

Commercial Law Developments

2005

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PRINCIPAL CASES

SECURED TRANSACTIONS

Scope Issues

1. *In re Grubbs Construction Co.*,
319 B.R. 698 (Bankr. M.D. Fla. 2005)
Applying the economic realities test after the per se rules failed to conclusively classify a purported lease transaction as a sale and secured transaction; transaction was not a lease because only economically sensible course for debtor was to exercise early buyout option.
2. *In re Tower Air, Inc.*,
397 F.3d 191 (3d Cir. 2005)
Insurance payable by reason of damage to the collateral is proceeds under old Article 9, even though the original collateral still exists. Possibly important dicta in footnote 10.
3. *In re Gallagher*,
331 B.R. 895 (9th Cir. BAP), *vacated and depublished*, (2005)
Structured settlement of tort claim is outside Article 9 and its anti-assignment rules.
4. *In re Nittolo Land Development Ass'n, Inc.*,
[333 B.R. 237](#) (Bankr. S.D.N.Y. 2005)
Sale of land generates an account to which Article 9 applies.

Attachment Issues

5. *Van Diest Supply Co. v. Shelby County State Bank*,
425 F.3d 427 (7th Cir. 2005)
Proceeds from intermingled inventory were not identifiable.
6. *In re Ferandos*,
402 F.3d 147 (3d Cir. 2005)
Debtor has no rights in funds deposited in escrow with mortgagee to pay insurance and taxes, and thus could not grant an effective security interest in them.
7. *Pride Hyundai, Inc. v. Chrysler Financial Co., LLC*,
369 F.3d 603 (1st Cir. 2004)
Court enforced a “dragnet clause” in a commercial transaction without regard to whether the obligations were of the same kind as the original debt, in part because of revised Article 9’s heightened standard of good faith.

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8. *In re Lexington Healthcare Group, Inc.*
335 B.R. 570 (Bankr. D. Del 2005)
Employer withheld funds representing § 401(k) contributions from employee paychecks but failed to remit them to the plan administrator. To the extent the employees can establish a nexus between assets on hand and their withheld contributions – through common-law tracing or otherwise – such assets would be held in trust, would not be property of the employer, and thus the secured interest of the employer’s creditors could not attach to them.
 9. *Grasser v. Infanti International, Inc.*,
353 F. Supp. 2d 342 (E.D.N.Y. 2005)
Lender did not have security interest in patent because borrower company which purported to grant such interest in it did not own the patent, the individual who owned and established the borrower did.
 10. *In re Chris-Don, Inc.*,
367 F. Supp. 2d 696 (D.N.J. 2005)
Liquor license is not property to which a security interest may attach in New Jersey.
 11. *In re Snelson*,
330 B.R. 643 (Bankr. E.D. Tenn. 2005)
Listing mobile home model year as 1997 instead of 1998 in security agreement did not undermine attachment of security interest.
 12. *Magill v. Schwartz*,
105 P.3d 867 (Or. App. 2005)
Specific performance of settlement agreement denied because plaintiff itself could not perform; plaintiff could not grant a security interest in the proceeds of a fisheries litigation settlement because an LLC he partially owned, not the plaintiff, owned those settlement rights.
 13. *Oakwood Acceptance Corp., LLC v. Ahmad*,
609 S.E.2d 700 (Ga. App. 2005)
Unauthorized signatures of debtors on security agreement were ratified by subsequent actions of making three monthly payments and using the collateral.

Perfection Issues

14. *In re Commercial Money Center, Inc.*,
2005 WL 1365055 (Bank. S.D. Cal. 2005)
Right to payment under equipment leases is chattel paper, not payment intangibles, and thus assignment of such rights requires filing for perfection.

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15. *In re Snelson*,
330 B.R. 643 (Bankr. E.D. Tenn. 2005)
Error in last two digits of vehicle identification number on certificate of title for mobile home was a minor error that was not seriously misleading, and thus did not undermine perfection.
16. *In re Hoggard*,
330 B.R. 595 (Bankr. W.D. Mich. 2005)
A mortgage lien on the real estate to which a mobile home is affixed properly perfects an interest in the mobile home even without notation on the certificate of title.
17. *In re Asheboro Precision Plastics, Inc.*,
[2005 WL 1287743](#) (Bankr. M.D.N.C. 2005)
Filing against debtor's trade name, "Wade Technical Molding, Inc.," was ineffective because it would not be disclosed in a search under debtor's correct name, "Asheboro Precision Plastics, Inc."
18. *Planned Furniture Promotions, Inc. v. Youngblood*,
374 F. Supp. 2d 1227 (M.D. Ga. 2005)
Individual debtors operated two business at same address; financing statement's description of collateral as that of one of the businesses at the address was sufficient to cover the property of the other business; no new filing needed after incorporation because the names were not that different.

Priority Issues

19. *General Electric Capital Corp. v. Union Planters Bank*,
409 F.3d 1049 (8th Cir. 2005)
Secured bank which contractually subordinated its interest to another lender did not convert cash proceeds deposited with it when it routinely swept them up to cover a revolving line of credit but may have converted funds so swept after default and demand by senior lender; equitable tracing of swept funds required use of the lowest intermediate balance rule.
20. *In re Spearing Tool and Manufacturing Co.*,
412 F.3d 653 (6th Cir. 2005)
IRS notice of tax lien need not be filed under the debtor's exact name to be effective; diligent searchers need to look for filings with likely abbreviations or risk losing the priority they seek.

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21. *Inergy Propane LLC v. Union Bank of Chandler*,
158 Fed. Appx. 987 (10th Cir. 2005)
Contracting party who mistakenly paid via wire transfer the gross amount due rather than net amount due from a series of similar purchase and sale agreements, as was the parties' practice, was unable three weeks later to recover the difference from the depositary bank which had effected setoff against the transferred funds. Court ruled that although the bank had a security interest in the deposit account it was not an assignee for the purposes of § 9-404 and therefore not subject to the terms of the agreement between the contracting parties, specifically the right to exercise setoff, and that bank's setoff rights had priority under § 9-340, even though payor did not actually claim a security interest.
22. *Tucker v. DAVCO Enterprises*,
329 B.R. 291 (Bankr. D. Ariz. 2005)
Reclaiming seller beats unperfected SP because failure to perfect prevents SP from being a purchaser in good faith.
23. *Walden v. Mercedes Benz Corp.*,
2005 WL 995217 (Pa. Com. Pl. 2005)
Applying the limits in § 9-320 to not allow a BICOB from taking free of lien created further up chain of title.
24. *Valley Bank & Trust Co. v. Holyoke Community Federal Credit Union*,
121 P.3d 358 (Colo. App. 2005)
Lender authorized sales of inventory free and clear of its security interest; buyer's secured party was itself a buyer in ordinary course of business.
25. *Metzger v. Americredit Financial Services, Inc.*,
615 S.E.2d 120 (Ga. App. 2005)
Applying § 9-337(1) to protect buyer of car with clean certificate of title.
26. *Fin Ag, Inc. v. Hufnagle, Inc.*,
700 N.W.2d 510 (Minn. App. 2005)
Buyer took subject to security interest under Food Security Act.
27. *In re Machinery, Inc.*,
337 B.R.368 (Bankr. E.D. Mo. 2005)
Junior SP had no right to enter senior's premises to repossess collateral and doing so was a trespass; junior SP who refused to return the collateral to senior upon demand was liable for conversion.

Enforcement & Liability Issues

28. *Miller v. Forge Mench Partnership Ltd.*,
2005 WL 267551 (S.D.N.Y. 2005)
Article 9 foreclosure sale does not preclude the imposition of successor liability; transferee that purchased a failed company's assets in a foreclosure sale was liable to a judgment creditor of the failed company, because the transferee conducted a de facto merger with, and was thus nothing more than a mere continuation of, the failed company.
29. *Glentel, Inc. v. Wireless Ventures, LLC*,
362 F. Supp. 2d 992 (N.D. Ind. 2005)
Article 9 foreclosure sale does not preclude the imposition of successor liability; foreclosure sale did not result in de facto merger and transferee that purchased failed company's assets in a foreclosure sale was merely a continuation of the debtor because even though the same business was conducted at the same location, the management and ownership changed, although the new owner was a family member of the prior owners.
30. *ESL Federal Credit Union v. Bovee*,
801 N.Y.S.2d 482 (N.Y. Sup. Ct. 2005)
Secured party's release of collateral discharged co-maker of note evidencing secured obligation under old § 3-606 (revised § 3-605(d)); because this occurred post-default, it was essentially a commercially unreasonable disposition and thus the defense could not be waived in the security agreement.
31. *In re Wilmington Hospitality LLC*,
320 B.R. 73 (Bankr. E.D. Pa. 2005)
Creditor who failed to give proper notice of a foreclosure sale was nevertheless entitled to recover a deficiency under § 9-626 because proper notice would not have yielded more.
32. *Federal Express Credit Union v. Lanier*,
2005 WL 2806638 (Tenn. Ct. App. 2005)
Secured Party did not provide reasonable notification of disposition by mailing it to debtor's residence, return receipt requested, when secured party knew debtor was working in Saudi Arabia and neither the letter nor the receipt was ever returned.
33. *Robertson v. Horton Bros. Recovery, Inc.*,
2005 WL 736681 (D. Del. 2005)
Repossession agencies that have no present right to the possession of the collateral violate the Fair Debt Collection Practices Act by seeking to take possession.
34. *R.I. Spiece Sales Co. v. Bank One*,
2005 WL 3005484 (N.D. Ind. 2005)
No tort liability for bogus filing unless filer fails to file a termination statement within 20 days after the debtor demands it under § 9-513.

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35. *Padin v. Oyster Point Dodge*,
397 F. Supp. 2d 712 (E.D. Va. 2005)
Seller who repossessed car after financing fell through acted improperly because debtor was current in payments and not in default.
36. *Missouri State Credit Union v. Wilson*,
176 S.W.3d 182 (Mo. Ct. App. 2005)
Debtor's truck secured both a truck loan from and credit card debt to same creditor. After default on both obligations, creditor who gave improper notice of disposition of the truck with respect to the truck loan. This barred a deficiency with respect to the truck loan but despite the cross-collateralization, did not prevent creditor from seeking to collect the credit card debt.
37. *Continental Insurance Co. v. Schneider, Inc.*,
873 A.2d 1286 (Pa. 2005)
Article 9 foreclosure sale does not preclude the imposition of successor liability; transferee that purchased the debtor's assets in a private foreclosure sale and which was owned and operated by the same individuals as the debtor was potentially merely a continuation of the original debtor and thus summary judgment was not appropriate.
38. *Milliken & Co. v. Duro Textiles, LLC*,
2005 WL 1791562 (Mass. Super. 2005)
Article 9 foreclosure sale conducted as auction after limited advertising was a de facto merger and the buyer had successor liability for the debts of the debtor.
39. *New Edge Network, Inc. v. Britsys, Inc.*,
2005 WL 103083 (Wash. App. 2005)
Internet broadband wholesaler contracted to furnish an internet service provider with broadband access for the ISP to provide to the ISP's customers; when ISP failed to make monthly payments, wholesaler terminated the contract, ceased providing service, and migrated the end-user accounts to other internet service providers; such migration did not constitute foreclosure on a security interest and thus Article 9's requirement of commercial reasonableness and its rules on the disbursement of the proceeds of a disposition were not applicable.
40. *Nessi v. Sudovest Group, Inc.*
2005 WL 832199 (Minn. App. 2005)
Obligor on note cannot use § 9-404(a)(2) to set off claim against secured party, who bought the note at a public sale, merely because a judgment was obtained on note, thereby arguably making the right to payment a payment intangible and the obligor an "account debtor."

Bankruptcy

Leases & Executory Contracts

41. *United Airlines, Inc. v. HSBC Bank USA*,
416 F.3d 609 (7th Cir. 2005)
Bankruptcy Code distinguishes leases from secured transactions based on substance, not form. Particulars are left to state law (unless state law regards form as controlling, in which case it must bow to federal law). Airline's lease of 20 acres near airport was a security arrangement because rent was for period of bonds, rental was based on bond repayment schedule, not value of property, balloon payment is not typical for a lease, and lessor has no interest at end of lease term.
42. *In re AB Liquidating Corp.*,
416 F.3d 961 (9th Cir. 2005)
Claim of landlord, whose \$5.6 million in damages were capped at \$2 million by § 502(b)(6), was further reduced by letter of credit supporting lease.
43. *In re Stonebridge Technologies, Inc.*
430 F.3d 260 (5th Cir. 2005)
Landlord who did not file claim could draw on letter of credit securing the debtor's performance under the lease without regard to the cap in § 502(b)(6).
44. *In re N.C.P. Marketing Group, Inc.*,
337 B.R. 230 (D. Nev. 2005)
A trademark license cannot be either assumed or assigned by a debtor in possession licensee without the consent of the licensor.
45. *In re C.Q., LLC*,
[343 B.R. 915](#) (Bankr. W.D. Wis. 2005)
Trustee's obligation to timely perform debtor's postpetition, pre-rejection lease obligations entitles lessors to immediate payment of postpetition rent owing under debtor's unexpired leases, without regard to whether estate is administratively solvent.

Avoidance Powers

46. *Sherwood Partners, Inc. v. Lycos, Inc.*,
394 F.3d 1198 (9th Cir. 2005)
Bankruptcy Code preempts state law that gives assignee for the benefit of creditors power to avoid preferences.

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47. *In re Enron Corp.*,
333 B.R. 205 (Bankr. S.D.N.Y. 2005)
Claims of creditors subject to equitable subordination under § 510(c) that were transferred post-petition were still subject to subordination in hands of the transferees.
48. *Aptix Corp. v. Quickturn Design Systems, Inc.*,
148 Fed. Appx. 924 (Fed. Cir.), cert. denied, 126 S. Ct. 751 (2005)
Security interest in substantially all of corporation's assets granted to majority shareholder in return for \$9.7 million in loans was made with actual intent to hinder or delay creditors, and thus avoidable even though no other lender was willing to provide operating funds.
49. *In re Stetson & Associates, Inc.*,
330 B.R. 613 (Bankr. E.D. Tenn. 2005)
Unlike the rule of former § 9-403(1), which made lapse of perfection retroactive against purchasers and lien creditors, revised § 9-515(c) makes lapse of perfection retroactive only against purchasers for value. As a result, lapse after the bankruptcy filing is immaterial.
50. *Megal Development Corp. v. Shadof*,
705 N.W.2d 645 (Wis. 2005)
Judgment debt discharged in bankruptcy led to discharge of judgment lien under state law.
51. *In re Lindell*,
334 B.R. 249 (Bankr. D. Minn. 2005)
Payment of \$50,000 for notes worth \$130,000 was not reasonably equivalent value and thus the sale of the notes was a fraudulent transfer.
52. *In re PurchasePro.com, Inc.*,
332 B.R. 417 (Bankr. D. Nev. 2005)
Unlike common stock, warrants are property of the issuer and thus their issuance can be the basis of a fraudulent transfer action.
53. *In re Lazarus*,
334 B.R. 542 (Bankr. D. Mass. 2005)
Mortgage granted to refinancer and which was recorded two weeks after refinancing, and therefore was not insulated from preference attack by § 547(e), was immune from preference avoidance under the earmarking doctrine.
54. *In re Zenith Industrial Corp.*,
319 B.R. 810 (Bankr. D. Del. 2005)
Creditors' "critical vendor" defense to action to avoid pre-petition preferential payments was legally insufficient to prevent recovery.

Reorganization Plans

55. *In re Armstrong World Industries, Inc.*,
432 F.3d 507 (3d Cir. 2005)

Absolute priority rule prohibits a plan in which one class of claimants assigns part of its distribution to equity interest holders while other classes of creditors remain unpaid.

56. *In re Owens Corning*,
419 F.3d 195 (3d Cir. 2005)

Substantive consolidation is available only when: (i) prepetition the debtor disregarded separateness so significantly that creditors relied on the breakdown of entity borders and treated the various entities as one; or (ii) the post-petition assets and liabilities are so entangled that separating them is prohibitive and hurts all creditors. Consolidation cannot be ordered over the objection of a creditor that relied on the separateness of the entities.

57. *In re Plymouth House Health Care Center*,
2005 WL 2589201 (Bankr. E.D. Pa. 2005)

Distinguishing lien subordination from debt subordination for the purposes of § 506(b).

Sales & Assignments of Assets

58. *In re Resource Technology Corp.*,
430 F.3d 884 (7th Cir. 2005)

Secured creditors cannot realize upon benefits of debtor's executory contract with third party by paying trustee to abandon the contract under § 554. Abandonment would constitute a breach, and not allow the creditors to enforce the contract. Section 363(f) does not prevent the trustee from settling contractual disputes even if creditors have a security interest in the debtor's contractual rights.

59. *In re Westpoint Stevens, Inc.*,
333 B.R. 30 (S.D.N.Y. 2005)

Bankruptcy Court cannot structure the distribution, claim satisfaction, and lien termination features of a sale order under § 363 to alter the priorities of creditors established by their credit agreement with the debtor and the intercreditor agreement among themselves.

60. *In re Tropical Sportswear International Corp.*,
320 B.R. 15 (Bankr. M.D. Fla. 2005)
Chapter 11 debtors authorized to pay 77.5% of prepetition claims owed to certain critical vendors because vendors supplied debtors with unique products essential to continued operation of their business, proposed sale of the was dependent upon its continuing to operate, vendors refused to continue supplying debtors unless they received this payment, vendors waived the remaining 22.5% due, and payment would benefit other creditors.

Guaranties & Related Matters

61. *Marc Nelson Oil Products, Inc v. Grim Logging Co.*,
110 P.3d 120 (Or. App. 2005), *modified*, 115 P.3d 935 (Or. App. 2005)
Creditor's assignment of claim discharged guarantor because it materially increased the guarantor's risk.
62. *WXI/Z Southwest Malles v. Mueller*,
110 P.3d 1080 (N.M. App.), *cert. denied*, 112 P.3d 1111 (N.M. 2005)
Landlord did not discharge assignee/guarantors of lease by failing to inform them of assignee's default for 20 months.
63. *Phelps Dodge Corp. v. Schumacher Electric Corp.*,
415 F.3d 665 (7th Cir. 2005)
Continuing guaranty did not expire after a "reasonable time" and in fact survived for 30 years even though the guarantor forgot about the guaranty and creditor had not informed guarantor of nonmaterial changes in its business relationship with the debtor.
64. *First Union National Bank v. Richmond Capital Partners I, L.P.*,
168 S.W.3d 917 (Tex. Ct. App. 2005)
Intercreditor agreement in which one creditor purported to hold for the benefit of both any "additional collateral" did not extend to a guaranty of the debtor's obligation.
65. *AEI Income & Growth Fund 24 LLC v. Parrish*,
[2005 WL 713629](#) (D. Minn. 2005)
Failure to proceed against principal obligor did not discharge secondary obligor.
66. *Allen v. Yates*,
870 A.2d 39 (D.C. 2005)
Settlement with principal obligor did not discharge guarantor.
67. *Koehler v. Bank of Bermuda, Ltd.*,
[2005 WL 551115](#) (S.D.N.Y. 2005)
Release of debtor discharged garnishee who failed to comply with garnishment order even though settlement agreement purported to reserve rights against garnishee.

Letters of Credit

68. *Hendricks v. Bank of America*,
408 F.3d 1127 (9th Cir. 2005)
Beneficiary of letter of credit is not a necessary party to a suit by applicant seeking to enjoin issuer from paying on it. Agreement between applicant and beneficiary to resolve disputes in a particular forum does not prevent suit in another forum against issuer to enjoin payment.
69. *In re Spring Ford Industries*,
[2005 WL 984180](#) (Bankr E.D. Pa)
Excess proceeds from draw on letter of credit belong to applicant, not issuer.

Lending, Contracting & Commercial Litigation

70. *Citadel Equity Fund Ltd. v. Aquila, Inc.*,
371 F. Supp. 2d 510 (S.D.N.Y. 2005)
One party cannot unilaterally waive contractual provision that benefits other contracting parties.
71. *General Electric Capital Corp. v. D'Agostino Supermarkets, Inc.*,
[2005 WL 1683531](#) (S.D.N.Y. 2005)
Lead lender that, because of "unresolved inter-creditor conflicts," declined to fund \$160 million loan after executing a commitment letter could not escape liability for breach of contract on the basis that preparation and execution of inter-creditor agreements was a condition precedent to the obligation to make the loan; creditor was responsible for managing these conflicts and could not use its own nonperformance to provide the non-occurrence of a condition.
72. *Smith v. Ajax Magnathermic Corp.*,
144 Fed. App. 482 (6th Cir 2005)
Lender could have WARN Act liability if it takes over management of debtor and lays off employees without proper notice.
73. *Trust One Mortgage Corp. v. Invest America Mortgage Corp.*
37 Cal. Rptr.3d 83 (Cal. Ct. App. 2005)
California anti-deficiency statute did not bar mortgage lender from enforcing indemnity agreement against real estate broker who promised to cover lender's losses resulting from borrower's default on any of first six payments because indemnity agreement was neither a guaranty nor a guise to avoid operation of the anti-deficiency statute.

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74. *River Terrace Associates, LLC v. Bank of New York*,
809 N.Y.S.2d 483 (N.Y. Sup. Ct. 2005)
Refusing to award summary judgment on whether banks breached loan commitment for a development project in lower Manhattan entered into prior to destruction of World Trade Center by seeking to renegotiate terms because of reduction in rental values; similarly refusing to issue summary judgment on whether borrower elected remedies by continuing to make payments under an associated interest rate collar agreement.
75. *Grafton Partners LP v. Superior Court*,
36 Cal. 4th 944, 32 Cal. Rptr. 3d 5 (Cal. 2005)
Pre-dispute, contractual waivers of a jury are unenforceable in California.
76. *ABF Capital Corp. v. Grove Properties Co.*
126 Cal. App. 4th 204 (2005)
By virtue of California Civil Code § 1717, which makes bilateral a contractual clause awarding attorney's fees to only one of the contracting parties, is fundamental policy in California and applies to commercial litigation in California even though the parties' agreement had a valid clause choosing application of New York law.
77. *ABF Capital Corp. v. Berglass*,
130 Cal. App. 4th 825 (2005)
Because, under choice-of-law principles, New York law would be applicable to this litigation in California court even if the parties had not contractually agreed to the application of New York law, New York rule enforcing unilateral attorneys fees governs and whether that rule violates California fundamental policy is irrelevant.
78. *Hicks v. Londra*,
125 P.3d 452 (Colo. 2005)
When buyer purchased property subject to three mortgages and a judgment lien, the three mortgages were discharged and a new one created in favor of buyer's own mortgage lender. While this would have normally left the judgment lien in first priority position, the doctrine of equitable subrogation applied to give priority to buyer's mortgage lender.
79. *Hubbert v. Dell Corp.*,
835 N.E.2d 113 (Ill. Ct. App. 2005)
Consumers who purchased computers online through seller's web site were bound by terms and conditions listed on web site even though they did not signify assent by clicking an "I agree" button because: (i) terms were available through hyperlink on web pages they did visit; and (ii) three web page forms completed by purchasers indicated that all sales were subject to such terms.

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80. *Arizona Cartridge Remanufacturers Association, Inc. v. Lexmark International, Inc.*
421 F.3d 981 (9th Cir. 2005)

Manufacturer of printer cartridges not liable for unfair and deceptive practices for “prebate” program in which it sells cartridges to wholesalers at a discount with the condition that consumers return the empty, used cartridges. Printing the terms of program on outside of cartridge packaging, including availability of higher priced cartridges not subject to such a condition, is not deceptive because it creates a contract with ultimate consumers and is binding on them.