#) (D. Utah 2017)  
The initial assignee of a lease of software that a court had already determined was a conditional sales agreement, and which had already assigned the lease to a subsequent assignee, had no authority to terminate the financing statement. No discussion of which party was the secured party of record.
60. *Concealfab Corp. v. Sabre Industries, Inc.*,  
[2017 WL 6297672](#) (D. Colo. 2017)  
A prospective borrower against which a financing statement was filed but which never entered into the credit transaction was entitled to an order declare the lien invalid even though the prospective lender had filed a termination statement because there was nothing to prevent the prospective lender from filing a financing statement again.



61. *In re Wheeler*,

[2017 WL 6568758](#) (Bankr. W.D. Ky. 2017)

A bank's perfected security interest became unperfected when the bank mistakenly filed a termination statement, even though 10 minutes later the bank attempted to amend the termination by adding itself as the secured party. Although the termination might have been inadvertent, it was authorized because it was filed by a loan processor of the bank that handles financing statements. As a result, the bank's security interest became subordinate to another perfected security interest, that previously was junior to the bank's security interest.

**– Possession**

62. *Citizens Bank & Trust v. Piggly Wiggly Alabama Distributing Co.*,

[228 So. 3d 469](#) (Ala. Ct. Civ. App. 2017)

A bank's security interest in the debtor's shares of stock in a corporation was not perfected by the issuing corporation's possession of the stock certificate, which the issuer had acquired to secure its own security interest. Although the issuer had provided a receipt for the certificate to the debtor, who had in turn delivered the receipt to the bank, the issuer never acknowledged that it had possession for the bank's benefit. As a result, the bank's unperfected security interest was subordinate to the judicial lien of a garnishor.

**– Collateral Covered by a Certificate of Title**

63. *In re Wharton*,

[563 B.R. 289](#) (9th Cir. BAP 2017)

A secured party's possession of the certificate of title and keys for a corvette did not perfect the security interest under Nevada law; to perfect the security interest needs to be noted on the certificate.

64. *In re Power*,

[2017 WL 4158329](#) (Bankr. D. Idaho 2017)

A secured party that paid off the debtors' existing car loan but whose initial title application was incorrectly completed, resulting in the new title certificate failing to indicate its lien, was not perfected until, at the earliest, it submitted a second, properly completed application for a new certificate of title. Because that was more than 30 days after the refinancing, the transfer occurred when the security interest was perfected, and thus was an avoidable preference under § 547(b). Whether the secured party had a defense under § 547(c)(1) remained to be decided.



65. *In re Guiles*,[2017 WL 4838751](#) (Bankr. W.D. Tex. 2017)

A credit union's security interest in a motor vehicle that was perfected by notation on the certificate of title did not become unperfected when the debtor borrowed additional funds from the credit union and used a portion of the loan to pay off the original note. Although the credit union did not change the lien date on the certificate, because the security agreement covered future advances, it did not matter that the original note was replaced by a new note. At every moment, the debtor's obligation was secured by the motor vehicle.

66. *In re Edwards*,[2017 WL 6754026](#) (Bankr. E.D.N.C. 2017)

Although a dealer's compliance with the state certificate of title statute perfected its security interest in a mobile home and all accessions thereto, it did not perfect the security interest in drapes, smoke detectors, ceiling fans, a set of steps, or a 4'-by-4' porch, each of which was readily detachable and not, therefore, an accession.

**– Bogus Filings**67. *United States v. Jordan*,[851 F.3d 393](#) (5th Cir. 2017)

An inmate who filed a fraudulent UCC financing statement against an assistant U.S. attorney was properly convicted of violating 18 U.S.C. § 1521, which prohibits filing a false lien or encumbrance against the property of a federal official on account of the performance of official duties, even though the \$6.54 contract identified as collateral did not exist.

68. *State of Connecticut v. Brightly*,[2017 WL 1311036](#) (Conn. Super. Ct. 2017)

The state and a judge were entitled to injunctive relief against a criminal defendant who filed a fraudulent financing statement against the judge that presided over his criminal trial.

***PMSI Status***69. *In re Jett*,[563 B.R. 206](#) (Bankr. S.D. Miss. 2017)

Because the transformation rule, not the dual-status rule, should be applied to PMSIs in consumer goods, a bank's PMSI in the debtors' vehicle lost purchase-money status when the debtors and bank refinanced the debt and included in it two previously unsecured loans. As a result, the bank's claim could be modified in the debtor's bankruptcy proceeding.

70. *In re McPhilamy,*[566 B.R. 382](#) (Bankr. S.D. Tex. 2017)

Although each of the two loans that the debtor incurred to acquire two vehicles was secured by a PMSI, five other loans cross-collateralized by one or the other of the vehicles were not secured by a PMSI. It did not matter that one of these five loans was contemporaneous with the purchase of the vehicle that secured it and another loan preceded the purchase of the vehicle that secured it because, in each case, the vehicle loan covered the full purchase price and there was no evidence that these other loans were used to acquire either of the vehicles.

71. *In re Villarreal,*[566 B.R. 859](#) (Bankr. S.D. Tex. 2017)

Four loans secured by the car that the debtor previously purchased were not secured by a PMSI. An additional, earlier loan secured by the car, which loan the debtor used to pay off a non-PMSI, was also not a PMSI.

72. *In re Manor,*[569 B.R. 764](#) (Bankr. W.D. Wis. 2017)

A vehicle lender's security interest was a PMSI even to the extent that the secured obligation included negative equity in the vehicle that the debtor traded in, as well as the charges for taxes, insurance, and a service contract, because all were value given to enable the debtor to acquire the new vehicle.

***Priority Issues******– Buyers of Goods***73. *In re SemCrude, L.P.,*[864 F.3d 280](#) (3d Cir. 2017)

Downstream buyers of oil and gas from the debtors were buyers for value who took free of the 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 delivery.

74. *Cyber Solutions International, LLC v. Priva Security Corp.,*[2017 WL 3599578](#) (W.D. Mich. 2017)

A secured party with a perfected security interest in the debtor's inventory of computer chips, manufactured pursuant to a licensing agreement, had priority over the buyer/licensor that had allegedly prepaid for the chips. Nothing in the agreements between the debtor and the buyer indicated that the buyer owned the chips.

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75. *Element Financial Corp. v. Marcinkoski Gradall, Inc.*,  
215 So. 3d 1252 (Fla. Dist. Ct. App. 2017), review granted, (Fla. Oct. 10, 2017)  
Even if the buyers of three Bobcat utility vehicles were buyers in ordinary course of the business, they did not take free of a perfected security interest because the security interest was not created by the buyers' seller.
76. *Focarino v. Travelers Personal Insurance Co.*,  
2017 WL 1456967 (N.J. Super. Ct. 2017)  
The buyer of a vehicle from a dealer that failed to pay off a lender with a prior perfected security interest in the vehicle took free of the rights of the prior owner's insurer, which paid off the lender. The dealer acquired voidable title to the vehicle and could under § 2-403 convey good title to a good faith purchaser for value.
77. *SMS Financial JDC, LP v. Cope*,  
685 F. App'x 648 (10th Cir. 2017)  
A bank's security interest in a yacht, which was unperfected due to the bank's failure to document the yacht with the Coast Guard, nevertheless had priority over the rights of the debtor's wife, who had acquired ownership of the yacht. A unperfected security interest is effective against a person having actual notice thereof. The debtor initially transferred title to a corporation of which he was president. His knowledge of the security interest was imputed to the corporation. The corporation then transferred the yacht to the debtor's wife, who had "implied actual knowledge."
78. *BMW Financial Services, N.A., LLC v. Felice*,  
75 N.E.3d 368 (Ill. Ct. App. 2017)  
A secured party that had perfected a security interest in a car by having its interest noted on the certificate of title had priority over the buyer that purchased the car after the debtor filed an unauthorized lien release and obtained a duplicate certificate that did not indicate the security interest. Issuance of the duplicate certificate did not cause the car to no longer be covered by the original certificate, within the meaning of § 9-303. Although a buyer who relies on a clean certificate can take free of a perfected security interest under § 9-337, that provision applies only when the new certificate is issued by a different state, which was not what occurred in this case.

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– Competing Security Interests

79. *In re Energy Future Holdings Corp.*,  
2017 WL 1170830 (D. Del. 2017)

Even if the waterfall in an intercreditor agreement covered distributions under the debtor's bankruptcy plan, the first-lien lenders who funded the debtor's Deposit L/C Loan Collateral Account did not have priority over the other first-lien lenders because the intercreditor agreement gives all the first-lien lenders *pari passu* priority in all the collateral. While the credit agreement gives priority in the Deposit L/C/ Loan Collateral Account to pay "Deposit L/C Obligations," the first-lien lenders who funded that account are not owed such obligations.

80. *In re Gold Digger Apples, Inc.*,  
2017 WL 508209 (Bankr. E.D. Wash. 2017)

Each of the three entities claiming a PMSI in apples sold to an agricultural cooperative had priority over the bank that had a perfected security interest in the association's assets because each was a successor in interest to the entity that sold the apples. Although Azzano Farms, Inc. claimed priority even though it was Azzano Orchards, LLC that sold the goods and was named as the secured party in the financing statement, the same individual owned both entities, the entities conducted the same business, and the claimant was the successor to all of the LLCs' assets and business operations. Although Five Star Orchard asserted a PMSI and was named as the secured party in the financing statement, while R&B Orchard was the seller, both entities are general partnerships with the same general partner and the manager. Moreover, the two partners of Five Star Orchard were two of the three partners in R&B Orchard, the third partner having been bought out by the other two. Although Alvarado Orchards, LLC claimed a PMSI based on goods sold by Miguel Alvarado, who was named as the secured party on the financing statement, the business never changed, merely its name. Although the PMSI claimants did not provide the bank with advance notification of their transactions with the association, the bank effectively waived that requirement in the parties' intercreditor agreement, which provided a waterfall with respect to the order of payments.

– Other

81. *In re Pettit Oil Co.*,  
575 B.R. 905 (9th Cir. BAP 2017)

The consignor of fuel in an Article 9 transaction, which failed to perfect its interest, had only an unperfected security interest in the accounts receivable and cash constituting proceeds of the consigned fuel, which interest was subordinate to the rights of the consignee's trustee in bankruptcy. Although § 9-319 refers only to the consigned goods, not their proceeds, when treating the consignor's interest as a security interest, that silence does not make all of Article 9's rules regarding proceeds inapplicable to consigned goods.

82. *In re Purdy,*[870 F.3d 436](#) (6th Cir. 2017)

The bankruptcy court did not err in concluding that a cattle lessor failed to demonstrate that the cattle sold by the debtor were leased cattle. The debtor used one bank account to conduct its dairy operations, commingling proceeds of owned cattle with proceeds of leased cattle and proceeds of milking operations, and then using those commingled proceeds to acquire replacements for leased cattle culled from the herd. Moreover, the court did not err in crediting the debtor's testimony that the debtor put the lessor's brand on cattle regardless of whether the cattle were acquired from suppliers paid by the lessor, and thus the brands were not reliable evidence of ownership. The bankruptcy court also did not err in concluding that a lender's security interest in the debtor's existing and after-acquired cattle did attach to all the cattle because the debtor used the commingled funds – which were part of the bank's collateral – to acquire the cattle. Consequently, the bank, not the lessor, was entitled to the proceeds of the cattle.

83. *In re Schley,*[565 B.R. 655](#) (Bankr. N.D. Iowa 2017)

A feed supplier's superior statutory lien on the proceeds of pigs that consumed about half of the feed was not limited to the cost of the feed consumed by the pigs sold, but extended to the cost of all the feed supplied to the debtor and consumed by the debtor's pigs, even those not sold.

84. *In re McDougall,*[572 B.R. 239](#) (Bank. D.N.D. 2017)

Although it was unclear whether the individual debtors or the LLC they created owned the cattle that the debtors raised, the weight of the evidence indicated that the LLC owned the collateral that it sold prepetition and the individual debtors owned the collateral remaining when the petition was filed. Accordingly, the agricultural lien of a supplier that provided feed, seed, and supplies to the LLC had priority over the perfected security interest of a bank in the proceeds of the cattle sold by the LLC. The agricultural lien of the lessor of pasture land did not have priority over the bank's security interest because the lessor did not file notice of its lien within 120 days after the lease began.

85. *Public Service Commission v. Grand Forks Bean Company, Inc.,*[900 N.W.2d 255](#) (N.D. 2017)

The bank with a security interest in the inventory of a grain warehouse did not have priority over eight bean growers that were noncredit-sale receipt holders of beans they had delivered to the warehouse. Delivery of grain to a public warehouse for an unconverted scale ticket or warehouse receipt is a bailment, the grain in a warehouse is subject to a first priority lien in favor of outstanding receipt holders, and that has priority over any lien or security interest in favor of a creditor of the warehouseman, regardless of when the creditor's lien attached to the grain. The growers engaged in noncredit sales transactions because a credit-sale contract must be signed by both parties and the growers did not sign anything.

86. *In re Edge Pennsylvania, LLC*,

[2017 WL 6498039](#) (Bankr. M.D. Pa. 2017)

A secured party was not entitled to summary judgment that its perfected security interest had priority over a landlord's statutory lien even though the landlord had contractually agreed to subordinate its lien because the subordination agreement also provided that the secured party had no right to leave the collateral on the leased premises for more than 30 days after the lease terminated, and it was unclear whether this provision was a condition to the provision on subordination.

87. *Dusenbery v. Hawks*,

[895 N.W.2d 640](#) (Minn. Ct. App. 2017)

A bailee's possessory lien had priority over a lender's perfected security interest because § 9-333 grants the possessory lien priority unless the statute creating the lien expressly provides otherwise, and that statute did not so provide. Although the statute did provide that some liens do not have priority over a purchaser or encumbrancer without notice, that portion of the statute did not apply to a bailee's possessory lien.

88. *BMI Federal Credit Union v. Charlton*,

[2017 WL 5903444](#) (Ohio Ct. App. 2017)

An auto mechanic's artisan's lien on a vehicle to secure the cost of repair and storage did not have priority over a security interest in the vehicle previously perfected through compliance with the certificate of title statute because the statute giving priority to artisan's liens does not apply to motor vehicles and the certificate of title statute for vehicles expressly provides that a security interest noted on the certificate of title has priority over other liens.

89. *Ally Financial Inc. v. Pira*,

[2017 WL 6014258](#) (Ill. Ct. App. 2017)

An auto mechanic was entitled to an artisan's lien on a car – with priority pursuant to § 9-333 over an earlier perfected security interest – to secure detailing and repairs charges of \$658 but for not storage charges totaling \$27,780.

90. *S & H Packing & Sales Co. v. Tanimura Distributing, Inc.*,

[850 F.3d 446](#) (9th Cir. 2017), *rehearing en banc granted*, (9th Cir. June 23, 2017)

Pursuant to a ruling by a prior panel of this court, a commercially reasonable factoring agreement by a buyer of produce removes accounts receivable from the PACA trust without breaching the trust regardless of whether the factoring transaction is a true sale. Accordingly, and despite contrary rulings by three other circuit courts, the unpaid growers of produce had no claim against the factor that purchased accounts from the produce buyer.

91. *Classic Harvest LLC v. Freshworks LLC*,  
[2017 WL 3971192](#) (N.D. Ga. 2017)

A factor's purchase of the accounts of a produce buyer was a secured loan, not a true sale, because even though the recitals in the purchase agreement stated that the transaction was a sale, the agreement limited the factor's risk of the account debtor's nonpayment. The factor was entitled to void the purchase of any receivable if, at the time the receivable was created, the produce buyer knew or had received notice of the account debtor's bankruptcy or insolvency. The factor was entitled to adjust the price paid if the produce buyer knew that an account debtor would be unable to timely pay its obligations within ninety days of the invoice date. The produce buyer also retained the risk if the account debtor disputed the quantity, quality or price of the goods sold to it. Accordingly, the factor's purchase did not remove the accounts from the PACA trust. The factor was not a bona fide purchaser for value of the accounts after it received notice of the produce buyer's breach of the PACA trust and might not have been at an earlier time, depending on when it should have known of the breach, which was a factual issue not ripe for summary judgment.

92. *In re Gold Digger Apples, Inc.*,  
[2017 WL 508209](#) (Bankr. E.D. Wash. 2017)

Apple growers that transferred apples to an agricultural cooperative association had priority under PACA over the bank that had a perfected security interest in the association's assets. The growers gave adequate written notice of their intent to assert PACA claims when, prior delivering apples, each of them entered with the association a written agreement containing a clause declaring the grower's intent to preserve PACA trust rights. The agreement containing the notice was not signed before delivery of apples, and thus did not precede the creation of PACA rights. The growers had no duty to provide an additional notice each time they delivered apples because they did not sell their apples to the association, they merely delivered them for packing and resale. Moreover, the PACA notice was also included on the invoices that the marketing agent for the association generated.

93. *In re Leonard*,  
[565 B.R. 137](#) (8th Cir. BAP 2017)

A lender with a perfected security interest in the debtor's existing and after-acquired cattle had priority over the reclamation rights of the seller of the cattle to whom the debtor had provided checks that were dishonored. Although the bill of sale provided by the seller to the debtor did not comply with Colorado law because it was not signed by the debtor and it did not list the address for either party, industry practices indicated that neither the defects in the bill of sale nor the fact that the lender might not have seen it prevented the lender from acting in good faith.



94. *Bank of the Pacific v. F/V ZOE A*,

[2017 WL 823298](#) (W.D. Wash. 2017)

The federal Ship Mortgage Act preempts Washington state law that prohibits the creation of a security interest in commercial shellfish and food fish permits. Therefore, the preferred ship mortgage granted by the limited liability company which acquired a Dungeness crab permit appurtenant to its vessel attached to the permit. It did not matter that the owner of the company had the permit titled in his own name and later sold the permit. The owner held title in trust for the limited liability company and the preferred ship mortgage attached and had priority over the rights of the buyer.

95. *City of Galveston v. Consolidated Concepts, Inc.*,

[2017 WL 1196213](#) (S.D. Tex. 2017)

The IRS, which had filed a notice of federal tax lien against a contractor, was entitled to summary judgment on its claim to priority in interpleaded funds over the claim of a lender with an earlier perfected security interest in the contractor's accounts from a specified project. The lender failed to produce sufficient evidence to raise a factual issue that the funds were proceeds of accounts from that project, and the checks previously issued (but not cashed) were made payable jointly to the contractor and a subcontractor.

96. *Berkley Insurance Co. v. Hawthorn Bank*,

[2017 WL 4391774](#) (W.D. Mo. 2017)

The surety company that issued a performance bond for a general contractor and which later completed the contractor's obligations on the bonded project did not have priority in the contractor's rights to payment on the project over the bank with a perfected security interest in the contractor's accounts. Even if the surety was entitled to be equitably subrogated to the contractor's rights – and even if that would give it priority over the bank – the right to equitable subrogation applies only after complete performance, not on the date the bond was issued, and the bank did not receive payment after the date performance was completed. Finally, even if the agreement between the contractor and the surety established a valid trust for the benefit of the surety, because the bank was not a party to that agreement and was not made aware of the agreement until after it had exercised setoff, the bank had no liability to the surety.

97. *Prestige Capital Corp. v. United Surety and Indemnity Co.*,

[245 F. Supp. 3d 349](#) (D.P.R. 2017)

A factor's perfected security interest in a contractor's accounts did not have priority in the payment due from the owner over the rights of the surety that issued a performance bond and completed the contractor's work. Under Puerto Rico law, a surety is subrogated to the owner's and contractor's rights in contract retainages as a consequence of its performance of the contractor's obligations, and this right is superior to that of an attaching creditor. The fact that the owner had deposited the amount owing in connection with its interpleader action did not make this rule inapplicable.



98. *Farmer's and Miner's Bank v. Lee*,  
[2017 WL 4707457](#) (E.D. Ky. 2017)

The bank with a perfected secured interest in an item of equipment used by the debtor in its service contract with a mining lessee had priority over a claimed mechanic's lien of the entities that repaired and stored the equipment after the debtor ceased performing on its contract. There was no mechanic's lien because the mechanic's lien statute provides for a lien on the lessee's property, but the debtor was not the lessee, and because the claimants had failed to file the requisite statement identifying the property. Even if the claimants did have a mechanic's lien, the bank's security interest would have priority because it was perfected long before the mechanic's lien would have arisen.

99. *Granata v. Broderick*,  
[172 A.3d 548](#) (N.J. 2017)

A lender that obtained a security agreement covering a lawyer's right to a contingent fee in a specified pending case had an Article 9 security interest in the lawyer's account. Because that interest was perfected by filing before two judicial liens were created on the right to the fee, the lender had priority.

### ***Enforcement Issues***

#### **– Replevin & Repossession**

100. *Davis v. Toyota Motor Credit Corp.*,  
[251 F. Supp. 3d 925](#) (D. Md. 2017)

A debtor who alleged that a repossession agent battered her in connection with a repossession stated a claim for battery against the repossession company but, in the absent of an allegation of agency, not against the secured party. The debtor's allegations also failed to state a claim for breach of the peace because there is no such tort, and failed to state a claim for conversion or trespass to chattels because the secured party had a right to repossess the collateral.

101. *Commerce Bank & Trust Company v. Property Administrators, Inc.*,  
[252 F. Supp. 3d 14](#) (D. Mass. 2017)

A bank with a security interest in an airplane that the debtor, after default, had sold without the bank's permission and from which the debtor had had avionics removed was entitled to a temporary restraining order prohibiting the debtor and the buyer from transferring or altering the airplane.

102. *Rabo Agrifinance, LLC v. Gerrald's Vidalia Sweet Onions, Inc.*,  
[2017 WL 9285371](#) (S.D. Ga. 2017)

A secured party that properly pled that it had a security interest in specified property and that the debtor had defaulted, and as to which pleading the debtor had not responded, was entitled to a writ of possession.

103. *T-Mobile USA, Inc. v. Platinumtel Communications, LLC*,  
[2017 WL 4122720](#) (Wash. Ct. App. 2017)  
The trial court did not err in denying a secured party's request for a writ of replevin because the secured party did not describe the collateralized equipment or its location.
104. *CNH Industrial Capital America, LLC v. T & P Farms, LLC*,  
[2017 WL 4448229](#) (N.D. Miss. 2017)  
The assignee of chattel paper was entitled to replevy the underlying goods securing the account debtor's obligation because the account debtor had agreed not to assert defenses against the assignee and had defaulted by not making payments when due.
105. *GEOMC Co. v. Calmare Therapeutics, Inc.*,  
[2017 WL 4335026](#) (D. Conn. 2017), *appeal filed*, (2d Cir. Oct. 30, 2017)  
The seller of medical devices which retained a security interest in the devices sold was entitled to a judgment for the unpaid purchase price plus interest but it would be inappropriate to also award it possession of all the remaining devices. If the judgment is not fully paid by December 31, the seller will be entitled replevy the remaining collateral.

**– Notification of Disposition**

106. *United Tactical Systems, LLC v. Real Action Paintball, Inc.*,  
[2017 WL 713135](#) (N.D. Cal. 2017)  
Because the evidence was insufficient to determine whether the foreclosing secured party sent notification of the sale to the debtor's other secured creditors or whether those other creditors received notification, summary judgment would be denied on whether the buyer of the debtor's trademarks at the sale acquired rights in the trademarks. No discussion of or citation to § 9-617(b).
107. *Auto-Site v. Matthews*,  
[2017 WL 5151204](#) (Ohio Ct. App. 2017)  
Although the debtor claimed at trial not to have received notification of the disposition, the debtor nevertheless failed to place in issue the secured party's compliance with the rules regarding notification because the debtor did not challenge the evidence that notification was sent.
108. *Volvo Financial Services v. Williamson*,  
[2017 WL 4708136](#) (S.D. Miss. 2017)  
A secured party provided sufficient notification of several private vehicle dispositions by using the statutory form even though the notifications did not specify that the disposition would be conducted on internet websites or contain information about the amount of advertising. The secured party's notification of two other dispositions was also sufficient even though it did not mention that vehicles would be sold on the salvage market.

109. *Kinzel v. Bank of America*,  
[850 F.3d 275](#) (6th Cir. 2017)

A brokerage house did not breach its agreement with its customers by liquidating, without prior notice, securities in the customers' securities account and using the proceeds to pay down the customers' secured obligation to the brokerage because: (i) § 9-611 requires notification only after default, and in this case the brokerage was exercising its contractual discretion to liquidate the collateral in the absence of a default; and (ii) notification is not required when the collateral is traded on a recognized market, and in this case the securities were traded on the New York Stock Exchange, which is a recognized market.

110. *Hamilton v. Muncy*,  
[2017 WL 4712410](#) (Ky. Ct. App. 2017)

A used car dealer with a security interest in a car sold to a consumer and whose notification of disposition did not comply with § 9-614 was not entitled to a deficiency.

#### – Conducting a Commercially Reasonable Disposition

111. *Volvo Financial Services v. Williamson*,  
[2017 WL 4708136](#) (S.D. Miss. 2017)

A secured party did not act in a commercially unreasonable manner in failing to recondition two collateralized trucks and selling them for salvage. The secured party had the trucks inspected by an independent appraisal service and the estimated costs of reconditioning were higher than their reconditioned value. Although the salvage buyer was now offering the trucks for sale at a significantly higher price, that was merely an asking price, not evidence of current value, and there was no evidence of the amount spent on reconditioning. The secured party also acted in a commercially reasonable manner in selling for \$69,010 another truck with an estimated wholesale value of \$80,850. The fact that the value of the collateral exceeds the disposition price is insufficient to establish that the disposition was commercially unreasonable. Although the sale might have yielded a higher price if the secured party had first reconditioned the truck, the value took its lack of reconditioning into account.

112. *Bruce v. Cauthen*,  
[515 S.W.3d 495](#) (Tex. Ct. App. 2017)

A limited partner who had a security interest in another partner's partnership interest wrongfully purchased that interest at a private sale. Although the partnership agreement expressly acknowledged that a public sale might be impossible due to securities laws, and that a private sale would be commercially reasonable even if it produced less than what a public sale would, it did not expressly modify the prohibition in § 9-610(c) on a secured party buying at a private sale.

113. *BMO Harris Bank v. Custom Diesel Express, Inc.*,  
[2017 WL 1367205](#) (E.D. Tenn. 2017)

The debtor did not place in issue the commercial reasonableness of the secured party's disposition of collateralized equipment merely by alleging that equipment sold was worth much more than the secured obligation. Instead, summary judgment on the secured party's deficiency claim against the debtor and the guarantor was warranted. The secured party provided evidence that it: (i) evaluated each of item of collateral independently to determine the best method to sell it, (ii) sold the equipment by unit, rather than in bulk, to maximize the sale price, (iii) advertised nationally, in print, digital, and other media for several months; (iv) invested resources to repair some items of collateral; (v) negotiated private sales for some items of collateral; and (vi) offered other items for public auction by a well established industrial engineer that routinely buys and sells commercial vehicles through multiple selling platforms.

114. *In re Comprehensive Power, Inc.*,  
[578 B.R. 14](#) (Bankr. D. Mass. 2017)

The debtor's bankruptcy trustee pleaded sufficient facts to state a claim that a secured party's disposition of substantially all of the debtor's assets was not commercially reasonable by alleging that the secured party: (i) did not employ a process intended to generate a reasonable sale price and the price obtained was substantially less than assets' appraised value; (ii) conducted the auction sale as a formality to consolidate its control the debtor's assets; (iii) failed to adequately market the property; (iv) was the sole bidder at a sale conducted on only fourteen days' notice, so that other potential purchasers were prevented from participating; and (v) without providing the debtor with the expected six-month period to obtain alternative financing.

115. *Bank Leumi USA v. GM Diamonds, Inc.*,  
[53 N.Y.S.3d 630](#) (N.Y. App. Div. 2017)

A secured party presented prima facie evidence that it disposed of collateralized diamonds in a commercially reasonable manner by showing that, prior to putting the goods up for auction, plaintiff had at least two experts appraise the value of the diamonds, it reached out to four potential bidders, three of which submitted bids, and it accepted the highest bid, which was reasonably close to the appraised value. The debtor did not rebut that evidence merely alleging that: (i) the secured party unreasonably rejected a better offer made to the debtor for only a portion of the diamonds before the secured party took possession of the collateral; or (ii) the diamonds had a book value over twice as high as the accepted offer.

116. *Kosowski v. Alberts*,  
[2017 WL 6604565](#) (Ill. Ct. App. 2017)

A secured party could not be liable for failing to conduct a commercially reasonable disposition of the collateral because the assignee to who the debtor made an assignment for the benefit of creditors, not the secured party, conducted the disposition. Because the disposition was approved by the assignee, it is commercially reasonable under § 9-627(c)(4).

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– Collecting on Collateral

117. *Ara, Inc. v. Waste Management National Services, Inc.*,  
[2017 WL 4857428](#) (D. Minn. 2017)

A factor that purchased accounts had no private right of action under § 9-404 or § 9-607 against an account debtor for paying the debtor after receiving instructions to pay the secured party.

118. *Integrity Factoring & Consulting, Inc. v. Triple S Materials, L.P.*,  
[2017 WL 8020218](#) (W.D. Tex. 2017)

A factor that purchased accounts had no private right of action under § 9-404 against an account debtor for that failed to pay the factor after receiving instruction to do so. The factor's path to recovery lies in a claim for breach of contract or suit on account.

119. *Durham Commercial Capital Corp. v. Ocwen Loan Servicing, LLC*,  
[2017 WL 1196574](#) (S.D. Fla. 2017)

A factor's letter to a law firm's client that identified the firm's accounts receivables assigned to the factor and instructed the client to pay the factor was an effective under § 9-406 even though the notification did not identify the underlying transactions giving rise to the client's obligation to the firm. Even if the law firm violated the rules of professional conduct by giving the factor access to confidential files, and even if that formed the basis for a claim of malpractice against the firm, the factoring agreement was enforceable. However, there were unresolved issues regarding the client's defenses and setoff rights that prohibited summary judgment on the factor's claim against the client.

120. *CNH Industrial Capital America, LLC v. Able Contracting, Inc.*,  
[2017 WL 4358706](#) (D.S.C. 2017)

The buyer of several items of equipment, which in the purchase contracts agreed not to assert against the seller's assignee any claim or defense the buyer might have against the seller, had no defense based on its claim that it "revoked acceptance by returning the equipment" to the assignee, which qualified as a holder in due course of the contracts. The buyer also could not assert a defense based on fraudulent inducement.

121. *Blue Ridge Bank v. City of Fairmont*,  
[807 S.E.2d 794](#) (W. Va. 2017)

A city that leased equipment under a finance lease with a hell-or-high-water clause had a defense to payment against the bank that received an assignment of the lease from the lessor. Because, after the lessor failed to pay the supplier for the equipment, the city paid the supplier directly, the city had a defense arising from the lease transaction, and thus it did not matter whether that defense accrued before or after the assignment to the bank. Although both the hell-or-high-water clause and § 2A-407 cut off most of a finance lessee's defenses to payment, that rule applies only after the finance lessee accepts the goods. In this case, the city accepted the goods not under the lease, but under its own purchase contract with the supplier.

122. *Estate of Grimmet v. Encompass Indemnity Co.*,  
[2017 WL 5592897](#) (E.D. Mich. 2017)

Health care providers that received an assignment from a patient of the patient's rights under a no-fault automobile insurance policy had a cause of action against the insurer in spite of the fact that the policy contained an anti-assignment clause because such clauses violate state public policy and are overridden by § 9-408.

#### – Statute of Limitations

123. *Kaiser v. Cascade Capital LLC*,  
[2017 WL 2332856](#) (D. Or. 2017)

A debt collector's deficiency action on a car purchase loan, brought after the car was repossessed and sold, was subject to the four-year limitations period applicable to an action relating to a sale of goods, not the six-year limitations period applicable to contracts generally (including actions under Article 9). Accordingly, the debt collector could be liable under the Fair Debt Collection Practices Act for initiating the action.

124. *Volvo Financial Services v. Williamson*,  
[2017 WL 4708136](#) (S.D. Miss. 2017)

The one-year limitations period under Mississippi law for an action for a deficiency did not begin to run when the secured party with seven notes, each secured by a vehicle, sold the first vehicles because the notes were cross-collateralized. Instead, the limitations period began after the last item of collateral was sold.

#### – Standing Issues

125. *2023 BR Holdings, LLC v. Williams*,  
[2017 WL 5009261](#) (D. Md. 2017)

Even though the holder of a guaranteed note had executed an allonge by which it "collaterally assigned" the note to a lender pursuant to a "Security Agreement," the holder had standing to enforce the note and guaranty. The assignment was only a partial assignment, and thus the holder retained sufficient rights to be a real party in interest.

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– Other

126. *Regions Bank v. Thomas*,  
[532 S.W.3d 330](#) (Tenn. 2017)

A secured party that failed to provide the guarantors with notification of its planned disposition of the collateral did rebut the resulting presumption that no deficiency was owing by submitted evidence that disposition proceeds exceeded the fair market value of the collateral at the time of the disposition. However, because the secured party still has the burden of proof on what deficiency is owing, the lower courts erred in not allowing the guarantors to submit evidence that, with notification, they would have satisfied the secured obligation. The court of appeals correctly ruled that the guarantors lack standing to seek recovery of a surplus, even if a proper disposition would have yielded a surplus.

127. *Hartwell v. Lone Star PCA*,  
[2017 WL 2664445](#) (Tex. Ct. App. 2017)

The trial court did not err in preliminarily enjoining the debtor from transferring collateral because the secured party showed that the debtor was in default and had committed conversion by selling some of the collateral and not remitting the proceeds to the secured party.

128. *Allied Building Products Corp. v. George Parsons Roofing & Siding, Inc.*,  
[2017 WL 2964018](#) (E.D.N.Y. 2017)

A creditor claiming a security interest in the debtor's accounts had not demonstrated irreparable harm so as to entitle it to a preliminary injunction prohibiting the debtor from transferring funds outside the ordinary course of business.

129. *In re Sun City Gun Exchange, Inc.*,  
[2017 WL 1968019](#) (Tex. Ct. App. 2017)

The trial court erred in issuing an order allowing the secured party with a security interest in a defunct gun dealership's inventory to enter the residence of the debtor's president for the purpose of inspecting, photographing and videotaping all firearms located on the property. The president was not a party to the security agreement and had offered to produce for inspection at a neutral location the guns in his possession and which he previously testified once belonged to the debtor.

130. *Vaneiser, LLC v. Nebraska Bank of Commerce*,  
[2017 WL 1229931](#) (Neb. Ct. App. 2017)

The bank with a security interest in the assets of an LLC and which, pursuant to a settlement agreement, conducted a public sale of the assets, was entitled to apply some of the sale proceeds to pay the LLC's obligation, under a guaranty, for the deficiency remaining on the debt of a sister entity following foreclosure of a deed of trust. The settlement agreement did not release the LLC of its liability on the guaranty. The bank could not, however, use any of the sale proceeds to pay a \$12,500 auction fee that the bank charged, even though the settlement agreement provided for the LLC to pay "costs associated with . . . the auction."



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131. *In re Ambrose*,  
[568 B.R. 716](#) (Bankr. N.D. Ga. 2017)  
Although Georgia Motor Vehicles Sales Finance Act generally prohibits a secured party that disposes of a motor vehicle from recovering a deficiency unless the secured party notifies the debtor within 10 days after repossession of its intent to pursue a deficiency, the act applies only to sellers and to finance companies that purchase chattel paper from sellers, not to lenders that provide financing directly to car buyers.
132. *Crop Production Services, Inc. v. Hogan Brothers, LLC*,  
[2017 WL 7693379](#) (N.D. Iowa 2017)  
An Iowa statute that requires mediation before a secured party may enforce a debt against agricultural property, including farm products and farming equipment, did not apply to a secured party's action against guarantors because only the principal obligation, not the guarantees, was secured by agricultural property and the secured party's action sought only an *in personam* judgment.
133. *Hawaiiweb, Inc. v. Experience Hawaii, Inc.*,  
[2017 WL 382617](#) (N.D. Ga. 2017)  
The court could not award a default judgment against the debtor for breach of a nonrecourse note secured by a domain name after the secured party had "repossessed" the domain name. A hearing was required to determine whether the secured party was entitled to damages and, if so, in what amount.
134. *AgStar Financial Services, ACA v. Northwest Sand & Gravel, Inc.*,  
[391 P.3d 1271](#) (Idaho 2017)  
A mortgagee that purchased the mortgaged real property at a foreclosure with a credit bid of less than the full debt, but which was denied a deficiency judgment because the value of the property exceeded the debt, could not thereafter foreclose on the personal property collateral. The debt was extinguished by the foreclosure sale.
135. *Chatham Square Owners Corp. v. Roth*,  
[52 N.Y.S.3d 245](#) (N.Y. Dist. Ct. 2017)  
The buyer of a condominium at an Article 9 foreclosure sale could not use summary proceedings to evict the debtor. The debtor was not a licensee but instead a tenant under the proprietary lease, even if that lease had been terminated by the sale.
136. *Arsr Solutions, LLC v. 304 East 52nd Street Housing Corp.*,  
[48 N.Y.S.3d 510](#) (N.Y. Sup. Ct. 2017)  
Because the lender that had a security interest in shares of stock associated with three cooperative apartment units purchased the shares at an Article 9 disposition, the lender's successor was entitled to an order requiring the cooperative housing corporation to recognize the successor as the owner of the stock, to deliver to the successor a new stock certificate naming the successor as the owner, and to issue to the successor proprietary leases for the apartment units associated with those shares.



137. *Santander Consumer USA, Inc. v. Mata*,  
[2017 WL 1208767](#) (Tex. Ct. App. 2017)

A secured party sued by the debtor for actions relating to a repossession, and which moved to compel arbitration pursuant to a clause in the security agreement, could not compel the repossession agent it hired or the agent's subcontractors to arbitrate the secured party's claims against them for indemnification and contribution. There was no arbitration clause in the secured party's agreement with the repossession agent, nor did that agreement incorporate by reference the terms of the security agreement.

138. *Credit Acceptance Corp. v. Lowery*,  
[2017 WL 1191087](#) (Del. Ct. Common Pl. 2017)

A secured party was entitled to a monetary judgment on the secured obligation even though it had not foreclosed on the collateral.

139. *PACCAR Financial Corp. v. Mostoller*,  
[2017 WL 1902898](#) (Pa. Super. Ct. 2017)

A secured party was entitled to summary judgment against the debtors and guarantors for the full amount of secured obligations even though the defendants contended that the secured party had disposed of some or all of the collateral. The secured party would, however, have to properly credit the secured obligation for the amount of the disposition proceeds.

### ***Liability Issues***

#### **– of the Secured Party**

140. *Kinzel v. Bank of America*,  
[850 F.3d 275](#) (6th Cir. 2017)

A brokerage house did not breach the implied covenant of good faith and fair dealing by liquidating, without prior notice or demand, a couple's securities account – which at the time consisted principally of stock in one company – when the value of the securities fell. Although the loan-to-value ratio was under 70%, which had been the brokerage's internal threshold for exercising its contractual discretion to liquidate collateral, nothing about the 70% threshold was actually a part of the parties' agreement. Although the debtors had taken great strides to pay down the secured obligation and the brokerage was aware of their attempt to obtain a home-equity line of credit and move other assets into the securities account, the brokerage liquidated collateral after the Dow Jones Industrial Average was at a twelve-year low and the securities were at their lowest price since 1991.

141. *O.F.I. Imports Inc. v. GECC*,  
[2017 WL 6734187](#) (S.D.N.Y. 2017)

A debtor failed to state a claim against a secured party that failed to file a termination statement or release its interest in the collateral after the debtor paid down to zero its obligation on a revolving line of credit because the security agreement conditioned the secured party's obligation to do so on the debtor's deposit of sufficient cash to cover all contingent obligations and execution of a release, neither of which the debtor had claimed to provide.

142. *Pinks v. M&T Bank*,  
[2017 U.S. Dist. LEXIS 50892](#) (S.D.N.Y. 2017)

A debtor to whom the secured party sent a notification of disposition that allegedly failed to comply with § 9-613 and § 9-614 had no standing to bring a class action in federal court because he had not suffered an injury in fact. Although his vehicle had been repossessed, there was nothing to tie that loss to the defective notification. Even if the debtor had standing, he would have it only for claims arising under the law of his state, not for claims based on other states' law. Although the UCC is designed to create uniformity in the laws governing commercial transactions through the United States, there are variations in enactment and in interpretation. Moreover, there are different potential conflicts between the notice requirements of each state's Retail Installment Sales Act and its version of the UCC, differing rights to deficiency claims (*i.e.*, some but not all follow the absolute bar rule), and different statutes of limitation.

143. *Soberanis v. City Title Loan, LLC*,  
[2017 WL 1232437](#) (D.S.C. 2017)

A debtor stated causes of action against a secured party for conversion, breach of the peace, violation of the Fair Debt Collection Practices Act, and unconscionable debt collection for repossessing the debtor's car over her objections and without first sending a notice of cure required by South Carolina law. The debtor also stated a claim for unfair trade practices by alleging that the secured party included a mandatory arbitration clause in the agreement, refusing to waive it, but also refusing to participate in arbitration, all for the purpose of delaying adjudication of the debtor's claims.

144. *In re House*,  
[2017 WL 2579026](#) (Bankr. S.D. Miss. 2017)

A secured party was liable for \$500 for not returning items allegedly in the debtors' car at the time of repossession despite testimony that the secured party's business practice was to inventory and store items of value.

145. *Duncan v. Asset Recovery Specialists, Inc.*

[2017 WL 2870520](#) (W.D. Wis. 2017), *appeal filed*, (7th Cir. Aug. 8, 2017)

Although the debtor did not have a claim under the Fair Debt Collection Practices Act against either the secured party or the repossession agent based on her mistaken belief that the repossession agent sought to charge her \$100 to return property within the repossessed car, the debtor might have a conversion claim.

146. *Napoleon v. Strategic Dealer Services, LP*

[2017 WL 894540](#) (Tex. Ct. App. 2017)

The debtor on a car loan who: (i) had made payments to one of two assignees of the loan; (ii) received those payments back when the payee determined that the other assignee had priority; and (iii) never paid the assignee with priority, had no defense or claim against that assignee, which eventually repossessed and sold the car. Because the debtor conceded that she signed the purchase contract, was obligated to make payments, and that she granted a security interest in the car, the trial court properly granted summary judgment on the assignee's claim for breach of contract. The fact that the assignee did not possess the original contract was irrelevant because the contract was not a negotiable instrument. Although the debtor claimed that the certificate of title application contained her forged signature, there was no evidence that the assignee had knowledge of this when it repossessed and sold the car.

147. *Complete Cash Holdings, LLC v. Powell,*

[2017 WL 1422476](#) (Ala. 2017)

A jury award of compensatory and punitive damages against a secured party for repossessing a vehicle based on a forged title pawn agreement had to be reversed because the secured party was creditor – not a debt collector within the meaning of the Fair Debt Collection Practices Act – and therefore the jury's general verdict could have been based in its erroneous conclusion that the secured party had liability under the FDCPA.

148. *Gay v. Alliant Credit Union,*

[2017 WL 35704](#) (E.D. Mo. 2017)

The debtor failed to state a cause of action against a secured party for damages caused by the fact that the collateral – a boat – had sunk because the secured party never took possession of the boat. Although the secured party sent the debtor a letter stating it had repossessed the boat, the debtor knew that was not true. Although the secured party had indicated an intention to repossess the collateral and had received relief from the automatic stay to do so, that did not justify the debtor's decision not to winterize the boat and could not be the basis for a promissory estoppel claim.

149. *Stoltenberg v. Sheppard, Mullin, Richter, & Hampton, LLP*,  
[2017 WL 2644646](#) (Cal. Ct. App. 2017)

A law firm that acquired a security interest in a client's artwork and cooperative apartments to secure the payment of the firm's fees did not thereby receive a fraudulent transfer. Although the security interest attached after an \$8.5 million judgment was entered against its client, it initially appeared that the client had sufficient assets to pay the firm's fees and at least a portion of the judgment and the judgment creditor's counsel had agreed that the client could use the art to pay attorney fees. The transfer was not constructively fraudulent because even if the collateral was worth substantially more than the amount of the fees, the firm's lien was limited to the amount of the fees.

150. *Wells Fargo Equipment Finance, Inc. v. Bacjet, LLC*,  
[221 So. 3d 671](#) (Fla. Ct. App. 2017)

A secured party located in Oklahoma and that did not lend to Florida residents was nevertheless subject to personal jurisdiction in Florida with respect to a judgment creditor's fraudulent transfer action against the secured party with respect to the transaction by which the secured party acquired a security interest in the judgment debtor's accounts, stock certificates, and Florida homestead.

151. *Mizrahi v. Checkolite International, Inc.*,  
[2017 WL 111919](#) (D.N.J. 2017)

An unsecured creditor of a corporation stated a cause of action for violation of the New Jersey Uniform Fraudulent Transfer Act against the corporation's secured lender and the buyer of the corporation's assets at a disposition by the secured lender. The unsecured creditor alleged that the buyer, which employs the debtor's principal owner, and the secured lender conspired to prevent payment to the unsecured creditor.

152. *La Bella Dona Skin Care, Inc. v. Belle Femme Enterprises, LLC*,  
[805 S.E.2d 399](#) (Va. 2017)

Although there is no cause of action for conspiracy to effect a fraudulent transfer, the trial court erred in awarding summary judgment that the secured party did not engage in an intentionally fraudulent transfer when it orchestrated a public sale of the collateral to itself and the transferred some of the collateral to a new entity formed by the principals of the debtor. There was evidence that the parties engaged in a series of transactions designed to place the debtor's assets beyond the reach of a judgment creditor.

153. *Cohen v. Forden*,  
[2017 WL 370909](#) (N.J. Super. Ct. 2017)

The managing member of a company who had an unperfected security interest in the company's assets was guilty of fraud and negligent misrepresentation for failing to disclose the security interest to a lender who would not have made the loan had he known of the security interest.

154. *Vendorpass, Inc. v. Texo Solutions, L.L.C.*,  
[2017 WL 444303](#) (N.J. Super. Ct. 2017)

A secured party that received payment from the debtor after the debtor had received funds from a related entity had no liability to a creditor of the related entity. There was no basis for a claim of constructive trust because the secured party was not unjustly enriched by the repayment of a debt. Even if the transfer of funds to the debtor was a constructive or intentionally fraudulent transfer, the secured party was a good faith subsequent transferee that gave value, and hence had a valid defense. Moreover, the secured party took free as a transferee fungible money.

155. *Ericsson Inc. v. Corefirst Bank & Trust*,  
[2017 WL 3053646](#) (D. Kan. 2017), *appeal filed*, (10th Cir. Aug. 17, 2017)

The bank with a security interest in a borrower's deposit account and which debited the account after a \$217,000 deposit from the debtor's employer, had no liability to the employer for unjust enrichment even though the deposit included an overpayment of \$122,000. Although the employer was entitled to restitution from the borrower, the bank took free of the restitution claim because it was a bona fide payee: it had no notice of the overpayment. It did not matter that the bank debited the account rather than receiving a voluntary payment from the borrower.

156. *McDonald v. Nixon Energy Solutions*,  
[2017 WL 1836937](#) (D.S.C. 2017)

The supplier of a generator to a biogas facility had no fraudulent conveyance claim against the owner's secured party for receiving payment of a federal grant to the owner, even though the secured party perfected its security interest after the supplier filed a notice of its mechanic's lien and the secured never complied with the Federal Assignment of Claims Act. The secured party did have a security interest in the owner's general intangibles, which included the right to payment of the federal grant, and there was no evidence that the owner was insolvent when the security interest was transferred. The supplier also had no claim for tortious interference with contract against the secured party because the secured party was justified in receiving the payment.

157. *TCP Printing Co. v. Enterprise Bank*,  
[2017 WL 4357378](#) (E.D. Mo. 2017), *appeal filed*, (8th Cir. Nov. 1, 2017)

A secured party that entered into an agreement with a potential buyer of the debtor's assets, by which the secured party agreed to waive its lien with respect to any receivables arising during the due diligence period from buyer-funded work, had no liability to the prospective buyer for breach of contract, unjust enrichment, or conversion for collecting the debtor's accounts because the buyer breached the agreement, which caused the agreement to expire.

158. *Quintanilla v. West*,

[2017 WL 1684832](#) (Tex. Ct. App. 2017)

The trial court should have dismissed the debtor's slander of title case against a secured party for filing a financing statement. A financing statement is a matter of public concern, is therefore protected speech under the Texas Citizens Participation Act, and accordingly the debtor had to establish each element of his claim by clear and specific evidence. Because the debtor's evidence that he had paid the secured obligation through a settlement agreement, which did not refer to the secured obligation, was barred by the parol evidence rule, the debtor was unable to make a prima facie showing of entitlement to relief.

159. *MBI International Holdings Inc. v. Barclays Bank PLC*,

[57 N.Y.S.3d 119](#) (N.Y. Sup. Ct. 2017)

A debtor's fraud claim against a bank that had a security interest in lease payments due from the Saudi government and which allegedly settled by releasing the Saudi government from the lease in exchange for a banking license in Saudi Arabia, was barred by the statute of limitations, which requires that the action be brought within six years or within two years of when it should have been discovered. The conduct alleged occurred in 2006, the debtor was aware of the settlement by 2008, and the banking license became public knowledge in 2009.

160. *Wass v. County of Nassau*,

[60 N.Y.S.3d 339](#) (N.Y. Sup. Ct. 2017)

An individual injured by an allegedly defective ladder had no product liability claim against the corporation that bought the assets of the manufacturer from the SBA, after it had foreclosed its security interest in those assets. The "mere continuation" doctrine of successor liability did not apply because, even though the corporation employed some of the people who had worked for the manufacturer, there was no sale between manufacturer and the corporation, no continuity of ownership or control, and no corporate reorganization.

161. *In re Comprehensive Power, Inc.*,

[578 B.R. 14](#) (Bankr. D. Mass. 2017)

A bankruptcy trustee stated a claim for successor liability under both the de fact merger and alter ego theories against the secured party that purchased the debtor's assets at a public disposition pursuant to a "loan to own" strategy and then hired many of the debtor's employees to engage in the same business, even though there was no continuity of ownership.

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– of the Debtor

162. *Burns v. State*,

[2017 WL 2819116](#) (Tex. Ct. App. 2017)

Because there was evidence that the debtor had refused to return the collateral – a truck – to the secured party after default and had threatened to conceal and damage it, there was substantial evidence to support the jury’s verdict that he was guilty of willfully damaging the truck by removing many components in order to hinder the secured party. The debtor was sentenced to incarceration for two years.

163. *B.J.’s Auto Wholesale, Inc. v. Automotive Finance Corp.*,

[2017 WL 6045223](#) (Ind. Ct. App. 2017)

Because the corporate debtor failed to appear through counsel, it was deemed to have admitted the allegations in the complaint that it converted the collateral by selling vehicles out of trust and not remitting the proceeds to the secured party, and therefore was liable for treble damages. The guarantor who owned and operated the debtor was also liable for conversion and treble damages because the security agreement expressly provided that proceeds were held in trust for the secured party, and there was unrefuted evidence that the guarantor exercised control over the proceeds and was aware of a high probability that such conduct was unauthorized.

164. *Ameris Bank v. Lexington Insurance Co.*,

[2017 WL 4225629](#) (S.D. Ga. 2017)

An insurer of equipment, which paid the owner instead of the secured party that was named as the loss payee on the casualty insurance policy, and which was therefore held liable to the secured party, had no claim against the owner for equitable indemnity, conversion, or unjust enrichment because it failed to back its claims up with citation to authority and because the insurer made the payment voluntarily.

165. *State v. Carey*,

[2017 WL 3412150](#) (Tenn. Ct. Crim. App. 2017)

The fact that the debtor granted a second lien on his vehicle was insufficient to convict him of intentionally hindering a secured creditor. There is no indication that the debtor was involved in a fraudulent scheme to prevent the initial secured party from repossessing the collateral or receiving payment on the loan. In fact, payments on the initial secured obligation were being withheld from the debtor’s paycheck when the second lien was created.



166. *Companion Property and Casualty Insurance Company v. Wood*,  
[2017 WL 4168526](#) (D.S.C. 2017)

A secured party's cause of action for breach against the debtor, who had provided a security interest in corporate stock to, for allegedly causing the assets of the corporation to be sold, would not be dismissed. It is at least arguable that the language of security agreement – which gave the secured party a right to “properties received upon the conversion or exchange thereof pursuant to any merger, consolidation, reorganization, *sale of assets* or other agreements” (emphasis added) – combined with the duty of good faith and fair dealing, precluded sale of substantially all assets of the pledged entities without delivering the proceeds or benefits of the sales to the secured party.

167. *First Security Bank v. Campbell*,  
[2017 WL 219516](#) (N.D. Ill. 2017)

A bank with a security interest in a securities account stated various claims against the debtors for causing entities controlled by the debtors to transfer securities out of the securities account and diverting the proceeds of the transferred securities for his own personal benefit. Specifically, the bank stated a claim against one of the debtors for tortiously interfering with an agreement under which the entities acknowledged the security interest and agreed to be bound by the terms of the security agreement. The bank also stated claims against both debtors for conspiring with the entities to defraud the bank and for unjust enrichment. The bank, however, failed to state a claim for aiding and abetting the entities' fraud because the bank had not specified what misrepresentations were made, to whom, or when.

168. *Woods v. Hall*,  
[2017 WL 2645689](#) (Wash. Ct. App. 2017)

Although the secured party refused to enter the debtor's leased premises to remove the collateral, due to threatened criminal charges, the debtor was liable in conversion for interfering with the secured party's right to reclaim the collateral because the debtor refused to deliver the collateral curbside despite the secured party's demand that the debtor do so.

169. *Jones v. Community Bank of Wichita*,  
[390 P.3d 127](#) (Kan. Ct. App. 2017)

A woman who had pledged a CD jointly owned with her sister to a bank to secure a loan to the sister's business had no cause of action for fraud against the sister's husband for allegedly encouraging the bank to declare a default and foreclose on the CD because the woman did not claim that any of the husband's statements was untrue and, in any event, all the statements were made to the bank, not to the woman. Although the husband might have mistakenly indicated that there were two \$100,000 CDs instead of one \$200,000 CD, the woman failed to show how that was material or how she had detrimentally relied on that misstatement. The woman also had no claim for conversion, unjust enrichment, or civil conspiracy.



170. *Holland v. Sullivan*,

[2017 WL 3917142](#) (Tenn. Ct. App. 2017)

The debtors who had given a lender the certificate of title to their automobiles to secure a debt were liable for both compensatory and punitive damages due to their slander of title and conspiracy to commit slander of title in connection with their actions in obtaining duplicate titles, and then using those duplicates to sell one of the automobiles. It did not matter that the lender's security interest was unperfected.

171. *Auto-Site v. Matthews*,

[2017 WL 5151204](#) (Ohio Ct. App. 2017)

Although the secured party repossessed the collateral due to the debtor's fraud or misrepresentation in the original application, the secured party demonstrated its intention to waive the right to rescind by thereafter restoring possession of the collateral to the debtor. Consequently, when the secured party later repossessed and disposed of the collateral, the debtor remained liable for the deficiency.

172. *Dupreez v. GMAC, Inc.*,

[2017 WL 6016592](#) (Md. Ct. App. 2017)

The secured party could charge the debtor for the cost of repossessing the collateral, both under the terms of the security agreement and pursuant to § 9-615(a). Such a charge did not violate other state law.

#### **– of Others**

173. *Wells Fargo Financial Leasing, Inc. v. Pope*,

[2017 WL 114408](#) (S.D. Miss. 2017)

Because the debtor's secured lender had a perfected security interest in the products and proceeds of the debtor's poultry houses, compost drum, generator, land, and related equipment of his farming operation, it had a perfected security interest in the proceeds of his poultry flocks. Therefore, the debtor's assignee, who knew of the money owed to the secured party and that the debt was secured by the land, poultry houses, and equipment of the poultry farming operation, was liable in conversion for failing to remit the proceeds of the flock to the secured party.

174. *Farm Credit of Southern Colorado, ACA v. Mason*,

[2017 WL 1279716](#) (Colo. Ct. App. 2017), *cert. granted*, (Colo. Oct. 2, 2017)

Although the bank with a security interest in the debtor's crops might have acquiesced to the debtor's father cultivating and harvesting the crops, the bank never waived its rights in the crops because such a waiver must be in writing. Indeed, the bank obtained a court order to preserve the collateral, evidencing its intent not to waive its rights. Consequently, the father was liable in conversion for selling the crops and retaining the sale proceeds.

175. *Ag Resource Management, LLC v. Southern Bank*,  
[2017 WL 2927477](#) (E.D. Ark. 2017)

A secured party with a security interest in the debtor's crops, and which was listed as a co-payee on thirteen checks issued by a buyer of the crops, had a cause of action for conversion against the bank that allowed the debtor to deposit the checks into an account at the bank without the endorsement of the secured party. Although checks written to alternative payees may be endorsed by any one of them, and any ambiguity about whether payees are joint payees or alternative payees will be resolved in favor of the latter, the secured party was a joint payee even though its name was indicated on a lower line because its name and the debtor's name were connected by the conjunction "and."

176. *Metabank v. Interstate Commodities, Inc.*,  
[2017 WL 5633104](#) (D.S.D. 2017)

A bank that by letter agreed to release or subordinate its security interest in crop proceeds to a new crop financier upon receipt of a specified amount had a conversion claim against the financier that purchased the debtor's crop because the bank did not receive the specified amount.

177. *Wall v. Altium Group, LLC*,  
[2017 WL 123779](#) (W.D. Pa. 2017)

A couple who purchased payments under a structured settlement from an intermediate buyer but who received no payments when a court vacated the order approving an earlier sale had no cause of action against the intermediate buyer for breach of transfer warranties because the initial assignment of the annuity was not a negotiable instrument and the couple was not a party to it. However, the couple did state a cause of action against the intermediate buyer for breach of contract.

178. *Connor v. Reilly*,  
[2017 WL 213840](#) (W.D. Wis. 2017)

The buyer of a car did not have a cause of action under § 1983 against the sheriff that seized the car and then released it to the secured party without first providing the buyer with a hearing. The buyer had acquired the car, indirectly, from an individual who had paid for it with a fraudulent cashier's check and who, when reselling it, had provided a fake Notice of Lien Release. The secured party retained a security interest in the car that was superior to the rights of the buyer.

179. *DS-Concept Trade Invest, LLC v. Morgan-Todt, Inc.*,  
[2017 WL 2180982](#) (N.D. Cal. 2017)

The factor that purchased the accounts of a cheese supplier might have a negligence claim against the storage company that improperly stored the cheese in a freezer, rather than a refrigerator, rendering the cheese unfit for consumption. The factor claimed to have a security interest in the cheese and the storage company might have had a duty to the factor because, the factor alleged that pursuant to practice within the global industry pertaining to trade debt and factoring agreements, the storage company should have understood that the cheese and its proceeds were subject to third-party interests “in favor of those who had provided financing in connection with the acquisition and intended sale of the cheese.”

180. *Exodus Vision, LLC v. Touchmark National Bank*,  
[2017 WL 951732](#) (N.D. Ga. 2017)

The owner of equipment that the debtor stored in its warehouse – in a segregated area and specially tagged – stated a claim for conversion against the buyer that purchased it from the debtor’s secured party.

181. *US Herbs, Inc. v. Riverside Partners, LLC*,  
[2017 WL 238446](#) (N.D. Ohio 2017)

The entity that purchased assets of the debtor from the debtor and its secured creditors – in lieu of a private foreclosure sale – was not liable to an existing creditor of the debtor because: (i) the buyer expressly disclaimed liability in the purchase agreement; (ii) there was no de facto merger because the debtor did not immediately or rapidly dissolve; and (iii) and the buyer was not a mere continuation of the debtor because there was no continuity of ownership.

182. *Commercial Credit Group, Inc. v. Process, Inc.*,  
[2017 WL 4214085](#) (E.D. Ark. 2017)

A buyer of collateralized equipment was estopped from alleging that the security interest was unperfected or that the buyer took free as a buyer in ordinary course of business by statements made in the buyer’s pleadings. The buyer also failed to show that no portion of the secured obligation remained outstanding after the secured party purchased the proceeds of the equipment using a credit bid.

183. *Ascentium Capital LLC v. Adams Tank & Lift Inc.*,  
[2017 WL 4102741](#) (M.D. Ga. 2017)

The lender expecting to obtain a PMSI in equipment and which advanced funds directly to the debtor’s seller had a cause of action against the seller for money had and received – but not for unjust enrichment – for not returning the portion of the funds allocated to equipment that the debtor never purchased, and instead forwarding those funds to the debtor.

184. *Rebel Auction Co., Inc. v. Citizens Bank*,  
[805 S.E.2d 913](#) (Ga. Ct. App. 2017)

A bank claiming a security interest in equipment was not entitled to summary judgment on its claim for conversion against the auctioneer that admitted (apparently mistakenly) to selling the equipment because the bank's filed financing statement identified the debtor as "Big Metal Construction Inc. Payroll Account" instead of "Big Metal Construction Inc.," and neither party had submitted evidence about whether the financing statement would have been disclosed in response to a search under the debtor's correct name. Hence a material fact remained in dispute about whether the equipment was encumbered by the financing statement.

185. *Oakland Police & Fire Retirement System v. Mayer Brown, LLP*,  
[861 F.3d 644](#) (7th Cir. 2017)

The law firm representing the debtor and which provided transaction documents to counsel for the creditors' agent, resulting in the filing of termination statements for a \$1.5 billion term loan that was not paid off, had no liability to the creditors because the firm owed no duty to the creditors. It did not matter that the firm represented the agent in unrelated matters or that it had prepared the documents.

186. *GemCap Lending, LLC v. Quarles & Brady, LLP*,  
[2017 WL 4081884](#) (C.D. Cal. 2017), *appeal filed*, (9th Cir. Oct. 6, 2017)

A secured party did not have a cause of action against the debtor's counsel for professional malpractice in connection with an opinion letter counsel issued because, even though the opinion stated that the Loan Agreement creates a valid security interest in favor of the secured party in the debtor's rights in the "collateral," and some of the intended collateral was in fact owned by a related entity, the opinion letter defined "collateral" to be the debtor's property and thus was not incorrect.

187. *J.W. Hall, Inc. v. Nalli*,  
[2017 WL 626715](#) (Pa. Super. Ct. 2017)

The seller of a business had no cause of action for malpractice against the attorney who documented the transaction for both the buyer and the seller and who failed to provide for a security interest in the assets sold to secure the buyer's obligation to pay the balance of the purchase price because the seller could not prove to have suffered damages. The seller repurchased the property in the buyer's bankruptcy proceeding, the seller therefore had the property back, and the payments the seller did receive from the debtor offset the expenses incurred in repurchasing the property.

188. *Hattem v. Smith*,

[52 N.Y.S.3d 172](#) (N.Y. App. Div. 2016)

The malpractice claim of an individual who sold a business against his lawyer who failed to perfect a security interest in the buyer's assets was properly reduced by the individual's comparative fault and failure to mitigate. The individual failed to inform the lawyer of changes in the closing process until after a bank perfected its security interest in the buyer's assets and the individual failed to foreclose on some of the assets, permitting them to be seized and sold by another creditor.

189. *DLA Piper LLP (US) v. Linegar*,

[2017 WL 6559658](#) (Tex. Ct. App. 2017)

The law firm that represented the surviving company in a merger, in connection with which the company received a bridge loan from an entity controlled by one of the company's principal owners, was liable for malpractice for failing to perfect the security interest that secured the loan. Even though the firm did not represent the secured party or the principal owner, a member of the firm told the principal owner that the security interest was not at risk and that "everything would be taken care of," and failed to make clear who the firm represented.

190. *In re Reckart Equipment Co.*,

[2017 WL 943909](#) (Bankr. N.D.W. Va. 2017)

Factual issues prevented summary judgment on whether the filing office was liable to a secured party that, before extending credit, searched but did not find a financing statement that the filing office mis-indexed but which was nevertheless effective to perfect. The failure to locate that earlier filing might not have caused the loss if the prior secured party's other financing statements were authorized and covered the collateral at issue.

191. *Edwards Family Partnership, LP v. Bancorpsouth Bank*,

[236 F. Supp. 3d 964](#) (S.D. Miss.), *aff'd*, [2017 WL 4641274](#) (5th Cir. 2017)

The assignee of a secured party that had a control agreement with a bank had no claim against the bank for allegedly permitting the debtor to make 13 transfers from the blocked account to accounts other than the one to which the control agreement permitted transfer. Even if the assignee could enforce the control agreement, the assignee, through its course of conduct, had waived that restriction in the control agreement because the assignee was aware of numerous transfers to other accounts – including some of its own accounts – yet did not complain and instead relied on the debtor to replenish the blocked account.

192. *Susaraba v. Bates*,  
[2017 WL 3723366](#) (Tex. Ct. App. 2017)

A man who, following his divorce, remained liable for half of the debt represented by a promissory note to his former mother-in-law, was not released therefrom when his ex-wife provided to her mother a security interest in business property “in lieu of judgment.” There was no accord and satisfaction with the ex-husband because he did not sign the document. There was no release because nothing in the document unambiguously indicated that either the ex-husband or the ex-wife was released of personal liability.

## **BANKRUPTCY**

### ***Property of the Estate***

193. *In re Town Center Flats, LLC*,  
[855 F.3d 721](#) (6th Cir. 2017)

An assignment of rents is, under Michigan law, an absolute assignment if the assignment has been recorded and a default has occurred. Therefore, rents arising from the debtor’s residential complex were not property of the estate.

194. *In re TSAWD Holdings, Inc.*,  
[574 B.R. 482](#) (Bankr. D. Del. 2017)

Although the seller of goods had the right to stop shipment while the goods were in transit after discovering that the buyer was insolvent, and the seller sent proper notice to stop shipment by sending it to the freight forwarder, which was the agent of the carrier, the carrier was not obliged to follow the seller’s instruction because neither the seller nor the freight forwarder was listed as the consignee on the nonnegotiable document of title. Accordingly, the buyer became the owner of the goods upon receipt and the goods thereafter became property of the estate when the debtor filed for bankruptcy protection.

### ***Claims & Expenses***

195. *In re Province Grande Old Liberty, LLC*,  
[655 F. App’x 971](#) (4th Cir. 2016), *cert. granted*, 2017 WL 2742889 (2017)

A transaction structured as a sale of a secured loan to an entity newly formed and owned by insiders of the debtor was really a settlement and satisfaction of the debt. Consequently, the portion of the purchase price paid with new funds was re-characterized as an equity investment in the debtor. The re-characterization analysis was properly applied to the settlement transaction, rather than the initial loan.

196. *In re Sunnyslope Housing L.P.*

[859 F.3d 637](#) (9th Cir. 2017)

Replacement value, not foreclosure value had to be used in valuing for the purposes of cram down collateral that the debtor proposed to retain and use, even though in this rare case foreclosure value would be higher because it would vitiate covenants requiring that the collateral be used for low-income housing

197. *In re Salamon,*

[854 F.3d 632](#) (9th Cir. 2017)

A creditor whose claim was secured by a junior deed of trust on real property could not make the § 1111(b) election after the property was sold at a nonjudicial foreclosure sale. After that time, the claim was no longer secured by a lien on property of the estate.

198. *In re Alliance Well Service, LLC,*

[577 B.R. 389](#) (Bankr. D.N.M. 2017)

An insurance premium financier that had a security interest in the debtor's unearned premium and which, pursuant to a confirmed plan of reorganization, had the right to cancel the policy, collect any unearned premium from the insurer, and to apply it to the loan balance, was not entitled to retain the amount that the insurer refunded as an overpayment of the premium. The financier's secured claim was paid in full by periodic payments pursuant to the plan; the plan provided that amounts remaining due were unsecured.

199. *In re Hhgregg, Inc.,*

[2017 WL 6016290](#) (Bankr. S.D. Ind. 2017)

A supplier that sold goods to the debtor less than 45 days before the petition had no reclamation right because the goods were subject to the perfected security interest of the debtor's inventory lender.

200. *In re World Imports, Ltd.,*

[862 F.3d 338](#) (3d Cir. 2017)

A furniture seller's claim was entitled to priority under § 503(b)(9) because the goods sold were "received" by the debtor within 20 days prior to bankruptcy, even though the goods were shipped FOB and the risk of loss passed to the debtor prior to that time.

201. *In re SRC Liquidation, LLC,*

[573 B.R. 537](#) (Bankr. D. Del. 2017)

A supplier's claim for goods that a supplier drop shipped to the debtor's customers was not entitled to priority under § 503(b)(9) because the goods were not "received" by the debtor.

202. *In re ADI Liquidation, Inc.,*

[572 B.R. 543](#) (Bankr. D. Del. 2017)

Goods that a seller delivered directly to the members of the bankrupt debtor – a cooperative food distributor – were not "received" by the debtor and might not even have been sold to the debtor, and thus the claim for the price was not entitled to priority under § 503(b)(9).



203. *In re Escalera Resources Co.*,

[563 B.R. 336](#) (Bankr. D. Colo. 2017)

Because metered electrical energy is a “good” within the meaning of the UCC and § 503(b)(9), the utility that provided electricity to the debtor during the 20 days preceding bankruptcy was entitled to administrative expense priority for the price of the electricity.

204. *In re Windmill Run Associates, Ltd.*,

[566 B.R. 396](#) (Bankr. S.D. Tex. 2017)

An oversecured creditor was entitled to post-petition interest at the pre-default rate, not at the default rate. Even though the debtor’s Chapter 11 plan provided for full payment of all unsecured claims, so that other creditors would not be hurt by awarding interest at the default rate, and even though the spread between the rates was only 4% and thus not unreasonable, because the creditor was at all times oversecured and engaged in obstructionist tactics, both before and during bankruptcy, the court would exercise its equitable powers to deny default-rate interest.

205. *In re Roselli Moving & Storage Corp.*,

[568 B.R. 592](#) (Bankr. E.D.N.Y. 2017)

A secured party’s prepetition security interest did not encumber the trustee’s recovery pursuant to a settlement of a fraudulent transfer claim. To the extent that the property transferred by the debtor consisted of funds on deposit, the transferee of those funds took them free of the security interest. Even if the personal property that the debtor had transferred was and still is encumbered by the security interest, that property was not recovered by the trustee.

206. *In re Montiel*,

[572 B.R. 758](#) (Bankr. W.D. Wash. 2017)

The date to value collateral for the purposes of determining whether lien stripping will be permissible in a Chapter 13 case is the petition date, not the date on which the motion was made or heard, even though the debtor waited three years to bring the motion.

### ***Automatic Stay & Injunctions***

207. *In re Cowen*,

[849 F.3d 943](#) (10th Cir. 2017)

Retaining possession of property is not, but itself, exercising control over that property, and thus a secured party does not violate § 363(a)(3) merely by retaining possession of collateral after the debtor files a bankruptcy petition. The secured party in this case might, however, be liable for forging documents in an effort to show that it had disposed of the collateral before the petition was filed.

208. *In re Denby-Peterson,*[576 B.R. 66](#) (Bankr. D.N.J. 2017)

Although a secured party does not violate the stay simply by retaining possession of a vehicle repossessed prepetition, the debtor is entitled an order requiring the secured party to turn over the vehicle.

209. *In re Avila,*[566 B.R. 558](#) (Bankr. N.D. Ill. 2017)

A city that had impounded the debtor's vehicle for nonpayment of tickets did not violate the automatic stay by refusing to release the vehicle after the petition was filed because possession was necessary to maintain perfection of the city's statutory lien and the trustee's rights and avoidance powers are subject to such a perfected lien.

210. *In re House,*[2017 WL 2579026](#) (Bankr. S.D. Miss. 2017)

A secured party that had repossessed the debtors' car prepetition violated the automatic stay after the petition was filed by refusing to return the car after the debtors had provided proof of insurance.

211. *In re Holloway,*[565 B.R. 435](#) (Bankr. M.D. Ala. 2017)

The order vacating dismissal of a Chapter 13 case reinstated the stay as of the date of the order, not retroactively to the date of dismissal. Therefore, a secured party that repossessed a vehicle after the dismissal but before the dismissal order was vacated did not violate the stay.

212. *In re Gilford,*[567 B.R. 412](#) (Bankr. D. Mass. 2017)

The debtor's ex-husband and his counsel willfully violated the automatic stay by proceeding with a state-court hearing that held the debtor in contempt for failing to comply with an order requiring the debtor to refinance a car lease or turn the car over to the ex-husband. Even though the car lease was in the ex-husband's name, the car was in the debtor's possession and thus protected by the automatic stay.

213. *In re Gray,*[567 B.R. 841](#) (Bankr. W.D. Wash. 2017)

A judgment creditor and its law firm violated the automatic stay by failing to take steps to quash a bench warrant for the debtor's arrest which they had obtained for failing to appear at supplemental proceedings. Those proceedings, which related to collecting a judgment debt, did not come within the police or regulatory power exception to automatic stay.

214. *In re HardRock HDD, Inc.*,  
[569 B.R. 443](#) (Bankr. E.D. Mich. 2017)

In determining whether collateral is needed for a successful reorganization, the court must consider which debtor entity in a jointly administered but not substantively consolidated case owns the collateral, and whether that owner has a realistic chance of successfully reorganizing.

### ***Sales of Assets***

215. *In re Spanish Peaks Holdings II, LLC*,  
[862 F.3d 1148](#) (9th Cir. 2017)

A sale of the debtor's real property free and clear effectively terminated prepetition leases that the trustee had not rejected prior to the sale. Although § 365 includes protections for lessees of the debtor's property upon rejection, there was no conflict between § 363 and § 365 because the leases had not been rejected.

216. *In re ARSN Liquidating Corp.*,  
[2017 WL 279472](#) (Bankr. D.N.H. 2017)

A 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.

### ***Discharge, Dischargeability & Dismissal***

217. *In re Brand*,  
[578 B.R. 729](#) (D. Md. 2017)

The debtor's Chapter 7 discharge did not absolve her of liability under a prepetition continuing guaranty for an extension of credit made after the discharge order was entered because the liability was based on conduct occurring postpetition. Because the debtor could have but did not revoke the continuing nature of the guaranty, she remained liable.

218. *DZ Bank AG Deutsche Zentral-Genossenschaft Bank v. Meyer*,  
[869 F.3d 839](#) (9th Cir. 2017)

The debt of an individual who was the sole member of a limited liability company and a guarantor of its secured debt, who caused the LLC to transfer \$123,200 of collateral to a corporation of which he was the sole owner, and who then caused the corporation to fraudulently transfer all of its assets – worth \$385,000 – in an effort hinder the collection efforts of the secured party, was nondischargeable for the full \$385,000 value of the property transferred, not merely the value of the collateral, because the secured creditor could have executed against the individual's 100% ownership interest in the corporation.

219. *In re Licursi*,[573 B.R. 786](#) (Bankr. C.D. Cal. 2017)

The obligations of a husband and wife who guaranteed a secured loan to a corporation that they owned and operated and that sold collateral to a newly formed entity that the couple also owned, and who not only failed to inform the secured lender of the sale but continued to misrepresent corporation's financial condition, was nondischargeable under § 523(a)(2). Although the misrepresentations occurred after the secured lender had extended credit, they caused the secured lender to delay exercising its rights. Because the corporation was insolvent at the time of the sale, and thus the husband as an officer owed a fiduciary duty to the corporation's creditors, the husband's liability was also nondischargeable under § 523(a)(4). The couple's dissipation of proceeds of the collateral was also grounds for making their obligation nondischargeable under § 523(a)(6).

220. *In re Moroni*,[2017 WL 436148](#) (Bankr. N.D. Ill. 2017)

The obligations of the individuals who owned car dealerships and guaranteed the dealerships' debts to the floor plan lender were nondischargeable under § 523(a)(4) because the individuals embezzled funds by knowingly and selling vehicles out of trust and not using the proceeds to pay down the debt. It did not matter that they allegedly used the proceeds to pay other expenses of the dealerships. Their fraudulent intent could be inferred from their attempts to hide the out-of-trust sales from the lender and from the fact that they conducted those sales in defiance of a state-court replevin order. For the same reasons, the obligations were nondischargeable under § 523(a)(6).

221. *In re Wille*,[2017 WL 3084402](#) (Bankr. W.D. Mo. 2017)

The obligations of a married couple that owned a car dealership and guaranteed its floor plan financing, which dealership sold vehicles out of trust, were not nondischargeable under § 523(a)(4) because the debtor's owed no fiduciary duty to the floor plan financier and did not embezzle the sale proceeds. It did not matter that the floor plan financing agreement expressly provided that "[u]pon the sale of any item of such Inventory, Dealer shall hold the amount received from the disposition of inventory in Trust for the benefit of Lender and Dealer shall pay to Lender all amounts due."

222. *In re Bagsby*,[2017 WL 3084405](#) (Bankr. W.D. Mo. 2017)

The obligations of a married couple that owned a car dealership and guaranteed its floor plan financing, which dealership sold vehicles out of trust, were not nondischargeable under § 523(a)(4) because the debtor's owed no fiduciary duty to the floor plan financier and did not embezzle the sale proceeds. It did not matter that the floor plan financing agreement expressly provided that "[u]pon the sale of any item of such Inventory, Dealer shall hold the amount received from the disposition of inventory in Trust for the benefit of Lender and Dealer shall pay to Lender all amounts due."

223. *In re Guarracino,*[2017 WL 4676241](#) (Bankr. D.N.J. 2017)

The assignee of a PACA beneficiary's claim had standing to seek a ruling that the debtor's obligation was nondischargeable under § 523(a)(4). Because the debtor, as the sole officer and owner of the entity whose assets were subject to a PACA trust, disregarded his fiduciary duties in using trust assets to pay expenses other than the PACA claims, the debtor's obligation was nondischargeable.

224. *In re Adkins,*[567 B.R. 501](#) (Bankr. S.D.W. Va. 2017)[578 B.R. 382](#) (Bankr. S.D.W. Va. 2017)

The obligation of a debtor who could not account for more than 30 items of collateralized farm equipment and who without the secured party's authorization sold other items of collateral and used some proceeds to buy assets in his son's name and had other proceeds paid directly to his son was nondischargeable under § 523(a)(6). The debtor's acts caused injury, were willful, and were malicious. Nondischargeability will be limited to the damages caused, which consist of the amount of diverted proceeds and, because appraisals cannot be performed on the missing items of collateral, the purchase price of those items.

The debtor's is not entitled to a discharge due to the debtor's failure to explain the loss of livestock and equipment.

225. *In re Edwards,*[2017 WL 3037451](#) (Bankr. W.D. Ky. 2017)

The personal obligation of the individual who owned a limited liability company that operated a boat dealership, guaranteed the company's debts, and who used proceeds of inventory collateral to pay personal expenses, was nondischargeable under § 523(a)(6). The obligation of the individual's wife, who also guaranteed the company's debt was dischargeable. Although she signed some of the checks that dissipated the proceeds, she did not sign the security agreement and there was no evidence that she was aware that the funds were proceeds of collateral.

226. *Salim v. VW Credit, Inc.,*[577 B.R. 615](#) (E.D.N.Y. 2017)

The bankruptcy court did not err in holding nondischargeable under § 523(a)(6) the obligations of the debtor under a guaranty of an auto dealership's floor-plan financing. The debtor was a managing member and part owner of the dealership, which sold 78 vehicles out of trust and which, a few days before filing bankruptcy, transferred \$810,000 to two individuals in Syria – one of whom was the debtor's brothers – allegedly to purchase more vehicles and transferred \$335,000 to the debtor's mother allegedly to repay a loan.

227. *SMS Financial JDC, LP v. Cope*,  
685 F. App'x 648 (10th Cir. 2017)

Because the maker of a promissory note claimed that the note revived a debt previously discharged in bankruptcy, a genuine issue of material fact should have prevented summary judgment on a claim for payment of note by the bank that acquired the note when the FDIC placed the original payee in receivership. Although, under 12 U.S.C. § 1823(e), an assignee takes free of most defenses, including those that render an agreement voidable, an assignee acquires no rights in a void agreement, and an agreement to pay a discharged debt is void.

### ***Avoidance Powers***

#### **– Preferences**

228. *In re NewPage Corp.*,  
569 B.R. 593 (D. Del. 2017)

The payments made by the debtor for custom equipment that payee was not obligated to begin manufacturing until after it received these payments, and pursuant to a contract that the debtor could terminate without liability any time before manufacturing began, were advance payments that were not on account of any antecedent debt, and thus could not be preferential.

229. *In re Tenderloin Health*,  
849 F.3d 1231 (9th Cir. 2017)

In determining whether a prepetition payment to a creditor from a deposit account in which the creditor had setoff rights satisfied § 547(b)(5), by enabling the creditor to receive more than it would have had the transfer not been made and the debtor liquidated in Chapter 7, it was appropriate to consider whether the deposit of funds into the deposit account would itself have been an avoidable preferential transfer.

230. *In re Agriprocessors, Inc.*,  
859 F.3d 599 (8th Cir. 2017)

A bank's prepetition payment of overdrafts on the debtor's checking account – by allowing provisional settlements of checks to become final even though those settlements contributed to negative account balance – gave rise to “debts” that were owed by debtor to bank, and whose subsequent payment by debtor was an avoidable preference. There was no available defense under § 547(c)(1) because the parties did not intend a contemporaneous exchange for new value. There was no defense under § 547(c)(2) because the debts were not incurred in the ordinary course of business. However, the debtor's “netting” agreement with the bank, under which there was no overdraft to the extent a positive balance in one account exceeded a negative balance in another, limited the amount of the debt and hence the bank's preference liability.

231. *In re Dots, LLC*,[562 B.R. 286](#) (Bankr. D.N.J. 2017)

To determine whether prepetition payments were made according to ordinary business terms, and thus protected by § 547(c)(2)(B) from avoidance as a preference, the court must examine industry practices; it is not sufficient to look only at the changes to the parties' credit relationship during the preference period. Preference defenses should be applied in the order most advantageous to the defendant; § 547(c)(2) can and should be applied before § 547(c)(4). A factor's extension of credit to the debtor's suppliers, which enabled the debtor to purchase goods on credit, was new value for the purposes of the § 547(c)(4) defense. Even though the credit was extended to the suppliers, not to the debtor, the credit provided new value – in the form of goods – to the debtor because the factor, not the suppliers, analyzed the debtor's creditworthiness, interacted with the debtor's financial personnel, and owned the related invoice immediately upon its issuance. Such new value would be calculated on an aggregate basis, not on an individual-supplier basis.

232. *In re Hill*,[566 B.R. 891](#) (Bankr. W.D. Mich. 2017)

The \$4,000 payment that, within the preference period, the debtor made to a court officer to prevent the officer from seizing property pursuant to a writ of execution was not a voluntary transfer; the debtor merely selected the type of property that the officer would receive. Accordingly, the debtor could claim an exemption in the portion of the payment that was avoided by the bankruptcy trustee.

233. *In re McNabb*,[567 B.R. 326](#) (Bankr. W.D. Tenn. 2017)

A security interest in crops that the mother of the debtors perfected five months after the security agreement and note were executed was a transfer on account of an antecedent debt – and avoidable as a preference – with respect to advances made more than 30 days before the financing statement was filed, but not with respect to the last advance, which was made less than 30 days before the financing statement was filed.

234. *In re Asheford*,[2017 WL 6550424](#) (Bankr. N.D. Ohio 2017)

A security interest in a motor vehicle that was perfected 32 days after the debtor signed the purchase agreement and took possession was avoidable as a preference even though the agreement was conditional on financing and the approval for the financing came through less than 30 days before the security interest was perfected. Even if the transfer of the security interest did not occur the date when financing was approved, the transfer would still be on account of an antecedent debt because the debtor made his promise to pay when he signed the purchase agreement. The transfer of the security interest was not a substantially contemporaneous exchange because it was outside the 30-day period.



235. *In re Xurex, Inc.*,  
[2017 WL 3084400](#) (Bankr. E.D. Mo. 2017)

The prepetition payments the debtor made to an insurance premium financier that had a security interest in unearned premiums were insulated from avoidance by § 547(c)(1) because the unearned premiums exceeded the debt at all times and the financier refrained from exercising its right to cancel the policy in exchange for the payments.

#### – Strong-Arm Powers

236. *In re CVAH, Inc.*,  
[570 B.R. 816](#) (Bankr. D. Idaho 2017)

A trustee's power under § 544(b) to exercise the rights of unsecured creditors to avoid prepetition transfers includes the power of the IRS to avoid transfers under state law as far back as ten years, without regard to any state statute of limitations. It also includes the power to use the Federal Debt Collection Procedures Act to avoid transfers made up to six years earlier.

237. *In re Alpha Protective Services, Inc.*,  
[570 B.R. 888](#) (Bankr. D. Ga. 2017)

Because the IRS had an unsecured claim in the case, the trustee's power under § 544(b) included the right to use the Federal Debt Collection Procedures Act to avoid transfers made up to six years earlier, provided the debtor was insolvent at that time.

#### – Fraudulent Transfers

238. *Meoli v. Huntington National Bank*,  
[848 F.3d 716](#) (6th Cir. 2017)

Because a bank's investigator discovered the fraudulent past of the operator of a Ponzi scheme, whose company was a depositor and borrower of the bank, but failed to share that discovery with the bank's manager who oversaw the company's account, the bank failed to demonstrate that it acted in good faith with respect to loan payments it received after that date. With respect to earlier indirect transfers, the bank did not necessarily have knowledge of the voidability of those transfers merely because it had acquired inquiry notice of the fraud; it depends on what a reasonable investigation would have disclosed. Moreover, the bank was not a "transferee" with respect to deposits received into the depositor's account from a related entity that participated in the scheme because the bank has no dominion or control over ordinary deposits that the customer may withdraw, even though the bank had a security interest in the deposits.

239. *In re International Management Associates, LLC*,  
563 B.R. 393 (Bankr. N.D. Ga. 2017)

Although all transfers in furtherance of a Ponzi scheme are presumed to have been made with fraudulent intent, to be “in furtherance of” the scheme and subject to the presumption, a transfer must be one that directly and materially induces future investors. Therefore, the debtor’s transfer of funds to a brokerage to open an account was not in furtherance of the debtor’s Ponzi scheme. The transfer was for contemporaneous and equivalent value to a third party who was neither an investor nor participant in the scheme. Even if the presumption did apply, the brokerage acted in good faith. While an insider might be subject to an objective standard of good faith – and therefore properly be charged with knowledge of the facts that an inquiry in response to red flags would have disclosed – an unaffiliated third-party in an arm’s-length transaction is subject only to a subjective standard of good faith, and lacks good faith only if it has actual knowledge of the insolvency of the debtor or the existence of a Ponzi scheme. The fact that the account was opened in the name of the debtor entity and funded with the entity’s assets, rather than in the name of the entity’s owner does not suggest bad faith, even if that somehow violated regulatory requirements or the brokerage’s internal policies. The fact that two of the debtor’s checks to the brokerage were dishonored and funds were then sent by wire might indicate financial difficulties, inadequate capital or liquidity, or insolvency, but does not give rise to an inference of dishonesty or lack of integrity. Finally, the fact that the debtor traded on margins, incurred substantial losses, and the brokerage did not investigate further, as industry standards might require, would be relevant only if good faith were an objective test; it does not suggest that the brokerage lacked honesty or remained willfully ignorant of facts that would give rise to a belief that the debtor was operating a Ponzi scheme.

240. *In re Cornerstone Homes, Inc.*,  
567 B.R. 37 (Bankr. S.D.N.Y. 2017)

The debtor’s bankruptcy trustee stated a cause of action for actual and constructive fraudulent transfers against the banks for making loans that enabled the debtor to operate a Ponzi scheme. The complaint adequately pled fraudulent intent of the transferor by alleging that the loans were used to create the illusion of profitability, to pay off individual investor loans, to solicit individuals to make unsecured investments, and to perpetuate the alleged Ponzi scheme. The complaint adequately pled fraudulent intent of the banks by alleging that, at the time the loans were made, the banks knew or should have known that the debtor was insolvent based on the debtor’s audited financial statements and tax returns, which the banks had. The trustee also adequately pled claims for constructive fraud by alleging that the banks lacked good faith for the same reasons.

241. *In re Comprehensive Power, Inc.*,

[578 B.R. 14](#) (Bankr. D. Mass. 2017)

The trustee stated a claim the secured party's purchase of the debtor's assets at a public disposition was intentionally fraudulent by alleging that the secured party engaged in a "loan to own" strategy and because it assumed effective control of the debtor prior to the sale, its intent could be imputed to the debtor. The trustee also state a claim that the transfer was constructively fraudulent by claiming that the value of the assets was substantially greater than the amount the secured party credit bid, which was the only bid.

242. *Ehrlich v. Commercial Factors of Atlanta*,

[567 B.R. 684](#) (N.D.N.Y. 2017)

The allegations of the debtor's bankruptcy trustee that the debtor provided false invoices to its factor to obtain new loans, and used those funds to pay down the debt to the factor, did not state a claim against the factor for avoidance of a fraudulent transfer. The factor had a perfected security interest in all of the debtor's assets, and thus the transfers could not have harmed other creditors.

243. *In re Caribbean Fuels America, Inc.*,

[688 F. App'x 890](#) (11th Cir. 2017)

In ascertaining the value of what the debtor received in exchange for an allegedly constructively fraudulent transfer, the objective value of the property is what matters, not whether the debtor benefitted from it. Accordingly, because the trustee did not challenge the objective value of the leasehold that the debtor received in return for the rent paid for a house used as a residence and office by the debtor's principals, the payments were not avoidable.

244. *Development Specialists, Inc. v. Kaplan*,

[574 B.R. 1](#) (D. Me. 2017), *appeal filed*, (1st Cir. May 17, 2017)

The bankruptcy court did not err in concluding that reasonably equivalent value was received by corporations that signed promissory notes and granted a security interest in their assets to secure a loan used to pay the corporations' shareholders for their stock, which was transferred to the corporations' new parent. The shareholder gave reasonably equivalent value and although the bankruptcy court failed to focus on what each of the corporations received, the court did find synergy and indirect benefits in the transaction.

245. *In re Fah Liquidating Corp.*,

[572 B.R. 117](#) (Bankr. D. Del. 2017)

The debtor's prepetition transfers of \$31.5 million to a German company could not be avoided as a constructively fraudulent transfer under § 548(a)(1)(B) because, even though the transfers originated in the United States from a Delaware corporation, they were made pursuant to contracts that included milestones to be achieved at production facilities in Germany, required disputes to be resolved in Munich, chose German law to govern, and payment required in Euros, and thus the transfers were made extraterritorially.

246. *In re East Coast Foods, Inc.*,

[2017 WL 3701211](#) (Bankr. C.D. Cal. 2017)

The recipient of an avoidable fraudulent transfer has no claim for the consideration provided if the recipient did not act in good faith.

247. *In re Trinity 83 Development, LLC*,

[574 B.R. 136](#) (Bankr. N.D. Ill. 2017)

The re-recording thirteen months before the petition of a mortgage for which a satisfaction had erroneously been recorded did not result in a new “transfer” that could be avoided under § 548.

### **– Liens Impairing Exemptions**

248. *In re Goodman*,

[566 B.R. 80](#) (Bankr. M.D. Ala. 2017)

A riding mower is not a “lawn tractor,” and therefore is not excluded from the definition of “household goods.” Therefore a nonpossessory, non-PMSI in the mower could be avoided.

### ***Equitable Subordination***

249. *In re Eddy*,

[572 B.R. 774](#) (Bankr. M.D. Fla. 2017)

The claims of a trust that was an insider of the debtor, and which participated in and received the debtor’s intentionally fraudulent transfers, would be equitably subordinated.

### ***Reorganization Plans***

250. *In re MPM Silicones, LLC*,

[874 F.3d 787](#) (2d Cir. 2017)

In setting the interest rate to be applied to a dissenting class of secured claims in a crammed-down Chapter 11 plan, courts must use a market rate if an efficient market exists and, only if no efficient market exists should the court employ the formula approach in *Till*, which starts with the prime rate and makes adjustments for the time-value of money, inflation, and the risk of non-payment.

A class of senior-lien noteholders, whose indenture provided for a make-whole premium if the debtor redeemed the notes prior to a specified date, were not entitled to compensation for the make-whole premium because the debtor did not redeem the notes; the indebtedness was instead accelerated by the debtor’s bankruptcy filing.

251. *In re Yeshivah Ohel Moshe,*

[567 B.R. 438](#) (Bankr. E.D.N.Y. 2017)

To cure a prepetition default on a mortgage loan, the Chapter 11 debtor had to pay interest at the contractual default rate of 24%, rather than the pre-default rate of 8%. Neither the debtor's status as a non-profit religious organization nor the large gap between the pre-default and default interest rates provided grounds for not enforcing the default rate.

252. *In re Kimball,*

[2017 WL 2110777](#) (Bankr. D. Kan. 2017)

The debtor's prepetition collateral assignment of a life insurance policy to the SBA was merely as security for a loan, not outright, and therefore the policy became property of the estate. Because the debtor's confirmed Chapter 11 plan did not expressly provide otherwise and the SBA had a meaningful opportunity to participate in the case, the SBA did not retain its lien.

253. *In re Poole,*

[2017 WL 401799](#) (Bankr. E.D. Tenn. 2017)

Because the two subsequent loans made by a mortgagee to the mortgagor were represented by separate notes, even though there was only one deed of trust and it covered future advances, there were three separate liens. Consequently, the mortgagor would modify in Chapter 13 the two most recent liens because each of them was completely under water.

254. *OPS3 LLC v. American Chartered Bank,*

[2017 WL 3263484](#) (N.D. Ill. 2017)

A confirmed plan that expressly provided that "any obligation of any of Debtors and all guaranties by or on behalf of any of the Debtors shall be merged into the obligation of the Debtor as stated in the Plan" did not discharge the guarantors or extinguish the mortgages they had provided.

255. *In re Keisler,*

[2017 WL 4685000](#) (Bankr. D.S.C. 2017)

Because the debtors, as guarantors of a secured obligation, had the statutory right to redeem the collateral, the debtor's Chapter 13 plan could provide for payment of the redemption amount over the life of the plan.

### ***Other Bankruptcy Matters***

256. *In re Tara Retail Group,*

[2017 WL 1788428](#) (Bankr. N.D.W. Va. 2017)

Although the debtor's organizational documents require the approval of an independent director for the filing of a bankruptcy petition, the debtor's managing member, through its independent director, ratified the petition by remaining silent, despite having complete information and an opportunity to be heard on the matter.

257. *In re Lexington Hospitality Group, LLC*,  
[577 B.R. 676](#) (Bankr. E.D. Ky. 2017)

An amendment to an LLC operating agreement, made as a condition to a lender providing a loan, that made a subsidiary of the lender a 30% member of the LLC until the loan was repaid, required the appointment of an independent manager until the loan was repaid, required the consent of independent manager and of members holding 75% of the membership interests to file a bankruptcy petition, and eliminated the independent manager's fiduciary duties, was tantamount to an absolute waiver of the LLC's right to seek bankruptcy protection and was thus void as against federal public policy.

258. *In re Taberna Preferred Funding IV, Ltd.*,  
[578 B.R. 244](#) (S.D.N.Y. 2017)

The holders of the senior class of notes in a uni-tranche CDO were not eligible to file an involuntary petition even if the entire tranche was undersecured. Although the holders of the senior portion of an undersecured uni-tranche claim are treated as undersecured claimants for the purposes of whether they are entitled to postpetition interest, that is based on equitable considerations that are not relevant to the determination of who is an appropriate petitioning creditor. Although the creditors purported to waive approximately \$15,000 worth of collateral, so as to have unsecured claims, the noteholders were not the secured party – the trustee for all the noteholders was – and thus the noteholders could not waive their lien. Moreover, even if they waived their lien, because the notes were nonrecourse, the noteholders would still not have an unsecured claim.

259. *In re Republic Airways Holdings Inc.*,  
[565 B.R. 710](#) (S.D.N.Y. 2017)

The bankruptcy estates of subsidiaries that leased aircraft and the corporate parent that guaranteed them would be substantively consolidated even though the lessors claimed that their claims for liquidated damages against the lessees might be subject to various defenses whereas their claims against the parent were not, because the debtors agreed to carve out the lessors' claims such that if the guarantee claims are allowed in an amount greater than the lease claims, the claims would be treated as if substantive consolidation had not taken place.

260. *In re Rocky Aspen, LLC*,  
[2017 WL 977813](#) (D. Colo. 2017)

Although a lender to a limited liability company had, pursuant to its security agreement with the members, the right to vote their membership interests after default, because the company was managed by managers, the managers retained the authority to file a bankruptcy petition on behalf of the company.

261. *Valley National Bank v. Ford Motor Co.*,  
[2017 WL 1084524](#) (D.N.J. 2017)

A lender with a prepetition security interest in the debtor's accounts was not entitled to collect from an account debtor on accounts generated postpetition from the provision of services. Nothing in the cash collateral order expressly granted the lender a security interest in postpetition accounts and, absent such a term in the order, the lender's security interest was cut off by § 552.

262. *In re Sagendorph*,  
[562 B.R. 545](#) (D. Mass. 2017)

A bankruptcy debtor cannot through a Chapter 13 plan force a secured party to accept title to the collateral over the secured party's objection.

#### **GUARANTIES & RELATED MATTERS**

263. *Sterling Savings Bank v. Thornburgh Resort Co.*,  
[694 F. App'x 568](#) (9th Cir. 2017)

Although the owner of real property that gave a bank a deed of trust on the property to secure a third party's debt thereby acquired suretyship status, the owner did not perform its secondary obligation until the bank foreclosed. Consequently, even if the bank impaired the owner's suretyship status by releasing cash collateral, that occurred before, not after, the owner performed. Because performance was with knowledge of the impairment, the owner had no defense based on the impairment.

264. *Ford Motor Credit Co. v. Orton-Bruce*,  
[2017 WL 1093906](#) (S.D.N.Y. 2017)

The continuing guaranties that the owner of a car dealership and his wife provided to an automobile manufacturer, and which provided for termination with respect to future indebtedness by providing notification sent by registered mail, remained in effect after the owner sold the dealership to his son. Neither guarantor sent notification of termination. It did not matter that the manufacturer had approved the sale.

265. *York v. RES-GA LJY, LLC*,  
[799 S.E.2d 235](#) (Ga. 2017)

A mortgagee that judicially foreclosed on several items of real property but was denied judicial confirmation of the sales because it failed to prove that it obtained the fair market value of the properties sold was nevertheless entitled to judgment against the guarantors of the debt. The guarantors, by expressly waiving in the guaranty agreements "all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of . . . 'anti-deficiency' law" had effectively waived the protection of the state confirmation statute, which is a defense based on suretyship and based on an "anti-deficiency" law.



266. *G & W Warren's, Inc. v. Dabney*,  
[218 Cal. Rptr. 3d 75](#) (Cal. Ct. App. 2017)

A written guaranty executed in connection with the sale of a motorcycle dealership and which covered the obligations under the promissory note and lease did not cover the buyer's obligations under a noncompete agreement or two consulting agreements. Although the guaranteed "Purchase Price" was expressly stated to be in exchange for, in part, goodwill, there was nothing in the transaction documents to support the seller's contention that goodwill included the compensation allocated to the noncompete and consulting agreements.

267. *The Coastal Bank v. Martin*,  
[2017 WL 5564525](#) (11th Cir. 2017)

A bank was entitled to obtain a deficiency judgment against the guarantors of a mortgage loan even though the bank had purchased the property at the foreclosure sale and had not obtained a court order confirming that the foreclosure sale price constituting the fair market value of the property because even though a debtor cannot waive the confirmation requirement, guarantors can under Georgia law and they did in this case.

268. *Gensco, Inc. v. Johnson*,  
[2017 WL 3589251](#) (Wash. Ct. App. 2017)

The individual who signed a continuing guaranty of the obligations of a corporation and later rescinded the guaranty remained liable for the obligations incurred prior to rescission. The guaranty was not limited either to debts incurred at only one of the debtor's locations or to the amount of the desired credit limit in the initial application because the guaranty covered "all existing and future indebtedness." The creditor's allocation of a portion of payments received after rescission to the newly incurred debts was effective because the credit agreement expressly stated that the creditor "may apply payments at its own discretion," unless contrary instructions were provided by the debtor.

269. *Signature Financial, LLC v. McClung*,  
[2017 WL 6940652](#) (C.D. Cal. 2018)

A guarantor had no affirmative defense based on the creditor's alleged failure to send notification of the disposition of leased property or to conduct the disposition in a commercially reasonable manner because, even if the underlying transaction created a security interest rather than a lease, the guaranty agreement purported to waive these rights. No discussion of § 9-602(7) because the guarantor did not respond to the creditor's waiver argument.

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**LENDING, CONTRACTING & COMMERCIAL LITIGATION**

270. *Peterson v. Imhof*,  
[2017 WL 1837856](#) (D.N.J. 2017)

Even though an intercreditor agreement required the consent of all lenders to a release of the guarantors, because the original loan documents authorized the lenders' agent to release the guarantors with the consent of lenders holding a majority interest in the loan, the agent's release of the guarantors pursuant to a settlement agreement was effective, despite fact that a lender with a 43.53% interest did not consent, and thus that lender had no claim against the guarantors as long as the guarantors materially performed their obligations under the settlement agreement. However, that lender did have a claim against the agent for breach of intercreditor agreement.

271. *Firestone Financial, LLC v. Meyer*,  
[2017 WL 714110](#) (N.D. Ill. 2017), *appeal filed*, (7th Cir. April 6, 2017)

The lender that provided loans to finance the acquisition of equipment was entitled to summary judgment against the guarantor of those loans even if, as the guarantor alleged, the lender failed to fulfill an oral promise to make additional loans and that failure led to the demise of the borrower's business. The alleged oral promise was too vague to be enforceable because it did not indicate the interest rate or the repayment period. Moreover, it was not reasonable for the guarantor, a former businessman and disbarred attorney, to rely on the alleged promise because it entailed funding new equipment purchases without further question, the signing of documents, or any further review of the guarantor's finances, all of which the lender had done prior to making the earlier loans.

272. *Marblegate Asset Management, LLC v. Education Management Finance Corp.*,  
[846 F.3d 1](#) (2d Cir. 2017)

A restructuring of a company's debt accomplished through a sale of assets by secured creditors and a release of guarantees of unsecured notes did not violate § 316(b) of the Trust Indenture Act because the terms of the indentures were not amended. The legal rights of the non-consenting noteholders were unaffected even though they would, as a practical matter, never receive payment because the transaction left the note issuer as nothing more than an empty shell.

273. *Pine River Master Fund Ltd. v. Amur Finance Co.*,  
[2017 WL 4023099](#) (Del. Ch. Ct. 2017)

A debtor that borrowed \$150 million to invest in operating companies breached its Credit Agreement with the lender by using loaned funds to pay \$7 million for legal fees incurred by related entities because the Credit Agreement authorized the use of funds to pay the administrative agent's legal fees, not the legal fees of entities related to the borrower. However, the payment did not constitute an Event of Default as a failure to pay interest when due, because even if such amounts should have been treated as PIK Accrual under the Credit Agreement waterfall, such amounts are capitalized into principal, due at maturity, not treated as interest.

274. *Pine River Master Fund Ltd. v. Amur Finance Co.*,  
[2017 WL 4548143](#) (Del. Ch. Ct. 2017)

Summary judgment was not appropriate on whether a debtor breached its Credit Agreement with the lender by failing to pay the correct amount of interest because both parties presented reasonable interpretations of the agreement. However, the debtor did breach the agreement by making distributions to equity holders without the lender's consent.

275. *Bank of America v. JB Hanna, LLC*,  
[866 F.3d 929](#) (8th Cir. 2017)

A sophisticated borrower which had experience with loan agreements and interest-rate swaps could not have reasonably relied on the lender's allegedly fraudulent representation that a new five-year loan agreement coupled with an interest-rate swap of mismatched duration was in the borrower's best interest.

276. *First Bank and Trust v. Fitness Ventures, L.L.C.*,  
[2017 WL 6031783](#) (La. Ct. App. 2017)

The trial court has sufficient evidence to support its finding that a term sheet executed by a secured party and a defaulting debtor, which provided for the secured party to take control of the debtor, run the debtor's business, credit income earned therefrom to the secured obligation, and during such time refrain from pursuing the obligors, was merely an agreement to agree, pending completion of the secured party's due diligence. Thus, the secured party could pursue the obligors after the debtor lost its lease and ceased operations.

277. *White Winston Select Assets Funds, LLC v. Intercloud System, Inc.*,  
[2017 WL 4390104](#) (D.N.J. 2017), *appeal filed*, (3d Cir. Nov. 6, 2017)

A prospective borrower that signed a term sheet for a \$5 million loan from a private investment company before obtaining alternative funding from another lender was liable for the \$500,000 breakup fee provided for in the term sheet. The investment company was excused from satisfying the conditions to close because the prospective borrower had made those conditions impossible to fulfill. The breakup fee was not a penalty because it was not grossly disproportionate to the \$600,000 maximum return that the investment company might have obtained from making the loan.

278. *In re Ultra Petroleum Corp.*,  
[575 B.R. 361](#) (Bankr. S.D. Tex. 2017)

The make-whole premium that noteholders were entitled to upon prepayment was not an unenforceable penalty under New York law, even though the amount was enormous, but was instead an enforceable liquidated damages clause. The damages resulting from prepayment were not readily ascertainable at the time the parties entered into the Note Agreement but instead would have been all future interest under the notes minus the proceeds from reinvestment in an alternative investment. It is extremely difficult to ascertain what an appropriate alternative investment would be and it was reasonable for the parties to choose, as they did in the Note Agreement, 0.5% in excess of the yield on U.S. Treasury securities having a maturity equal to the remaining term on the notes.

279. *In re Simplexity, LLC*,

[2017 WL 65069](#) (Bankr. D. Del. 2017)

The Chapter 7 trustee for a limited liability company stated a cause of action against the company's principles for breach of their fiduciary duties – despite the exculpatory clauses in the debtor's operating agreement – for their failure to file bankruptcy until after the company's secured creditor swept the company's deposit accounts and left the company with no funds to pay the WARN Act claims of its employees.

280. *Inland Empire Dry Wall Supply Co. v. Western Surety Co.*,

[389 P.3d 717](#) (Wash. Ct. App. 2017), *review granted*, (Wash. May 3, 2017)

The contractor that, in order to release the project property from a mechanic's lien, obtained a surety bond in favor of the unpaid supplier of a subcontractor, was not a necessary party to the supplier's action on the bond. Applying general principles of suretyship, which permit a creditor to sue a surety without suing the principal obligor, the supplier could sue the bond issuer without joining the contractor.

281. *Western Surety Company v. FutureNet Group, Inc.*,

[2017 WL 227957](#) (E.D. Mich. 2017)

The defendant in an action on an indemnification agreement, which the court had preliminarily enjoined from transferring of any of the collateral for its obligations outside the ordinary course of business, would not be permitted to factor \$997,500 in receivables for \$750,000. Such a transaction would effectively be a loan at a 24.9% interest rate, would not be in the ordinary course of business, and was not shown to be necessary.

282. *In re Designline Corp.*,

[565 B.R. 341](#) (Bankr. W.D.N.C. 2017)

A transaction by which a bankruptcy trustee sought to obtain financing for three, complex adversary proceedings by selling 25% of the net litigation proceeds – after payment of expenses and attorney's fees – constitutes champerty and would therefore not be approved because: (i) it does not require the financier to make any advances and instead requires the trustee to request advances quarterly; (ii) requires the trustee to seek the financier's input and approval of strategic decisions; and (iii) if the trustee's counsel withdraw, it requires the trustee to consult with the financier regarding substitute counsel.

283. *Cherokee Funding LLC v. Ruth*,

[802 S.E.2d 865](#) (Ga. Ct. App. 2017)

Because a litigation financing transaction created no recourse obligation, the financier was a buyer of a portion of the litigation proceeds, not a lender, and thus the transaction was not subject to the Georgia Industrial Loan Act or the Georgia Payday Lending Act.

284. *Spirit Broadband, LLC v. Armes*,  
[2017 WL 384248](#) (Tenn Ct. App. 2017)

Because the bill of sale for a small cable company covered “any and all assets owned by Sellers and utilized in the operation of the cable television system[ ] ... including, but not limited to . . . those certain Operating Contracts listed on Schedule III attached hereto,” the seller’s contract with DirectTV was included in the sale even though the Schedule contained only the word “none.” The bill of sale conveyed “any and all assets” and the introductory phrase, “including, but not limited to,” used in reference to operating contracts served a descriptive, not a restrictive, function.

285. *In re Mississippi Phosphates Corp.*,  
[2017 Bankr. LEXIS 5](#) (Bankr. S.D. Miss. 2017)

A liquidating trust that purchased all of a bankruptcy debtor’s assets, except commercial tort claims, thereby acquired the debtor’s pending right to a refund of payments for electric utility service after the state supreme court overturned a rate increase approved by the state utility commission. The right to a refund of an overpayment is a general intangible, not a commercial tort claim. Even if the commission had committed a constitutional tort in approving the rate increase, the state supreme court had ordered repayment before analyzing the constitutional issue.

286. *Moroni & Son Oil, LLC v. Daly*,  
[2017 WL 1310993](#) (Conn. Super. Ct. 2017)

The buyer of a limited liability company’s encumbered assets – which obtained an indemnity agreement from the company but not from the company’s principal, who had guaranteed the secured loan – had no unjust enrichment claim against the principal after the buyer paid the secured party to release its lien. The buyer received what it bargained for when it obtained the indemnity agreement from only the company.

287. *Rincon EV Realty LLC v. CP III Rincon Towers, Inc.*,  
[213 Cal. Rptr.3d 410](#) (Cal. Ct. App. 2017)

Even though a loan agreement selected New York law as the governing law, and a contractual clause waiving the right to a jury is enforceable in New York, the agreement’s jury waiver clause was unenforceable in California litigation because it violates fundamental policy of the state and California has a materially greater interest in the matter than does New York.

288. *Tilley v. Malvern National Bank*,  
[532 S.W.3d 570](#) (Ark. 2017)

A pre-dispute waiver in a loan agreement of the right to trial by jury violates the state constitutional right to a jury trial and is unenforceable.

289. *Madden v. Midland Funding, LLC*,  
237 F. Supp. 3d 130 (S.D.N.Y. 2017)

Application of Delaware law pursuant to a choice-of-law clause in the parties' credit card agreement would violate a fundamental public policy of New York because Delaware does not cap the interest rate that parties may agree to whereas New York has a criminal usury statute.

290. *Shanghai Commercial Bank v. Kung Da Chang*,  
404 P.3d 62 (Wash. 2017)

A bank that had a Hong Kong judgment against a borrower could enforce the judgment against the borrower's community property in Washington because the loan agreement chose Hong Kong law – which does not recognize community property – to govern enforcement, application of Hong Kong law does not offend Washington policy, and Hong Kong Law would have otherwise applied in the absence of a chosen law because Hong Kong had the most significant relationship to the transaction.

291. *In re Energy Future Holdings Corp.*,  
566 B.R. 669 (Bankr. D. Del. 2017)

The holders of the highest tranche of first-lien debt – the whole of which was undersecured – were not entitled to post-petition interest out of the adequate protection payments and plan distributions on the debt allocated to the lower tranches because the waterfall in the intercreditor agreement dealt only with payments out of the proceeds of collateral pursuant to the exercise of remedies. Neither the adequate protection payments nor the plan distributions constitute proceeds of collateral. Moreover, neither amounts resulted from the exercise of remedies under the loan documents. As a result, the intercreditor agreement did not speak to the allocation of payments and the payments were to be allocated pursuant to the Bankruptcy Code.

292. *U.S. Bank v. T.D. Bank*,  
569 B.R. 12 (S.D.N.Y. 2017)

Because the Rule of Explicitness is part of the non-bankruptcy law of New York and applies in disputes outside of bankruptcy court, if a lender is to be entitled to postpetition interest before the principal owed to a different lender, the intercreditor agreement must so state clearly. Nevertheless, by providing that the lenders were “entitled to receive post-petition interest . . . to the fullest extent permitted by law,” the intercreditor agreement in this case was sufficiently explicit that both the senior and junior lenders were entitled to postpetition interest before the principal of either the senior or junior debt is paid. It did not matter that post-petition interest would not have been available in the bankruptcy proceeding because this was not a bankruptcy case and, in any event, the agreement defined “Obligations” to include “interest and fees that accrue after the commencement . . . of any Insolvency or Liquidation Proceeding . . . regardless of whether such interest and fees are allowed claims in such proceeding.”

293. *In re 8110 Aero Drive Holdings, LLC*,

[2017 WL 2712961](#) (Cal. Ct. App. 2017)

An increase in a loan's interest rate from 5.977% to 10.977% after default was an invalid penalty rather than an enforceable liquidated damages clause. The higher rate was not an alternative performance but applied only after breach. The agreement had numerous other provisions to protect the lender from the added perils and overhead costs in the event of default, including funding reserve accounts, late charges, and a broad indemnity clause, and thus the increase in the interest rate was not a reasonable measure of the lender's damages.

294. *Vititech International, Inc. v. Sporn*,

[224 Cal. Rptr. 3d 691](#) (Cal. Ct. App. 2017)

An agreement to settle a contract dispute that required the defendant to pay \$75,000 and which provided that, if payment was not made by a specified date, the plaintiff could file a stipulated judgment for the \$166,000 amount claimed plus prejudgment interest and attorney's fees, created an unenforceable penalty because the defendant never admitted to liability on the underlying claim and the increase in liability for not timely paying the settlement amount was disproportionate to the harm caused.

295. *Bowling Green Sports Center, Inc. v. G.A.G. LLC*,

[77 N.E.3d 728](#) (Ill. Ct. App. 2017)

Although the senior lender violated its intercreditor agreement with the junior lender by failing to obtain the junior's consent to an increase in the senior loan, the junior was injured thereby only to the extent of the small increase in the loan. Consequently, the senior lender's lien would be subordinated only to the extent of the increase in the debt and the junior creditor remained bound by the intercreditor agreement and could not seek to collect from the debtor until the original amount debt to the senior lender was paid.

296. *State Bank & Trust Co. v. Philly Wholesale, LLC*,

[2017 WL 3279023](#) (E.D. Pa. 2017)

A liquidated damages clause in an equipment lease that provided for payment of both the entire unpaid amount under the lease and the present value of all future rent reduced by three percent was an unenforceable penalty. The sum was essentially a double recovery and was not a reasonable estimate of the lessor's damages, which might be the future income stream under the lease (*i.e.*, rent) plus the diminished value of the property upon repossession and the cost in time, effort, and expense in dealing with default. Moreover, while a late fee can be charged on past due amounts, the lessor could not get both a late fee and default interest with respect to the same missed payment because that would be a double recovery for the same injury. Because the court awarded default interest, there would be no award of the claimed late fees.



297. *Western Surety Co. v. La Cumbre Office Partners, LLC*,  
[213 Cal. Rptr. 3d 460](#) (Cal. Ct. App. 2017)

Because the official capacity of a person signing an agreement on behalf of a limited liability company does not need to be indicated, an LLC was bound by an indemnity agreement signed by the managing member of its manager, even though the agreement mistakenly identified him as the LLC's managing member.

298. *SEC v. Wells Fargo Bank*,  
[848 F.3d 1339](#) (11th Cir. 2017)

A district court that appointed a receiver to take control over the assets of the parties that operated a Ponzi scheme does not have the authority to extinguish a creditor's pre-existing security interest in two of those assets merely because the creditor did not file a claim in the receivership proceeding.

299. *MB Financial Bank v. Royal Tee, LLC*,  
[2017 WL 776083](#) (Ill. Ct. App. 2017)

The trial court that appointed a receiver in connection with a mortgagee's action to foreclose on a golf course erred in not authorizing the receiver to manage the golf course business. The applicable statute authorizes the receiver to collect "profits," not merely "rents," and without the authority to manage the golf course business, the receiver would have no income to pay expenses associated with maintaining the property.

300. *BMO Harris Bank v. Truland Systems, Corp.*,  
[2017 WL 2864947](#) (E.D. Va. 2017)

Pursuant to the terms of the order appointing a receiver, which gave the receiver broad authority to manage receivership property but was silent as to the use of cash, the receiver could use cash collateral of the secured party that sought the receiver's appointment without the secured party's consent.

301. *SEC v. ISC, Inc.*,  
[2017 WL 3736796](#) (W.D. Wis. 2017)

A receiver appointed by the court did not abuse its discretion in subordinating the claim of a creditor with a security interest that was unperfected on the date the receiver was appointed.

302. *Transit Funding Associates, LLC v. Capital One Equipment Finance Corp.*,  
[48 N.Y.S.3d 110](#) (N.Y. App. Div. 2017)

Because a loan agreement expressly provided that the lender could deny any funding request "in its sole and absolute discretion," the borrower had no claim against the lender for breach of contract or breach of the duty of good faith arising from the lender's refusal to make requested advances, even though the refusal might have put the borrower out of business and might have been motivated by the lender's relationship with a competitor of the borrower.

303. *SK Food Corp. v. Firstbank*,  
[2017 WL 776116](#) (Tenn. Ct. App. 2017)

A prospective borrower's promise in a loan commitment letter to pay the bank's expenses, including reasonable attorney's fees, "incurred in the preparation and negotiation of documentation," did not cover the attorney's fees the bank incurred in successfully defending against the prospective borrower's claim for breach by refusing to lend.

304. *Bena v. Schleicher*,  
[2017 WL 1907741](#) (Wash. Ct. App. 2017)

A suit to reinstate a promissory note was not an action "to collect" within the meaning of the contractual clause authorizing an award of attorney's fees, and therefore the trial court properly declined to award such fees.

305. *Cece & Co. Ltd. v. U.S. Bank*,  
[60 N.Y.S.3d 5](#) (N.Y. App. Div. 2017)  
*NMC Residual Ownership LLC v. U.S. Bank*,  
[60 N.Y.S.3d 110](#) (N.Y. App. Div. 2017)

The holders of residual interests in a REMIC trust stated a claim for breach of contract against the trustee for selling trust assets to itself at a price below market. Although an indenture trustee does not owe a fiduciary duty to the trust beneficiaries and its obligations are defined by the terms of the indenture agreement, it does owe a duty to avoid conflicts of interest. There would be no claim if the indenture agreement expressly gave the trustee the right to purchase trust assets at a price below market, but it does not; it merely states that the trustee may terminate the trust by purchasing the remaining trust assets. The agreement obligates the trustee to deposit a specified amount in an account for the beneficiaries, but does not state that this amount is the purchase price.

306. *Citimortgage, Inc. v. Equity Bank*,  
[261 F. Supp. 3d 942](#) (E.D. Mo. 2017)

Because the seller of mortgage loans had breached representations and warranties regarding some loans, the seller was contractually obligated to repurchase the loans that still existed. It did not matter that the loan buyer failed to include the repurchase amount in the repurchase request. However, the seller was not obligated to repurchase the loans which, prior to the repurchase request, had been liquidated through foreclosure, and thus no longer existed.

307. *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*,  
[2017 WL 6327110](#) (N.Y. 2017)

Although the seller of mortgage loans breached representations and warranties relating to some loans, the seller could not be liable for general contract damages because the sales agreement provided for cure or repurchase as the sole remedies for breach of loan-specific representations and warranties. While the seller also represented and warranted generally that the "documents . . . do not contain any untrue statement of material fact," and the agreement did not purport to limit the remedy for breach of this provision, the alleged defects were on loan-specific and thus the provision limiting remedies applies.

308. *PNC Bank v. Innovative Dental Group, LLC II*,  
[2017 WL 2345626](#) (N.D. Ill. 2017)

The attorney's-fee clauses in a promissory note and guaranty, by expressly applying "whether or not there is a lawsuit," were broad enough to cover the fees lender's counsel generated by engaging in negotiating and preparing loan modifications prior to the borrower's final default, which resulted in litigation and a judgment.

309. *Knope v. Green Tree Servicing, LLC*,  
[161 A.3d 696](#) (Me. 2017)

Because the assignment of a mortgage was defective, the assignee could not rely on the terms of the mortgage to recover from the mortgagors the amounts the assignee expended to pay property taxes, insurance, preservation fees, foreclosure fees, and legal fees. However, the assignee did have an unjust enrichment claim for the property taxes, insurance, preservation fees. The trial court should reconsider whether the assignee has an unjust enrichment claim for the assignee's foreclosure fees and legal fees.

310. *Central Bank v. Hogan*,  
[891 N.W.2d 197](#) (Iowa 2017)

Because a loan participant acquires an interest and the loan and the collateral securing it, not merely a receivable from the originating bank, the buyer of a loan participation had an interest in the real property that the originator acquired by foreclosing on the collateral. That interest had priority over the interest of a subsequent buyer that took by quitclaim deed from the originator because a buyer who takes by quitclaim deed takes subject to outstanding equities, about which the buyer is assumed to have notice.

311. *Western Property Holdings, LLC v. Aequitas Capital Management, Inc.*,  
[392 P.3d 770](#) (Or. Ct. App. 2017)

Loan participants had no claim against the originator for breach of contract or negligence arising out of the originator's foreclosure on the collateral, which action allegedly blocked a more lucrative sale of the collateral by the debtor. There could be no breach of the implied duty of good faith because the participation agreement expressly granted the originator the authority to exercise its reasonable business judgment regarding what remedies to pursue to enforce the loan. There was also no special relationship between the participants and the originator.

312. *Clearlake Shipping PTE Ltd. v. O.W. Bunker (Switzerland) SA*,  
[239 F. Supp. 3d 674](#) (S.D.N.Y. 2017), *appeal filed*, (2d Cir. May 3, 2017)

The now insolvent entity that contracted to supply fuel bunkers to ships – not the actual suppliers with which the insolvent entity had back-to-back contracts but which had no contract with the ship owners – was entitled to a maritime lien on the ships supplied, which lien was transferred to the funds deposited with the court in multiple interpleader actions.

313. *Semcon IP Inc. v. Huawei Device USA Inc.*,  
[2017 WL 1017424](#) (E.D. Tex. 2017)

The buyer of patents which granted the seller a security interest in the patents could maintain an action for infringement against a third party without joining the seller-secured party because, even though the buyer could not assign the patents without the seller's permission, the purchase and sale agreement expressly indicated that the buyer had sole authority to enforce the patents.

314. *Luana Savings Bank v. Caspersen*,  
[2017 WL 1086225](#) (Iowa Ct. App. 2017)

The mortgage that two borrowers provided to a bank that secured "Real Estate Loans of \$71,350.00 & \$17,000.00" did not in fact secure the \$17,000 loan that a third party co-signed because the note for that loan did not reference the mortgage but instead referenced three vehicles as the collateral. Consequently, when the borrowers voluntarily surrendered the mortgaged property in return for a release of the mortgage debt, that did not discharge the co-signer's liability on the \$17,000 note.

315. *Lyon Financial Services, Inc. v. Illinois Paper and Copier Co.*,  
[247 F. Supp. 3d 923](#) (N.D. Ill. 2017)

A term in a "Partnership Agreement," under which one party purchased copiers from the other for the purpose of leasing them to a town, by which the supplier warranted to the purchaser that all "lease transactions" are "valid and fully enforceable," applied to the transaction with the town even though that transaction was really a sale and secured transaction, rather than a lease. The agreement had to be interpreted consistently with the parties' intent and, given that there were only two transactions, the term had to refer to the lease transaction with the town.

316. *Ha Thi Le v. Lease Finance Group, LLC*,  
[2017 WL 2915488](#) (E.D. La. 2017)

Even if a lease of equipment located in Louisiana would be treated as a sale with a security interest under the law of New York, a clause in the lease agreement selecting New York as the forum for all litigation was not enforceable because it violated fundamental policy of Louisiana, as expressed in the state's Lease of Movables Act, that invalidates a consent to jurisdiction in another state or a fixing of venue.

317. *Rapid Capital Finance, LLC v. Natures Market Corp.*,  
[2017 WL 4764559](#) (N.Y. Sup. Ct. 2017)

A transaction structured as a sale of future receivables with a face amount of \$38,100, in exchange for \$30,000, with the seller obligated to turn over future receivables through daily debits of \$152 was a true sale, not a secured borrowing, because the agreement contained a reconciliation provision that allowed for changes in the daily debits based on the amount of receivables generated. As a result, the transaction could not be usurious.

318. *Bautista Cayman Asset Co. v. Desarrollos Bucana, S.E.*,  
[2017 WL 3610497](#) (D.P.R. 2017)

Language in three promissory notes, which were incorporated into a loan agreement, by which the borrowers “submit ourselves expressly to the competency of the state courts of the City of San Juan, Puerto Rico,” was a mandatory forum selection clause that bound both parties to litigate in the named courts.

319. *Throckmorton v. Soria*,  
[2017 WL 5793819](#) (Cal. Ct. App. 2017)

The seller of Mexican real property was bound by the choice-of-forum clause in the purchase and sale agreement, which selected courts of the city of Tijuana as the exclusive forum, even though her action as based solely on the promissory note issued in connection the sale, the note was not contemporaneous with the purchase and sale agreement, and the note lacked a choice-of-forum clause.

320. *First Home Bank v. Raut, LLC*,  
[2017 WL 6729178](#) (M.D. Fla. 2017)

A creditor’s federal action in Florida on a promissory note and the associated guaranty was not subject to the Florida choice-of-forum clause in the security agreement. Consequently, there was no personal jurisdiction over the defendants, and the case would be transferred to federal court in Kentucky, where the defendants were located.

321. *Maslowski v. Prospect Funding Partners, LLC*,  
[890 N.W.2d 756](#) (Minn. Ct. App. 2017)

The clause in a litigation funding agreement choosing New York courts as the forum to resolve disputes was enforceable attempt to circumvent violated Minnesota’s public policy against champerty and maintenance.

322. *FDIC v. FBOP Corp.*,  
[252 F. Supp. 3d 664](#) (N.D. Ill. 2017)

A tax allocation agreement between a bank holding company and its bank subsidiaries (with which it filed a consolidated return) that provided for how a tax refund would be allocated did not clearly alter ownership of the refunds. Consequently, ownership was to be determined based in the default rule, and the FDIC, as the successor to the banks, was entitled to the portion of the refunds attributable to taxes paid by the banks.

323. *Wilhelm Management, LLC v. MB Financial Bank*,  
[2017 WL 1333599](#) (Ill. Ct. App. 2017)

The trial court did not err in granting a judgment notwithstanding a verdict after a jury found a bank liable for inducing a assignee for the benefit of creditors to breach his fiduciary duties. The bank had a perfected security interest in all of the assignor's assets, did nothing wrong in conferring with the assignor, and was within its rights in refusing to consent to an offer to buy the assets conditioned on a release of the guarantors. Moreover, the assignor did not breach his fiduciary duties because he advertised the assets for sale and he received no offers for an amount in excess of what was owed to the bank.

324. *Fresh Direct, Inc. v. Harvin Foods, Inc.*,  
[2017 WL 1197674](#) (D. Del. 2017)

Regardless of the invoices sent by sellers of produce to a buyer were acceptances or confirmations of an oral agreement reached on the phone, the additional terms in the invoices had to be analyzed under § 2-207. Those terms – which consisted of interest on overdue invoices and attorney's fees incurred in collecting – were not material, and because the agreements were between merchants and the buyer never objected to the terms, the terms became part of the contract.

325. *Mellen, Inc. v. Biltmore Loan and Jewelry-Scottsdale, LLC*,  
[247 F. Supp. 3d 1084](#) (D. Ariz. 2017), *appeal filed*, (9th Cir. Apr. 27, 2017)

The pawn broker that purchased a diamond that the rightful owner had entrusted to a jeweler did not acquire good title to the diamond under § 2-403(2) because: (i) the pawn broker purchased the diamond not from the jeweler, but from another person who claimed that the jeweler was his agent, and the owner had not entrusted the diamond to the seller; (ii) the seller was not a person who deals in goods of that kind; and (iii) the pawn broker was not a buyer in ordinary course of business because it acquired the diamond in partial satisfaction of an earlier loan. The pawn broker did not get good title under § 2-403(1) because neither the jeweler nor the seller acquired the diamond through a transaction of purchase, and thus neither had voidable title and the power to transfer good title to a good faith purchaser for value.

326. *Export Development Canada v. E.S.E. Electronics*,  
[2017 WL 3868795](#) (C.D. Cal. 2017)

The terms in invoices sent by a seller of goods providing for interest on past due accounts and recovery of attorney's fees incurred to collect were not material additions to the parties' agreement. Because the buyer neither objected to the terms nor expressly limited acceptance to the terms of the purchase orders, the terms became part of the parties' contract.

327. *Nurmi Property LLC v. SourcePoint LLC*,  
[2017 WL 2082799](#) (S.D. Fla. 2017)

A term in an Attornment Agreement by which a lender "releases any lien right [the lender] may have against the Vessel" covered liens in existence on the date of the Agreement but did not clearly release future liens.

328. *Family Security Credit Union v. Etheredge*,  
[2017 WL 2200364](#) (Ala. 2017)

Even if the trial court correctly concluded that the arbitration provision in vehicle financing contracts was substantively unconscionable because the financier reserved the right to avail itself of the courts while forcing the borrowers to arbitrate every conceivable claim, the provision was nevertheless enforceable because there was no evidence of procedural unconscionability. By referring to “[a]ny controversy or claim arising out of or relating to this Agreement,” the arbitration provision covered the borrowers’ claims that the financier negligently failed to ensure that they obtained good title to the purchased vehicles.

329. *Sanders v. JGWPT Holdings, LLC*,  
[2017 WL 4281123](#) (N.D. Ill. 2017)

The individuals who sold to a factor some of their rights to payment under structured settlements were bound by the arbitration clause in their agreements.

330. *Dray v. Revah*,  
[2017 WL 6523566](#) (Cal. Ct. App. 2017)

A creditor’s action for breach of a secured promissory note was not subject to the arbitration clause in the parties’ loan agreement because the promissory note, which was executed three years later and after the borrower defaulted, superseded the loan agreement, given that virtually every aspect of the agreement was changed, including the amount to be repaid, the timing of repayment and term of the loan, the interest rate, the terms regarding default, the creation of a security interest, and terms dealing with governing law, payment of expenses, and waiver.

331. *Burcham v. Ford Motor Credit Company, LLC*,  
[2017 WL 2773697](#) (S.D. Ill. 2017)

Although it was not clear whether the debtor’s class action against the secured party for failing, pursuant to a state statute, to timely release its security interest on purchased vehicles was subject to the arbitration clause in the parties’ agreement – which excepted actions to “enforce the security interest” – the issue of arbitrability was for the arbitrator because the agreement contained a “delegation provision” indicating that the arbitrator was to decide “the arbitrability of any issue.”

332. *Sargon Enterprises, Inc. v. Browne George Ross LLP*,  
[223 Cal. Rptr. 3d 588](#) (Cal. Ct. App. 2017)

Although a court may not normally review an arbitrator’s ruling for legal error, it may review an award for exceeding that arbitrator’s authority by violating one of the party’s nonwaivable statutory rights. Accordingly, the trial court should not have confirmed an arbitrator’s award that held a party liable for breach of contract for filing a complaint despite have agreed to arbitrate. Parties have a statutory right – even if they have entered into an arbitration agreement – to bring an action in court and let the court decide whether the dispute is arbitrable.



333. *La Bella Dona Skin Care, Inc. v. Belle Femme Enterprises, LLC*,  
805 S.E.2d 399 (Va. 2017)

Unlike successor liability based on fraud, which must be proven by clear and convincing evidence, successor liability based on mere continuation need be proven only by a preponderance of the evidence.

334. *Columbia State Bank v. Invicta Law Group PLLC*,  
402 P.3d 330 (Wash. Ct. App. 2017)

The trial court did not err in concluding that a lawyer's sole proprietorship was the successor – under the mere continuation theory of successor liability – of the professional limited liability company of which he was the sole member and manager and which ceased paying its debts when the lawyer filed for personal bankruptcy protection. The lawyer continued his individual law practice under the sole proprietorship using the same name, location, website, signage, telephone number, employees, and equipment as the PLLC, and represented the same clients. The sole proprietorship also held itself out to the landlord and malpractice insurer as the PLLC or its successor. Because the lawyer, as a sole proprietor, had successor liability for the obligations of the PLLC, the lawyer was also bound by the attorney's-fees clause in the PLLC's loan agreement with a bank.

335. *Janice M. Hinrichsen, Inc. v. Messersmith Ventures, L.L.C.*,  
895 N.W.2d 683 (Neb. 2017)

The trial court did not err in concluding that the transaction by which an insurance agency with a \$98,000 judgment against it sold for \$250 to an entity newly formed by the agency's owner the agency's customer list was a fraudulent transfer for less than reasonably equivalent value. However, the trial court did err in awarding judgment for only \$250. Although the plaintiff did not prove the value of the customer list, the proper remedy for a fraudulent transfer is to avoid the transfer, so the plaintiff should have been permitted to levy on the asset transferred or its proceeds.

336. *Georgia Commercial Stores, Inc. v. Forsman*,  
803 S.E.2d 805 (Ga. Ct. App. 2017)

An unsecured creditor of an insolvent LLC stated claims for breach of fiduciary duty and intentionally fraudulent transfer against the LLC's president for causing the LLC to repay a \$239,000 debt to the president. Just as the officer and directors of an insolvent corporation owe a fiduciary duty to the corporation's creditors, so too do the managing members of an insolvent LLC. Although the LLC's assets were fully encumbered and the payment was made with the secured creditor's approval, those facts alone did not demonstrate that the unsecured creditor was uninjured by the transfer; the claim of a creditor that diligently pursues collection are not reduced or defeated by the hypothetical claims of other creditors who have slept on their rights.

337. *Impression Products, Inc. v. Lexmark International, Inc.*,  
[137 S. Ct. 1523](#) (2017)

Patent rights in goods are exhausted by the first sale of the goods. Consequently, a buyer that purchased used printer cartridges knowing that the manufacturer/patentee had previously sold them pursuant to agreements that prohibited re-use and resale, did not infringe on the patent by engaging in restricted resale and use.

338. *Schroeder v. Haberthur*,  
[401 P.3d 319](#) (Wash. Ct. App. 2017)

Because the Washington Deed of Trust Act could be interpreted consistently with Article 9 of the U.C.C., under which timber to be cut is not a “crop,” the debtor’s forest land was not agricultural property exempt from nonjudicial foreclosure.

339. *Milo & Gabby LLC v. Amazon.com, Inc.*,  
[693 F. App’x 879](#) (Fed. Cir. 2017)

A retailer remains the owner of goods sold through Amazon’s fulfillment center, pursuant to which the retailer sends its goods to Amazon, which stores the goods and, upon sale to a customer, pulls the goods off the shelf, packages them, and ships them to the customer. Consequently, Amazon is not the seller and cannot be liable – as a seller – for the copyright and trademark violations of the retailers that sold knock-off goods through Amazon. The transactions were not a consignment within the meaning of Article 9 because the retailers did not deliver goods to Amazon “for the purpose of sale,” but instead for the purpose of logistics and shipping after a sale had been made through the website.

340. *Impala Platinum Holdings Limited v. A-1 Specialized Services and Supplies, Inc.*,  
[2017 WL 2840352](#) (E.D. Pa. 2017)

Pursuant to the Uniform Contribution Among Tortfeasors Act, the defendant whom the jury determined was 59% responsible for the \$16 million verdict in a fraudulent transfer action was not entitled to any reduction for the amount paid by the defendants who settled during the trial because the settlement agreement provided that any judgment against other tortfeasors shall be reduced by the pro rata share of liability the jury apportioned to the settling defendants. Thus, the defendant remained liable for 59% of \$16 million, even though that amount plus the settlement amount exceeds \$20 million.

341. *Coastal Investment Partners, LLC v. DSG Global, Inc.*,  
[2017 WL 3605502](#) (S.D.N.Y. 2017)

A corporation that provided a \$72,500 promissory note with 8% interest in return for a \$10,000 loan, the agreement for which provided that \$62,500 of the debt could be “redeemed” for \$1 and which gave the holder a right to convert the note to equity, raised a plausible defense that the note was criminally usurious.

342. *Crystal Bay Lending Partners, LLC v. JMA Boulder Bay Holdings, LLC*,  
[2017 WL 3222271](#) (Nev. 2017)

The entity that bought a senior lender's "right, title and interest in, to and under the Loan Documents" could enforce the intercreditor agreement that the senior lender had entered into when the loan was made. Even though the intercreditor agreement was not expressly listed as one of the Loan Documents, that term was defined with broad language that necessarily included the intercreditor agreement.

343. *United Leasing, Inc. v. Balboa Capital Corp.*,  
[2017 WL 3674926](#) (S.D. Ind. 2017)

Because the phrase "to Seller's knowledge:" preceded a list of representations and warranties in an agreement for the sale of leases, it modified all of them, even though it arguably made no sense with respect to some of them. Because the buyer's complaint did not allege that the seller knew of the defects in some lease documents, the complaint had to be dismissed.

344. *MCR Federal, LLC v. JB&A, Inc.*,  
[808 S.E.2d 186](#) (Va. 2017)

Although the seller of a business materially misrepresented in a bring down certificate delivered at closing that no government investigation or inquiry against the seller was pending, the buyer had no action in tort for fraud because the source of the duty was the contractual obligation in the purchase and sale agreement to provide the bring down certificate. The fact that delivery of the bring down certificate was a condition precedent to closing, rather than a contractual duty, did not take the fraud claim outside of the contractual relationship. Nevertheless, the buyer did have a claim for breach of contract.

345. *In re Hutton*,  
[2017 WL 3704526](#) (Bankr. E.D.N.C. 2017)

Although a judgment creditor had the sheriff levy on two vehicles of the debtor, and thereby obtained a judgment lien on the vehicles, that lien was not perfected because it was not noted on the certificates of title for the vehicles.

346. *In re Ferguson*,  
[2017 WL 3783260](#) (C.D. Ill. 2017), *appeal filed*, (7th Cir. Sept. 12, 2017)

A creditor with a junior security interest in the debtor's farming equipment and crop proceeds was not entitled to a marshaling order requiring the senior secured party to look first to its real property collateral because the debtor planned to retain the real property and the delay would prejudice the senior secured party. The junior creditor was not entitled to a marshaling order later, after the real property was sold, because even though the bankruptcy court had, when it first denied marshaling, indicated it would consider revisit the issue if the real property was sold, at the time of the sale there were no longer two separate sources of funds.

347. *3432 West Henderson Building, LLC v. Gizynski*,  
[81 N.E.3d 94](#) (Ill. Ct. App. 2017)

A mortgagee was entitled to default interest on amounts paid for attorney's fees incurred in connection with the mortgage because the mortgage expressly provided that such expenses "shall become a part of the Indebtedness payable on demand and shall bear interest at the Note rate from the date of the expenditure until repaid."

348. *Magnusson v. Ocwen Loan Servicing, LLC*,  
[2017 WL 6261482](#) (D. Utah 2017)

Although credit documents provided for the borrower to pay the lender's attorney's fees "in enforcing the note," in litigation that "that might significantly affect Lender's interest in the property," or incurred "for the purpose of protecting Lender's interest in the Property," the lender was not entitled to attorney's fees incurred in successfully defending against the borrower's action for violation of the Home Affordable Modification Program. The litigation did not involve an effort to enforce the note and did not relate to the lender's lien on the collateral.

349. *Walker v. Probandt*,  
[902 N.W.2d 468](#) (Neb. Ct. App. 2017)

An individual who signed a promissory note as an accommodation party was liable for the unpaid portion of the note to the entity to which the note was assigned as when another accommodation party entered into a settlement with the payee. The claim was not an action for contribution, but an action on the note by the assignee.

350. *Blackwell Motors, Inc. v. DeShields*,  
[529 S.W.3d 367](#) (Mo. Ct. App. 2017)

The buyer of automobiles from an individual who acquired the automobiles at a dealers-only auction after submitting forged documents showing he was entitled to buy on behalf of a dealer had no claim against the seller that repossessed the automobiles after the bogus checks for the purchase price were dishonored. The individual was a thief who acquired no title to the automobiles and thus could pass no title to the buyer. Although a person who acquires goods by fraud has voidable title and can pass good title to a good faith purchaser for value, the individual was not a party to the sales contract at the dealers-only auction, the dealer he allegedly represented was.

351. *Koviack Irrigation and Farm Services, Inc. v. Maple Row Farms, LLC*,  
[2017 WL 4182409](#) (Mich. Ct. App. 2017)

A buyer of equipment for an irrigation system was entitled to reject nonconforming goods that were delivered late in the harvest season and which the buyer waited until spring to install and test.

352. *Ford Motor Credit Co. v. Smith*,  
[2017 WL 4558761](#) (N.Y. Civ. Ct. 2017)

The assignee of a car lease contract that sold the car after repossessing it was not entitled to summary judgment on its claim for lost least profits because the assignee might have breached the state Motor Vehicle Retail Leasing Act by misaddressing the required notification of the sale.

353. *In re MPM Silicones, LLC*,  
[874 F.3d 787](#) (2d Cir. 2017)

An intercreditor agreement that excepted from its debt subordination clause “any Indebtedness . . . that by its terms is subordinate or junior in any respect to any other Indebtedness” was ambiguous as to whether it referred to lien subordination or debt subordination, in part because each meaning rendered other language in the agreement superfluous. Extrinsic evidence indicates that the language did not except notes with a springing lien that was subject to lien subordination because the parties understood that those notes were not subordinated and a contrary ruling would have led to an absurd result that the notes were senior when issued but then subordinated when their springing lien sprung.

354. *In re Crystal Waterfalls, LLC*,  
[2017 WL 4736707](#) (C.D. Cal. 2017)

The assignee of a secured loan was bound by the original lender’s waiver of the right to collect interest at the default rate. Although the loan agreement provided that the original lender “shall not be deemed to have waived any rights . . . unless such waiver is given in writing and signed [by the original lender],” such a non-waiver clause can itself be waived if enforcing it would be inappropriate or unconscionable. In this case, the original lender had provided the debtor with an estimated payoff amount was based on the non-default interest rate, the Purchase and Sale Agreement between the original lender and the assignee, in stating the amount owing, reflected interest calculated at the non-default rate, and the original lender continued to accept monthly interest payments from the debtor at the non-default rate until the loan was transferred.

355. *Shields Limited Partnership v. Bradberry*,  
[526 S.W.3d 471](#) (Tex. 2017)

Although a no-implied waiver clause can normally be waived, a term in a commercial lease providing that the landlord’s “acceptance of late installments of Rent shall not be a waiver and shall not estop Landlord from enforcing that provision or any other provision of this Lease in the future” was specific enough to prevent the landlord’s acceptance of late payments from being a waiver of default. Because the tenant was in default, the tenant had not properly exercised its contractual right to extend the lease term.

356. *Kanno v. Marwit Capital Partners II, L.P.*,  
[2017 WL 6547078](#) (Cal Ct. App. 2017)

Evidence of an oral agreement by the buyer of a business to redeem preferred stock provided to the seller in connection with the sale was not barred by the parol evidence rule. Although each of the three documents executed in connection with the sale – a Contribution and Purchase Agreement; a Stock Subscription Agreement; and a Stockholder Agreement – contained an integration clause, such clauses are merely rebuttable evidence that the agreements were fully integrated. The fact there were three agreements intended to be part of the same transaction in fact demonstrated that the parties did not intend for any one agreement to be a complete integration. Moreover, the alleged of the oral stock redemption agreement was not inconsistent with the terms of any of the three written agreements.

357. *Kosowski v. Alberts*,  
[2017 WL 6604565](#) (Ill. Ct. App. 2017)

A clause in a loan agreement by which the debtor appointed the bank as attorney-in-fact to take such acts as the bank may require to perfect or enforce its security interest did not create a fiduciary obligation of the bank to the debtor.