

Commercial Law Developments

2008

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SECURED TRANSACTIONS

Scope Issues

1. *In re Action Transit, Inc.*
[2008 WL 533992](#) (Bankr. E.D. Wis. 2008)
Option to purchase for \$100 at expiration of lease equipment worth over \$100,000 was for a nominal amount, and thus the transaction was a sale with a retained security interest. This conclusion was further supported by the fact that the agreement was ambiguous and thus should be interpreted against the drafter, which was the putative lessor.
2. *In re Ecco Drilling Co.*,
[390 B.R. 221](#) (Bankr. E.D. Tex. 2008)
Equipment leases were really sales because the lessee's option to purchase at the end of the lease term for about 15% of the equipment's expected fair market value was for a nominal amount.

Attachment Issues

3. *In re Moon*,
[2008 WL 345847](#) (Bankr. D. Neb. 2008)
Bank which inadvertently signed and delivered certificate of title to release lien when debtor refinanced the loan did not in fact release the lien or lose perfection because the signed certificate was never submitted to the Department of Motor Vehicles and a third party searching the records of the Department would have been informed of the bank's lien.
4. *Insurance Company of the State of Pennsylvania v. HSBC Bank of USA*,
[882 N.E.2d 381](#) (N.Y. 2008)
Although debtor's receipts from cigarette sales were in part trust fund taxes, the failure of the state's bond issuer to raise that point in the debtor's bankruptcy, which led to the bankruptcy court to award the funds to the debtor's secured creditor, was *res judicata*. Thus, even though a security interest might not normally be able to attach to such trust funds, the bond issuer, which paid the state and was subrogated to its rights, could not recover the funds from the secured creditor.
5. *In re Plastech Engineered Products, Inc.*,
[399 B.R. 1](#) (Bankr. E.D. Mich. 2008)
Bank that entered into interest rate swap with debtor was not a secured party under the debtor's credit agreement with its first lien lenders and the debtor's obligations under the swap did not become covered by that credit agreement when the bank later received an assignment of a piece of the first lien loan. Although the swap agreement and the parties' correspondence indicated an intent that it be secured, an amendment to the credit agreement was necessary for the bank to share priority with the first lien lenders.

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6. *In re Greg James Ventures LLC*,
[2008 WL 4829952](#) (Bankr. N.D. Cal. 2008)
Lender's security interest in debtor's inventory of motor vehicles did not attach as proceeds to postpetition receipts for the sale of extended warranties, fees paid by customers' lenders for originating loans, incentive payments from the manufacturer, or charges for servicing vehicles under warranty, but it did attach as proceeds to receipts for amounts charged for preparing vehicles for sale and to proceeds of parts provided to repair vehicles.
 7. *In re Zwosta*,
[395 B.R. 378](#) (6th Cir. BAP 2008)
Lender had security interest in proceeds of collateralized receivables collected by debtor even though debtor voluntarily used them to pay "trust fund" tax liability, and the debtor's actions may have caused willful and malicious injury to the lender within the meaning of Bankruptcy Code § 523(a)(6).
 8. *RESCO, Inc. v. GLAC Holdings, LLC*,
[2008 WL 400679](#) (Mich. Ct. App. 2008)
Letter of intent signed by individual in his capacity as corporate president that indicated security interest would be granted in individual's corporate stock did not satisfy the authentication requirement of § 9-203 because it was not signed in individual's personal capacity.
 9. *In re Phipps*,
[2008 WL 5606175](#) (Bankr. S.D. Ill 2008)
Security agreement signed by individual encompassed equipment used in two different business operated as sole proprietorships.
 10. *Franklin Bank v. Tindall*,
[2008 WL 4771927](#) (E.D. Mich. 2008)
Individual borrower who, as president of corporation, had previously executed an agreement by which the corporation had leased a boat to him, had actual authority to grant a security interest in the entire boat on behalf of the corporation.
 11. *In re Estate of Danyus*,
[2008 WL 4710811](#) (Del. Ch. Ct. 2008)
Unperfected security interest that attached before the debtor's death was enforceable against the decedent's estate. When the estate sold the collateral, the buyer took free of the security interest but the security interest attached to the proceeds.

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12. *In re Phillips Group, Inc.*,
[382 B.R. 876](#) (Bankr. W.D. Pa. 2008)
Seller of equipment did not have a valid security interest because its only evidence of a written security agreement was: (i) an unsigned financing statement; and (2) a letter from the buyer's attorney that stated the attorney was looking forward to receiving a copy the security agreement, but which did not describe the collateral.
13. *Sanders v. Comerca Bank, Inc.*,
[274 S.W.3d 861](#) (Tex. Ct. Civ. App. 2008)
Creditor with a security agreement and financing statement describing the collateral as stock and who later filed a second financing statement describing the collateral as equipment and agreed to subordinate to an equipment lender did not in fact have a security interest in the equipment, and was therefore not entitled to share in the proceeds of the equipment lender's disposition.
14. *In re Noonan*,
[2008 WL 4974835](#) (Bankr. N.D. Iowa 2008)
Putative secured party could not use composite document rule to obtain dismissal of bankruptcy trustee's avoidance action because whether putative secured party really had a security interest was a factual matter that depended in part of the parties' intent.
15. *In re United Energy Coal, Inc.*,
[2008 WL 496142](#) (Bankr. N.D.W. Va. 2008)
Security agreement which did not expressly reference after-acquired collateral but which did refer to certificates of deposit and letters of credit that "shall be deposited" with the secured party, was sufficient to cover such property that did not exist when the debtor authenticated the agreement but which was later so deposited. The secured party was perfected in the certificates of deposit because they qualify as instruments and the secured party had possession; the secured party was perfected in the letters of credit because they were issued in the secured party's name and thus it had control.
16. *Rice v. Miller*,
[864 N.Y.S.2d 255](#) (N.Y. Sup. Ct. 2008)
Security agreement covering "general intangibles" included patents owned by the debtor.

17. *Helms v. Certified Packing Corp.*,
551 F.3d 675 (7th Cir. 2008)

Although tort and insurance claims for loss or damage to collateral are proceeds of the collateral (limited by the collateral's value), neither debtor's claim against insurance broker for negligent failure to list the debtor's destroyed facility on a business-losses insurance policy nor debtor's tort claim against utility company for business losses arising from fire were proceeds of secured lender's collateral. Lender's security interest also did not attach to commercial tort claims pursuant to the terms of the security agreement because even though the filed financing statement expressly covered commercial tort claims and the security agreement gave the lender permission to amend the schedule of collateral to include commercial tort claims upon receiving notification of the claim from the debtor, the secured party failed to make such an amendment.

18. *Waltrip v. Kimberlon*,
79 Cal. Rptr. 3d 460 (Cal. Ct. App. 2008)

1996 security agreement that covered existing and after-acquired general intangibles did not extend to later commercial tort claim because old Article 9 did not cover security interests in tort claims, revised Article 9 defines "general intangibles" to exclude commercial tort claims, a description of commercial tort claims by collateral type is insufficient, and an after-acquired property clause is ineffective to cover later-arising commercial tort claims.

19. *In re Yelverton*,
298 Fed. Appx. 941 (11th Cir. 2008)

Loan agreement with three borrowers which provide for collateral and purported to make the collateral secured all of the borrowers' other obligations to the lender was sufficient to cover an earlier loan by the lender to only one of the borrowers.

20. *In re Keeton*,
2008 WL 686938 (Bankr. M.D. Ala. 2008)

Dragnet clause in security agreement in connection with car loan to joint debtors did not clearly encompass obligations later incurred by only one of them, and thus the collateral did not secure one debtor's individual credit card obligations.

21. *Starlines International Corp. v. Union Planters Bank*,
976 So. 2d 1172 (Fla. Ct. App. 2008)

Dragnet clause in mortgage note is ineffective against a third party who acquired the mortgaged property to the extent it covers a pre-existing debt of debtor, unless the clause specifically identifies the earlier debt or the third party had notice of the earlier debt. Whether a third party who learned nothing by inquiring of the debtor but who failed to make inquire of the creditor had such notice is a question of fact.

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22. *In re Greenline Equipment, Inc.*,
[390 B.R. 576](#) (Bankr. N.D. Miss. 2008)
Because equipment was delivered to seller not for purposes of sale, but merely for temporary storage, the transfer was a bailment, not a consignment, and the seller's secured lender obtained no security interest in it.
23. *Texas Lottery Commission v. First State Bank of DeQueen*,
[254 S.W.3d 677](#) (Tex. Ct. App. 2008)
Section 9-406(f) trumps statute prohibiting assignment of state lottery winnings even though that statute was more recent and more specific because § 9-406(f) makes clear that it takes precedence over other law. Thus, lottery winner could assign right to receive payments.
24. *Stone Street Capital, LLC v. California State Lottery Commission*,
[80 Cal. Rptr. 3d 326](#) (Cal. Ct. App. 2008)
Specific provisions of Lottery Act that restrict assignment of lottery winnings control over the more general – but subsequently enacted – anti-assignment rules of § 9-406(f).
25. *In re Prosser*,
[2008 WL 3979476](#) (D.V.I. 2008)
Statute requiring bank directors to hold shares in bank and to deposit those shares with the bank did not prevent director from granting a security interest in his shares to lender or prevent lender from perfecting that security interest by possession.
26. *Symetra Life Insurance Co. v. Rapid Settlements, Ltd.*,
[599 F. Supp. 2d 809](#) (S.D. Tex. 2008)
Assignee of payments from structured settlements was permanently enjoined from using arbitration scheme to bypass state statutory requirements of judicial approval for any such assignment.
27. *In re Jack*,
[390 B.R. 307](#) (Bankr. S.D. Tex. 2008)
Even absent a restriction on assignment, because the beneficiary has no right to the annuity issued in a structured settlement, the beneficiary's assignment of the right to annuity payments was ineffective. However, despite an anti-assignment clause in the structured settlement agreement, the beneficiary could assign rights to payment under that agreement because he and his spouse had waived the protections of the restrictive provision.

28. *In re Brankle Brokerage & leasing, Inc.*,
[394 B.R. 906](#) (Bankr. N.D. Ind. 2008)

Lease of six vehicles was in reality a sale and secured transaction because the lessee was required at the end of the lease term to either: (i) buy the vehicles for 20% of the lessor's initial cost; (ii) sell the vehicles for at least 20% of the lessor's net cost and remit that amount to the lessor; or (iii) return the vehicles to the lessor and pay the lessor 20% of its initial net cost, whereupon the lessor would sell them and remit any amount in excess of that payment to the lessee. Accordingly, the lessor had no meaningful reversionary interest in the vehicles; the lessee had the downside risk and the right to upside gain.

Perfection Issues

29. *In re Commercial Money Center, Inc.*,
[392 B.R. 814](#) (9th Cir. BAP 2008)

Surety bonds that provided credit enhancement for equipment leases were supporting obligations; they were not instruments because they are not transferred by delivery in the ordinary course of business and do not represent an obligation to pay a sum certain. Thus, a security interest in them could not be perfected by possession. Lender did not have possession of the leases through an agent by virtue of a temporary restraining order that merely required the debtor to make the leases available to the agent and restricted the debtor's right to transfer the leases or the payments thereunder because the agent never sought or took actual physical custody of the leases. Accordingly, the lender did not perfect its security interest in the rights to payment under the leases.

30. *In re Silver Dollar, LLC*,
[2008 WL 3539790](#) (Bankr. E.D. Tenn. 2008)

Filing that identified the debtor using its registered assumed name, "Silver Dollar Stores, LLC," instead of its organizational name, "Silver Dollar, LLC," was improper. Because official search failed to produce improper filing – although it did produce filings by other creditors that listed both names for the debtor – the filing was seriously misleading and ineffective. *See also* [388 B.R. 317](#) (Bankr. E.D. Tenn. 2008) (earlier ruling in the case denying summary judgment because of lack of evidence on official search results).

31. *In re The Holladay House, Inc.*,
[387 B.R. 689](#) (Bankr. E.D. Va. 2008), *aff'd*, [2008 WL 4682770](#) (E.D. Va. 2008)

Security interest in all of the debtor's inventory was only partially perfected because the financing statement was limited to "all inventory . . . delivered to the consignee at any time by the consignor pursuant to a consignment agreement between the consignee and the consignor." The fact that the secured party filed the consignment agreement with the financing statement was not adequate to contradict the limiting language in the financing statement.

32. *Thermal Supply, Inc. v. Big Sky Beef, LLC*,
[195 P.3d 1227](#) (Mont. 2008)

Five-year limit on the effectiveness of a filed financing statement is not tolled by commencing litigation to enforce the security interest, and thus the perfected status of secured party who failed to file a continuation statement during the litigation lapsed.

33. *In re Vission, Inc.*,
[400 B.R. 215](#) (Bankr. E.D. Wis. 2008)

Creditor did not perfect its security interest in property owned by the debtor, a Michigan corporation, by filing a financing statement in Wisconsin. Because the creditor's later filing in Michigan was within the preference period, the trustee could avoid the security interest. The creditor is entitled to equitable defense or to equitable subordination.

34. *In re Williams*,
[381 B.R. 742](#) (Bankr. W.D. Ark. 2008)

Creditor has automatically perfected PMSI in guttering system even though the debtor installed the system on his home because the security agreement provided that the goods would not become fixtures.

35. *In re Bechtel*,
[2008 WL 4348691](#) (Bankr. N.D. Ohio 2008)

Purchase-money security interest in inventory and equipment is not perfected automatically.

36. *In re Lull*,
[386 B.R. 261](#) (Bankr. D. Haw. 2008)

Rare coins are not money, but goods, and thus a security in them can be perfected by filing a financing statement.

37. *In re Harper*,
[516 F.3d 1180](#) (10th Cir. 2008)

Security interest in motor vehicle was unperfected even though noted on certificate of title issued by Native American nation because no tribal law expressly provides that such act perfects the security interest.

38. *In re Clark Contracting Services, Inc.*,
[399 B.R. 789](#) (Bankr. W.D. Tex. 2008)

Assignee of secured party whose security interest in vehicles that was initially perfected by notation on the certificates of title was unperfected because the assignee failed to follow the procedure under the Texas certificate of title statute to have the certificates reissued to reflect the assignment.

39. *In re Brouillette,*[389 B.R. 214](#) (Bankr. D. Kan. 2008)

Under Kansas law, a security interest in a mobile home or manufactured home can be perfected only by notation on the certificate of title, but a security interest in a modular home is perfected by filing. The trustee failed to prove that a creditor with a fixture filing was unperfected because the trustee failed to prove that the home had a permanent chassis and the space evidence indicated that the dwelling was designed to be used on a permanent foundation.

40. *In re Sands,*[2008 WL 4290949](#) (Bankr. E.D. Ky. 2008)

Security interest noted on certificate of title was not perfected because the certificate was not issued by the county clerk in the county of the debtor's residence, as required by statute.

41. *In re Zysset,*[2008 WL 4283131](#) (Bankr. D. Neb. 2008)

Lender had a perfected security interest in new car even before its lien was noted on the certificate of title because it had possession of the manufacturer's statement of origin and Nebraska allows for perfection in that manner prior to issuance of the title certificate.

42. *In re Moye,*[2008 WL 4179239](#) (Bankr. S.D. Tex. 2008)

Lender cannot perfect security interest car dealer's inventory of used cars in by getting possession of certificates of title, but must file a financing statement.

43. *In re Laursen,*[391 B.R. 47](#) (Bankr. D. Id. 2008)

Typographical error in debtor's first name on certificate of title for vehicle did not render security interest unperfected because certificates of title are indexed by vehicle identification number, not by name, and thus Article 9's rules on financing statements are inapplicable.

44. *In re Farley,*[387 B.R. 751](#) (Bankr. S.D. Ohio 2008)

Using abbreviated name for secured parties on certificates of title for collateral was not seriously misleading and did not render security interests unperfected.

45. *In re Lancaster Mortgage Bankers, LLC,*[388 B.R. 106](#) (Bankr. D.N.J. 2008)

Bankruptcy trustee of estate of mortgage loan originator could not avoid prepetition transfer of mortgage notes because the transfer was a sale [and thus the purchaser was automatically perfected without filing or possession]. The purchaser need not have recorded an assignment of the mortgage and the estate retained no interest in the notes sold.

46. *In re Tracey*,
[394 B.R. 635](#) (1st Cir. BAP 2008)
Notice of federal tax lien that was properly submitted to town clerk's office but not indexed was nevertheless properly filed.

PMSI Status

47. *In re Penrod*,
[392 B.R. 835](#) (9th Cir. BAP 2008)
Under Article 9, negative equity in a trade-in vehicle is not part of the price of the new vehicle or other value given to enable the debtor to acquire the new vehicle, and thus is not secured by a PMSI. Under federal law, the dual status rule applies for the purpose of the hanging paragraph of § 1325(a) of the Bankruptcy Code, and thus the remainder of the secured obligation is secured by a PMSI.
48. *In re Padgett*,
[389 B.R. 203](#) (Bankr. D. Kan. 2008)
Amount loaned to finance negative equity in trade-in vehicle is not part of the price of the vehicles, and is therefore not covered by a PMSI, because it is not necessary to the transaction or of the same type as the items listed in the official comments.
49. *In re Miller*,
[2008 WL 5539811](#) (Bankr. D. Kan. 2008)
None of the amounts loaned to cover negative equity in a trade-in vehicle, gap insurance, or a service contract were part of the purchase-money obligation.
50. *In re Wear*,
[2008 WL 217172](#) (Bankr. W.D. Wash. 2008)
Financing of negative equity in trade-in car is neither part of the "price" of the new car nor "value given to enable the debtor" to acquire the new car, and thus is not a purchase-money obligation. Because the total debt exceeds \$40,000, and Washington has a non-uniform rule treating such debts as non-consumer-goods transactions, the dual-status rule of § 9-103(f) applies and the remainder of the secured obligation is a purchase-money obligation which, pursuant to § 1325(a), the debtor cannot modify.
51. *In re Hall*,
[400 B.R. 516](#) (Bankr. S.D.W. Va. 2008)
Credit extended to cover negative equity in trade-in vehicle is not part of the purchase-money obligation but dual status rule applies and thus remainder of the debt does have PMSI status. Payments are to be allocated proportionately.

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52. *In re McCauley*,
[398 B.R. 41](#) (Bankr. D. Colo. 2008)
Amounts loaned to pay off negative equity in trade-in vehicle is not part of the purchase-money obligation but the remainder of the debt is, including incidental transactional expenses.
53. *In re Brodowski*,
[391 B.R. 393](#) (Bankr. S.D. Tex. 2008)
Amounts loaned to cover negative equity are not covered by a PMSI but such amounts are nevertheless still secured and the dual status rules applies so that the remainder of the debt is covered by a PMSI. Payments, interest, and fees are to be allocated ratably.
54. *In re Busby*,
[393 B.R. 443](#) (Bankr. S.D. Miss. 2008)
Amounts loaned to cover negative equity are not part of the purchase-money obligation and thus are not covered by a PMSI. The dual status rules applies so that the remainder of the debt – including amounts to cover a service contract and inspection fee – is covered by a PMSI. Payments are to be allocated ratably.
55. *In re Steele*,
[2008 WL 2486060](#) (Bankr. N.D. Tex. 2008)
Amounts financed to cover negative equity in trade-in vehicle and insurance are not covered by a PMSI, but amounts loaned to cover cash price of new car and extended warranty on new car were. The dual-status rule applies and prepetition payments are to be allocated on a pro rata basis.
56. *In re Mancini*,
[390 B.R. 796](#) (Bankr. M.D. Pa. 2008)
Amounts financed to cover negative equity in trade in vehicle and gap insurance are not covered by a PMSI, but remainder of the loan, including amounts to finance administrative fees, licensing fees, and taxes, is subject to a PMSI.
57. *In re Munzberg*,
[388 B.R. 529](#) (Bankr. D. Vt. 2008)
Amounts financed to cover negative equity in trade-in vehicle and gap insurance are not covered by a purchase-money security interest, but amounts loaned to acquire service contract on new vehicle were. The dual-status rule applies and prepetition payments are to be allocated on a pro rata basis.
58. *In re Callicott*,
[386 B.R. 232](#) (Bankr. E.D. Mo.), *aff'd*, [390 B.R. 506](#) (E.D. Mo. 2008)
Amounts loaned to finance negative equity in trade-in vehicle and gap insurance were not part of the purchase-money obligation but remainder of the loan did have PMSI status.

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59. *In re Mierkowski*,
[2008 WL 4449471](#) (Bankr. E.D. Mo. 2008)
Amounts loaned to finance negative equity are not part of the purchase-money obligation but the dual-status rule applies and payments are to be allocated on a pro rata basis.
60. *In re Crawford*,
[397 B.R. 461](#) (Bankr. E.D. Wis. 2008)
Amounts loaned to finance negative equity are not part of the purchase-money obligation but the dual-status rule applies and payments are to be allocated ratably over the life of the loan.
61. *In re Bandura*,
[2008 WL 2782851](#) (Bankr. E.D. Ky 2008)
Amount loaded to cover negative equity is not covered by a PMSI but remainder of loan is.
62. *In re Hernandez*,
[388 B.R. 883](#) (Bankr. C.D. Ill. 2008)
Amount financed to cover negative equity in trade-in vehicle is not secured by a PMSI.
63. *In re Riach*,
[2008 WL 474384](#) (Bankr. D. Or. 2008)
Debt incurred to financing negative equity in trade-in vehicle is not covered by a purchase-money obligation but debt to finance a service contract is. The dual status rule applies and thus the bulk of the security interest is a PMSI. Payments will be allocated between the PMSI and non-PMSI portions of the loan on a pro rata basis.
64. *In re Hargrove*,
[400 B.R. 616](#) (Bankr. M.D. Tenn. 2008)
Although amounts financed to cover negative equity in trade-in vehicle are generally not part of the purchase-money obligation, the rebated amount in this transaction was properly allocated to the negative equity with the result that no negative equity was actually financed. Amounts financed to cover gap insurance are not part of the purchase-money obligation, the dual status rule applies, and payments by the debtor are to be allocated ratably between the purchase-money and non-purchase-money obligations.
65. *In re Graupner*,
[537 F.3d 1295](#) (11th Cir. 2008)
Negative equity in trade-in vehicle is part of the price of the new car and thus covered by a PMSI.
66. *In re Muldrew*,
[396 B.R. 915](#) (E.D. Mich. 2008)
Amounts financed to cover negative equity in trade-in vehicle are part of the purchase-money obligation.

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67. *GMAC v. Horne*,
390 B.R. 191 (E.D. Va. 2008)
Amount financed to cover negative equity and fees for titling, license, and registration are part of the price of the new vehicles and thus covered by a PMSI, but amounts loaned to pay for gap insurance and extended warranty and service contracts are not.
68. *In re Austin*,
381 B.R. 892 (Bankr. D. Utah 2008)
Amount loaned to cover negative equity in trade-in is – but not amount to cover gap insurance is not – value given to enable the debtor to acquire the collateral, and thus subject to a PMSI.
69. *In re Ford*,
387 B.R. 827 (Bankr. D. Kan. 2008)
Amount loaned to cover negative equity in trade-in is both part of the price of the new vehicle and value given to enable the debtor to acquire the new vehicle, and thus subject to a PMSI.
70. *In re Dunlop*,
383 B.R. 113 (Bankr. E.D. Wis. 2008)
Amount loaned to cover negative equity in trade-in is part of the price of the new vehicle and thus subject to a PMSI.
71. *In re Vinson*,
391 B.R. 754 (Bankr. D.S.C. 2008)
Amount financed to cover negative equity in trade-in vehicle was part of the “price” of the new car and thus included in the purchase-money obligation.
72. *In re Myers*,
393 B.R. 616 (Bankr. S.D. Ind. 2008)
Financing of negative equity in trade-in vehicle and gap insurance are both value given to enable the debtor to acquire the collateral and this are covered by a PMSI.
73. *In re Schwalm*,
380 B.R. 630 (Bankr. M.D. Fla. 2008)
For the purposes of § 1325 of the Bankruptcy Code, secured parties have purchase-money security interests for the full amount of the secured obligations even though they included amounts to finance negative equity in a trade-in vehicle, gap insurance, and an extended warranty.

74. *In re Look,*[383 B.R. 210](#) (Bankr. D. Me. 2008)

While state law determines if a security interest is a PMSI for the purpose of § 1325, the language and structure of the hanging paragraph exclude partial PMSIs from the anti-modification rule.

Priority Issues75. *In re Hulett Corp.,*[389 B.R. 610](#) (Bankr. N.D. Ill. 2008), *reconsideration denied*, [2008 WL 4058869](#)

Federal lien for employment taxes for which notice was filed at exactly the same moment that financing statement was filed to perfect a lender's security interest had priority because the IRS is an involuntary creditor.

76. *In re Crystal Cascades Civil, LLC,*[398 B.R. 23](#) (Bankr. D. Nev. 2008)

Lender with deed of trust on real property had priority over Internal Revenue Service because earlier filed notice of tax lien was ineffective. The notice identified the debtor as "Crystal Cascades, LLC, a corporation," rather than "Crustal Cascades Civil, LLC, a Nevada limited liability company," and while a professional searcher would have discovered the notice using a proprietary title plant, a diligent but non-professional searcher using the real estate records would not have.

77. *In re Miller Engineering, Inc.,*[398 B.R. 473](#) (Bankr. S.D. Fla. 2008)

Lender with a PMSI in lathe was subordinate to main equipment financier because lender's financing statement had lapsed. Marshaling in favor of lender was not appropriate because it would leave judgment creditor – who had a judicial lien on all the equipment – out of the money. Instead, proceeds of the equipment would be apportioned ratably: because the lathe brought 60% of the proceeds, 60% of the debt to the equipment financier would be paid from the lathe proceeds and 40% of that debt would be paid from the proceeds of other equipment, leaving some recovery for both the lender and the judgment creditor.

78. *DLJ Mortgage Capital, Inc. v. Homeloan Mortgage Corp.,*[2008 WL 376941](#) (Cal. Ct. App. 2008)

In a case involving duplicate original promissory notes issued by a mortgage broker, the assignee of the first originals was entitled to retain payments received and need not disgorge those funds to the holder of the second originals, even though the first originals were issued before the loans were funded. The second originals were not negotiable instruments.

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79. *In re Jersey Tractor Trailer Training, Inc.*,
[2008 WL 2783342](#) (D.N.J. 2008)
Purchaser of accounts who searched under an incorrect name of the debtor and therefore failed to discover a proper filing by a previous secured party could not qualify as a holder in due course of either the accounts or the proceeds of the accounts; purchaser should have searched under the debtor's correct name and roots of that name. The original secured party had priority not only in the proceeds paid by the purchaser, but also in the accounts remaining and the collections held in escrow, even though it was also entitled to proceeds paid by the purchaser of the accounts.
80. *Stoeckinger v. Presidential Finance Corp. of Delaware Valley*,
[948 A.2d 828](#) (Pa. Super. Ct. 2008)
Because bankruptcy court had denied junior account financier's claim to government receivable and allowed the senior accounts financier to collect it, junior was collaterally estopped from later suing the senior for unjust enrichment or tortious interference with contract.
81. *In re Wild West World, LLC*,
[2008 WL 4642266](#) (Bankr. D. Kan. 2008)
Seller who reserved title in goods delivered to buyer had merely a security interest and because seller failed to perfect within 20 days of delivery, seller's PMSI was subordinate to bank's perfected interest in existing and after-acquired property.
82. *Orix Financial Services, Inc. v. Kovacs*,
[83 Cal. Rptr. 3d 900](#) (Cal. Ct. App. 2008)
Judgment creditor who garnished debtor's deposit account and received funds from it was a "transferee" who took free under § 9-332(b) of a lender's security interest in the deposit account.
83. *In re Laurel Hill Paper Co.*,
[387 B.R. 677](#) (Bankr. M.D.N.C. 2008)
Because § 9-333 is the only provision of Article 9 applicable to statutory liens for services or materials, the rule of § 9-334(e), governing priority in fixtures of an encumbrancer of real property does not apply to statutory lienors.
84. *Bair v. United States*,
[515 F.3d 1323](#) (Fed. Cir. 2008)
Commodity Credit Corporation's security interest in debtor's processed sugar, which pursuant to 7 U.S.C. § 7284(d) primed processor's existing statutory lien, did not constitute a taking because the federal law providing for priority predated the processor's lien, even though the CCC's security interests did not.

85. *Stockman Bank of Montana v. Mon-Kota, Inc.*,
[180 P.3d 1125](#) (Mont. 2008)

Agricultural supplier that filed agricultural lien statement with the Secretary of State did not also have to file a UCC financing statement in the same office to perfect its agricultural lien and it therefore had priority in the debtor's crops over the debtor's previously perfected secured lender. Although such priority extends to proceeds of the crop only if the agricultural lien statute so provides – and Montana's does not – the agricultural lien normally continues in crops despite sale. Thus, if the buyer makes payment jointly to the agricultural lienor, in exchange for a release of the agricultural lien, the lienor may retain the proceeds.

86. *Fin-Ag, Inc. v. Cimpl's, Inc.*,
[754 N.W.2d 1](#) (S.D. 2008)

Secured party with perfected security interest in debtor's collateral had no conversion claim under the Food Security Act against buyer who failed to make payment jointly to debtor and secured party because debtor used fictitious business name in making the sale and that name was not included in the FSA master list, allowing the buyer to take free (*i.e.*, the fictitious business was different from the real debtor and was the "seller under the FSA but the fictitious business was the same entity as the seller in the sense that it created the security interest, which allowed the buyer to take free).

87. *Bank of Dawson v. Worth Gin Co.*,
[671 S.E.2d 279](#) (Ga. Ct. App. 2008)

Buyer of crops that had knowledge of bank's security interest could not take free under § 9-317 and therefore committed conversion by offsetting from purchase price paid to bank amounts debtor previously owed to buyer.

88. *Premier Pork, LC v. Westin, Inc.*,
[2008 WL 724352](#) (D.N.J. 2008)

Packers and Stockyards Act protects sellers of livestock, but not sellers of meat products, such as pork bellies. Secured party who foreclosed on pork bellies that debtor had acquired on credit from supplier was not liable to supplier in unjust enrichment.

89. *A & J Produce Corp. v. Bronx Overal Economic Development Corp.*,
[542 F.3d 54](#) (2d Cir. 2008)

PACA suppliers of commodities has priority over secured creditor in proceeds of debtor's units in a cooperative association because the units were part of the PACA trust and, unlike buyers of trust assets, lenders who receive trust assets through enforcement of a security interest are not bone fide purchasers.

90. *Nickey Gregory Co. v. AgriCap, LLC*,
[2008 WL 4224613](#) (D.S.C. 2008)

Factoring by commodity wholesaler was not a per se breach of its PACA trust and thus factor was not necessarily liable to commodity suppliers for collecting on accounts proceeds of commodities.

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91. *Nickey Gregory Co. v. AgriCap, LLC*,
[592 F. Supp. 2d 862](#) (D.S.C. 2008)
In whether factor may retain receivables and their proceeds over claims of unpaid commodity suppliers under PACA, the court must first determine if the factoring arrangement was a sale or a secured borrowing. If a sale, it is evaluated for commercial reasonableness. Because the arrangement here left the debtor with all the risk of loss, it was a secured borrowing. Because the bona fide purchaser defense does not protect payments to accounts lenders, the factor had to disgorge all assets retained from the PACA trust – calculated as the total amount of payment received minus the amounts advanced to the debtor.
92. *In re Western Iowa Limestone, Inc.*,
[538 F.3d 858](#) (8th Cir. 2008)
Buyers can qualify as buyers in ordinary course of business if they have constructive possession of the goods. Constructive possession does not require a some visible step sufficient to inform the world that the seller no longer has possession; identification of the goods to the contract as an undivided share in an identified fungible bulk is insufficient.
93. *Balallan Ltd. v. Green Oasis Environmental, Inc.*,
[2008 WL 897540](#) (E.D.N.Y. 2008)
Because the debtor had granted a security interest in all its general intangibles – a term that includes patents – and had agreed not to assign the collateral to anyone else, debtor’s subsequent assignment of a European patent application violated the security agreement and was fraudulent. Accordingly, the secured party was entitled to declaration that assignment was null and void.
94. *Atlantic National Trust, LLC v. Midwest Machine Technologies, LLC*,
[2008 WL 2312852](#) (Mich. Ct. App. 2008)
Amounts advanced under collateralized line of credit after debtor had paid down the line and the line was renewed were secured despite secured party’s promise in inter-creditor agreement that future advances would not be collateralized. The purpose of a line of credit is to maintain a business’s working capital and the loan documents implied that the line would be renewed annually.
95. *In re Vission, Inc.*,
[2008 WL 2230741](#) (Bankr. E.D. Wis. 2008)
Lender who was first to obtain a security interest in the debtor’s assets but who initially filed in the wrong state and later filed in the correct state after a bank had perfected its own security interest, was subordinate to the bank even though the bank acted with knowledge of the lender’s security interest. Lender’s marshaling claim would not be dismissed even though lender’s security interest might be avoidable as a preferential transfer and even though bank’s other collateral was provided by the debtor’s shareholders and not the debtor itself.

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96. *Joseph Stephens & Co. v. Cikanek*,
588 F. Supp. 2d 870 (N.D. Ill. 2008)
Depository bank with security interest in customer's deposit account to secure customer's obligation to reimburse bank for losses on standby letter of credit was superior to claim of levying creditor.
97. *Prime Financial Services LLC v. Vinton*,
761 N.W.2d 694 (Mich. Ct. App. 2008)
Under old Article 9, Lender who received a security interest in mortgage notes and who recorded assignments of the mortgages but who did not take possession of the notes – and was therefore unperfected – lost priority to a later lender that took possession of the notes. The first lender had no claim against the second for conversion or unjust enrichment.
98. *Metropolitan Bank & Trust Co. v. Pacific Business Capital Corp.*,
2008 WL 2277510 (D. Nev. 2008)
Purchaser of chattel paper did not acquire priority under old Article 9 over a security interest previously perfected by filing because the purchaser knew or was charged with knowledge of the security interest and the sales to the purchaser were not in the ordinary course of business because selling the same chattel paper to multiple parties is not in the ordinary course of business.
99. *Bartlett Milling Co. v. Walnut Grove Auction and Realty Co.*,
665 S.E.2d 478 (N.C. Ct. App. 2008)
Senior secured party was entitled to proceeds of junior secured parties' disposition of the collateral because: (i) the debtor was not in default on the secured obligation to the juniors and thus the juniors had no right to conduct the disposition and therefore the waterfall rules of § 9-615 were inapplicable; and (ii) the juniors had agreed to keep the proceeds in escrow pending a determination of priority.

Enforcement Issues

100. *Chapa v. Traciers & Associates*,
267 S.W.3d 386 (Tex. Ct. App. 2008)
Parents of minor children who were within car when it was repossessed from a public street did not have a claim for breach of the peace even though the car was not the one subject to the security agreement because the repossession agent did not act in an intimidating or indecorous manner, did not proceed with the repossession over an objection, and peaceably returned the vehicle and the children immediately upon learning of their presence. The mother also did not have a claim for negligent infliction of emotional distress she did not witness either the repossession or any injury to her children, instead her distress resulted from her lack of information as to their location or condition.

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101. *Meecorp Capital Markets, LLC v. Tex-Wave Industries LP*,
[265 Fed. Appx. 155](#) (5th Cir. 2008)
Amount creditor received from foreclosure on collateral is, as a matter of law, a credit, not an offset, and must be deducted in computing amount remaining due whether or not the debtor raises it.
102. *Wasser & Winters Co. v. Ritchie Bros. Auctioneers (America), Inc.*,
[185 P.3d 73](#) (Alaska 2008)
Auctioneer hired by debtor to sell equipment who mistakenly informed secured party that there were no other liens when it sought authorization to sell the equipment free and clear of the secured party's lien did not bear risk of mistake, the secured party did.
103. *Krajewski v. American Honda Finance Corp.*,
[557 F. Supp. 2d 596](#) (E.D. Pa. 2008)
Summary judgment would not be granted on whether debtor had defaulted under security agreement clause that prohibited the debtor from "expos[ing] the Vehicle to misuse, seizure, or confiscation." Although the car was seized by the police in connection with a drug-related offense, the debtor had allowed the car to be registered in her ex-husband's name and to be used exclusively by him and their son, and it was up to the jury to decide if this was sufficient to "expose" the car to seizure.
104. *Grohman-Kahlig v. Kahlig*,
[2008 WL 4735591](#) (Tex. Ct. App. 2008)
Debtor who had granted security interest in shares of corporate stock breached the security agreement's prohibition on disposing of the collateral by converting the corporations to limited partnerships.
105. *Lewis v. Arkansas Pulpwood Co.*,
[2008 WL 4946407](#) (Ark. Ct. App. 2008)
Because logger, who had obtained secured equipment loan from timber company, was aware that timber companies finance only those loggers who work exclusively for them, logger's action in beginning to work for a different timber company was an event of default.
106. *Segovia v. Equities First Holding, LLC*,
[2008 WL 2251218](#) (Del. Super. Ct. 2008)
Secured party committed conversion by selling pledged stock prior to default, failing to credit the secured obligation with the proceeds received from the sale, and continuing to accept interest payments on the debt that was thereby paid in full.

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107. *Casablanca Trax, Inc. v. Trax Records, Inc.*,
[889 N.E.2d 1219](#) (Ill. Ct. App. 2008)
Even though security agreement and loan agreement both lacked an arbitration clause, because the related and contemporaneous joint venture agreement contained an arbitration clause, the trial court should have stayed proceedings brought to enforce the security interest to allow an arbitrator to determine arbitrability.
108. *QuesTech Financial, LLC v. Benni's, LLC*,
[939 A.2d 1220](#) (Conn. Ct. App. 2008)
Secured party had right to replevy collateral upon default and trial court erred in staying writ of replevin to allow debtor time to redeem or bond the collateral.
109. *Beal Bank, SSB v. Sarich*,
[2008 WL 4902514](#) (Wash. Ct. App. 2008)
The duty to care for pledged securities does not require the secured party to sell the securities when they are declining in value. The duty to conduct a disposition in a commercially reasonable manner applies only when the secured party actually conducts a disposition and does not limit the secured party's discretion to sue on the debt rather than dispose of the collateral.
110. *In re Plante*,
[2008 WL 2518616](#) (Bankr. D. Idaho 2008)
Secured party did not waive security interest by obtaining judgment against debtor and writ of garnishment on the judgment.
111. *Helena Chemical Co. v. Huggins*,
[2008 WL 4908463](#) (D.S.C. 2008)
Article 9 does not displace pre-Code equitable remedies available to a secured party, and thus inventory lender could maintain unjust enrichment claim against debtor.
112. *Comerica Bank v. State Petroleum Distributors, Inc.*,
[2008 WL 2550553](#) (M.D. Pa. 2008)
Secured creditor was not entitled to appointment of receiver because agreement did not provide for such remedy and although the debtor was in default and the collateral was intangible, the debtor was current on payments, had paid off more than 20% of the principal in the last year, was negotiating a merger that would produce payment in full, and was not alleged to be dissipating the collateral.
113. *Oracle Real Estate Holdings I, LLC v. Adrian Holdings Co. I, LLC*,
[582 F. Supp. 2d 616](#) (S.D.N.Y. 2008)
Investor was entitled upon default to preliminary injunction ordering defendant to convey voting control of subsidiary, as the profit sharing agreement required. The defendant's claim that this would destroy its equity of redemption would be dealt with at a later time.

114. *Renwood Winery, Inc. v. WJ Deutch & Sons Ltd.*,
[2008 WL 2680451](#) (N.D. Cal. 2008)

Putative secured party was not entitled to writ of possession prior to arbitration of claims because the papers raised substantial questions as to the validity of the security interest and thus the secured party was unable to show a substantial likelihood of success on the merits and because the secured party was unable to post the required bond.

115. *Knight Aerospace Products, Inc. v. Gittinger*,
[2008 WL 1733252](#) (Tex. Ct. App. 2008)

Secured party was not entitled to an award of specific performance ordering the debtor to execute a new assignment of life insurance proceeds and new financing statements because the secured party had not shown that damages were inadequate, and thus equitable relief was not warranted.

116. *Yellowstone Federal Credit Union v. Daniels*,
[181 P.3d 595](#) (Mont. 2008)

Authorization in § 9-609 to use judicial process to obtain possession of the collateral does not create an independent judicial remedy and therefore does not excuse a secured party from complying with the statutory requirements for a writ of possession or a writ of attachment.

117. *Octapharma Ag v. Bio-Medics*,
[2008 WL 2404079](#) (Cal. Ct. App. 2008)

Secured party that sued buyers of collateral for interference with contract but not for conversion or trespass was not entitled to a preliminary injunction to protect and preserve the collateral.

118. *General Electric Capital Corp. v. Nucor Drilling, Inc.*,
[551 F. Supp. 2d 1375](#) (M.D. Ga. 2008)

Secured party was not entitled to summary judgment on amount of deficiency owing because there remained a factual dispute over whether the secured party had mitigated its damages. Specifically, the secured party had paid over \$59,000 to repossess collateral that a guarantor had offered to deliver to the secured party at his own expense and there were issues about whether the damage to the collateral occurred after repossession and whether the secured party properly advertised the sale.

119. *Smith v. Mallick*,
[514 F.3d 48](#) (D.C. Cir. 2008)

Account debtor discharged its obligation by settling with and paying assignee after receiving notification of the assignment even though the account had been reassigned back to the assignor because no notification of the reassignment had been received.

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120. *Conopco, Inc. v. Minster Bank*,
[2008 WL 4443117](#) (S.D. Ind. 2008)
Account debtor who paid the debtor's suppliers after receiving notification of the assignment of its account but before receiving an instruction to pay the assignee had discharged its obligation under old § 9-318 and did not have to also pay the assignee. The account debtor's payment to the suppliers arose out of its claim that the debtor had breached its contract with the account debtor because that contract required the debtor to "administer payments" to its suppliers. The merits of that claim are not material, merely the source of it.
121. *Commercial Plumbing and Heating, Inc. v. Fisher Sheetmetal Co.*,
[2008 WL 2020482](#) (Minn. Ct. App. 2008)
Secured party who had notified account debtors to make payment directly to it had waived that right because it knew debtor had sent contrary instruction the following week and then waited three years before taking any action against the account debtors.
122. *Buckeye Retirement Co. v. Meijer, Inc.*,
[2008 WL 4278038](#) (Mich. Ct. App. 2008)
Account debtor/landlord held no liability to secured party who had demanded payment and unsuccessfully sought to repossess tangible collateral because the secured party had failed to provide the landlord with reasonable proof of the assignment. No constructive trust would be imposed and the landlord could retain via setoff amounts due to it under its contract with the debtor.
123. *Popular Leasing USA, Inc. v. Mortgage Sense, Inc.*,
[2008 WL 1952380](#) (Cal. Ct. App. 2008)
Assignee of personal property leases was entitled to summary judgment on its action to collect from the lessees who had defaulted because the leases provided that the lessees waived all claims, defenses, and setoffs against an assignee.
124. *Lyon Financial Services, Inc. v. Wallace*,
[2008 WL 4606541](#) (Cal. Ct. App. 2008)
Assignee of equipment lease was entitled to collect full payment from lessee, not reduced by damages relating to malfunctioning equipment, because assignment did not transfer the repair obligation. No discussion of or citation to § 9-404.
125. *Nationwide Transport Finance v. Cass Information Systems, Inc.*,
[523 F.3d 1051](#) (9th Cir. 2008)
Merchants who hired carriers to transport goods were the account debtors to the carriers' factor, but the merchants' payment agent was not. Thus, the payment agent had no duties under § 9-406 and could not be liable for intentional interference with business relations for refusing to pay the factor without a hold harmless agreement.

126. *Madison Financial, LLC v. Hunts Point Cooperative Market, Inc.*,
[2008 WL 724362](#) (D.N.J. 2008)

Account debtor's agreement to waive defenses was valid because it was supported by consideration: the advances the secured party made to the debtor. Account debtor gets no credit for amounts paid to debtor after receiving instruction to pay secured party, even though the payments were criminally diverted away from the secured party.

127. *CNH Capital America, LLC v. Wilmot Farming Ventures, LLC*,
[2008 WL 2386166](#) (W.D. La. 2008)

Purchaser of chattel paper from farm implements dealer was not bound by side agreement between dealer and account debtors that allowed account debtors to return the goods within one year and to be released of further payment obligation because the purchaser had no knowledge of that side agreement at the time of its purchase and the account debtors had waived the right to assert defenses.

128. *Mooney v. University System of Maryland*,
[943 A.2d 108](#) (Md. Ct. App. 2008)

Account debtor that was state governmental agency could not discharge its payment obligation by paying debtor after receiving instruction to pay secured party and had waived sovereign immunity by contracting in writing with the debtor.

129. *RBS Holdings, Inc. v. Gordon & Ferguson, Inc.*,
[2008 WL 782616](#) (S.D.N.Y. 2008)

Even though assigned account was for less than the total secured obligation and the secured party had instructed the account debtor to pay it – so that the debtor would likely never receive payment of any portion of the account – the debtor had sufficient rights to bring an action against the account debtor. The secured party was not an indispensable party because it had expressly waived the right to appear and reached a settlement with the debtor.

130. *Payne v. Wyeth Pharmaceuticals, Inc.*,
[2008 WL 4890764](#) (E.D. Va. 2008)

Creditor of tort plaintiff to whom proceeds of tort claim had been assigned was not the real party in interest to the claim and need not be joined.

131. *Yoder Machinery Sales Co. v. Welden F. Stump & Co.*,
[893 N.E.2d 522](#) (Ohio Ct. App. 2008)

Secured party could intervene in action to dissolve partnership in which the debtor was a partner. The other partner was not entitled to wind up the business because it and the debtor had altered their records to obscure which assets were collateralized and because it had “poached” the debtor’s employees.

132. *Jefferson Loan Co. v. Session*,

[938 A.2d 169](#) (N.J. Super. Ct. App. Div. 2008)

While the assignee of a secured loan is not responsible under the Consumer Fraud Act for the conduct of the original lender, it is liable for its own deceptive and unconscionable conduct in enforcing the security interest. Repossession of a vehicle and turning it over to the seller with a view to permitting the seller to retain possession for almost four years while interest continued to accrue on the secured obligation was not a commercially reasonable disposition.

133. *Hills Bank & Trust Co. v. Converse*,

[756 N.W.2d 481](#) (Iowa Ct. App. 2008)

Guarantor cannot waive prior to default the requirement that the secured party conduct a disposition in a commercially reasonable manner.

134. *Brunswick Acceptance Co., LLC v. MEJ, LLC*,

[2008 WL 4648350](#) (Tenn. Ct. App. 2008)

Secured party's notification of disposition was reasonable even though it did not comply with the safe harbor of § 9-613 because its series of e-mail messages to the debtor's attorney communicated its intent to sell four boats by private sale and the total sales price of two of the boats, and because the debtor had ample opportunity to provide alternative buyers or to object to the sale.

135. *Mancuso v. Long Beach Acceptance Corp.*,

[254 S.W.3d 88](#) (Mo. Ct. App. 2008)

Debtor was not entitled to statutory damages for secured party's allegedly deceptive notification of disposition. Although notification purported to require debtor to show proof of insurance as well as to pay the full amount of the secured obligation in order to redeem the collateral, that statement was not unreasonable because the debtor's duty to insure was part of the secured obligation.

136. *Parks v. CNAC-Joliet, Inc.*,

[886 N.E.2d 376](#) (Ill. Ct. App. 2008)

Disposition notification that failed to state that debtor was entitled to an accounting would nevertheless be sufficient if it actually provided an accounting, but the notification in this case which listed the debt and the costs for storing the collateral was insufficient to satisfy the accounting requirement because it failed to identify the defaulted payments or inform the debtor how the creditor calculated the amount due.

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137. *Drewry v. Starr Motors, Inc.*,
2008 WL 2035607 (E.D. Va. 2008)
Automobile seller to whom buyer had returned car subject to a conditional sale when the buyer's financing fell through was not required to give the buyer notification of a resale because the buyer, who had made no payment, had no interest in the car. Even if Article 9 did apply, the seller's notification of an upcoming public sale was adequate even though the car was not sold at that sale but at a later private sale.
138. *Border State Bank v. AgCounty Farm Credit Service*,
535 F.3d 799 (8th Cir. 2008)
Lenders were not required to give junior secured party notification of a sale of the collateral, although held at their insistence, because the debtor itself conducted the sale and remitted the proceeds to the lenders.
139. *Primus Financial Services v. Seitz*,
2008 WL 1735038 (Ark. Ct. App. 2008)
Creditor with security interest in car that was wrecked and who allowed towing company to sell the car to recover its towing and storage fees was not barred from collecting the debt from the debtor for failing to provide notification of the sale; the sale was not a disposition by the secured party.
140. *In re Griffin*,
391 B.R. 210 (6th Cir. BAP 2008)
Brother of car purchaser was not entitled to notification of disposition by the secured party because the car purchaser was the only owner listed on the certificate of title and no facts or documents supported the brother's claim that he was a co-owner of the vehicle, although he did owe an unrelated debt to the secured party.
141. *Commercial Savings Bank v. Fronks Service Center, Inc.*,
2008 WL 2230067 (Ohio Ct. App. 2008)
Secured creditor acted improperly by not providing notification of a private sale of convenience store inventory and car wash equipment. It also conducted the sale in a commercially unreasonable manner by not obtaining competent and credible information about the value of the collateral and by ignoring inquiries from possibly interested buyers.
142. *Kowalski v. Mommy Gina Tuna Resources*,
2008 WL 583553 (D. Haw. 2008)
Loan agreement that assigned to the creditor a 25% interest in the debtor's patent to secure the loan did not make the creditor an indispensable party to debtor's infringement action against third parties.

143. *Westmoreland v. Rutz Construction, LLC*,
[2008 WL 880160](#) (W.D. Mo. 2008)
Owner of copyright on architectural plans for a house had no claim for infringement against mortgagee of allegedly infringing house.

Liability Issues

144. *Noble Systems Corp. v. Alorica Central, LLC*,
[543 F.3d 978](#) (8th Cir. 2008)
Perfected secured party that foreclosed its security interest was not liable to unperfected secured party for tortious interference with contractual relationship even though it may have known of the unperfected security interest because there was justification for the foreclosure. The buyer at the foreclosure sale also had no such liability.
145. *JCB, Inc. v. Union Planters Bank*,
[539 F.3d 862](#) (8th Cir. 2008)
Junior secured party committed trespass when it entered senior secured party's premises without authorization and repossessed the collateral, and it was liable for conversion for then selling the collateral. Punitive damages were available for both torts.
146. *Citizens National Bank v. Maries County Bank*,
[244 S.W.3d 266](#) (Mo. Ct. App. 2008)
Lender that financed and closed transaction in which buyers purchased manufactured home from dealer owed no duty to dealer's floor plan financier to ensure that sale proceeds were disbursed to the financier, even though the financier had a perfected security interest in manufactured home sold. Therefore, financier had no cognizable negligence claim against lender. However, floor plan financier could not be ordered to surrender manufacturer's statement of origin to the buyers.
147. *Starlight Development (China) Ltd. v. Textron Financial Group*,
[2008 WL 2705394](#) (E.D. Cal. 2008)
Secured party's agents, who became court-appointed receiver for debtor, were immune from liability for fraud and for aiding and abetting fraud alleged to have occurred though misrepresentations designed to get supplier to continue to provide goods on credit to the debtor so that the secured party could collect the proceeds of the goods. There was also no claim against the secured party itself because it did not make the misrepresentations. [2008 WL 2705395](#).

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148. *Clif-Tex Land and Livestock, Inc. v. First Dakota National Bank*,
2008 WL 2930203 (Neb. Ct. App. 2008)
Secured party, whose collateral was sold and its proceeds deposited into a sweep account with revolving credit feature at bank, had no cause of action for unjust enrichment against the bank because the debtor later withdrew the funds and used them to pay other creditors. [No discussion of § 9-327 or § 9-340.]
149. *Bank of Nichols Hills v. Bank of Oklahoma*,
196 P.3d 984 (Okla. Ct. Civ. App. 2008)
Although insurer was not negligent in delivering to home owner a check made payable jointly to owner and mortgagee, insurer was negligent in failing to inform mortgagee of the check, and as a result was liable to the depository bank for the owner's forged endorsement.
150. *Farragut Financial Corp. v. Capital One Auto Finance, Inc.*,
2008 WL 4367822 (Tex. Ct. App. 2008)
Secured party who received checks from refinancing lender that almost paid off the secured car loan and who later was paid off in full by the debtor was not obligated to send the certificate of title for the car to the refinancing lender (and incurred no liability for sending the certificate to the debtor) merely because the checks were imprinted with a stamp on the endorsement line purporting to show the payee's agreement to send the certificate to "_____" and were accompanied by a letter from the debtor authorizing the secured party to release the certificate to the refinancing lender.
151. *Grafft v. Jensen*,
763 N.W.2d 248 (Wis. Ct. App. 2009)
Although strict foreclosure under former § 9-505 discharges the debt, it does not prevent the secured party from recovering the difference between the value of the collateral and the amount of the secured obligation from a third party whose negligence caused the debtor to be unable to fulfill its obligations.
152. *Five Star Bank v. CNH Capital America, LLC*,
865 N.Y.S.2d 190 (N.Y. App. Div. 2008)
Secured party had no conversion claim against buyer of collateralized equipment who later resold the equipment because the secured party had entered into a settlement with the debtor that satisfied the secured obligation.
153. *David A. Flynn, Inc. v. General Motors Acceptance Corp.*,
2008 WL 2185377 (N.D. Ohio 2008)
Buyer of used car dealership had no cause of action against dealer's inventory lender in connection with dealer's odometer fraud because lender owed no duty to the buyer and the because lender committed no fraud or misrepresentation when it informed the buyer of its suspicions; lender had no actual knowledge of the fraud.

154. *Pamperin v. Streamline Mfg., Inc.*,
[276 S.W.3d 428](#) (Tenn. Ct. App. 2008)

Customer of defunct corporation could pierce the corporate veil and maintain a claim against one of its two shareholders who received all the assets of the corporation not in his capacity as shareholder, but as a secured creditor, and who later failed to account for a surplus upon disposition of the assets.

155. *Milliken & Co. v. Duro Textiles, LLC*,
[887 N.E.2d 244](#) (Mass. 2008)

Although secured party has right to sell collateral and if it is not paid in full, unsecured creditors may be left with nothing, a sale of substantially all of the debtor's assets to a reconstituted version of itself in an effort to maintain its business as a going concern while shedding unsecured debts can subject the buyer at the disposition to successor liability.

156. *Tripodi v. Coastal Automation LLC*,
[2008 WL 2954768](#) (E.D. Pa. 2008)

In Pennsylvania, the successor liability of the purchaser of a product line who continues to manufacture and distribute the product is limited to purchasers who causes the plaintiff's inability to recover from the original manufacturer, and thus does not extend to an unrelated entity who bought at an Article 9 foreclosure sale.

157. *In re Commercial Money Center, Inc., Equipment Lease Litigation*,
[2008 WL 4279888](#) (N.D. Ohio 2008)

Bondholders' tort and contract claims against surety may not have been assigned to bondholders' secured lenders initially, but they do require a continuing interest in the bonds, so that bondholders lost their claims when the lenders foreclosed on the bonds.

158. *Jenkins v. Hyundai Motor Financing Co.*,
[2008 WL 781862](#) (S.D. Ohio 2008)

Because of nonuniform variations in the enacted versions of the UCC and variations in state consumer protection legislation, 49-state class would not be certified for action against secured party for sending allegedly inadequate notification of disposition. However class for single-state action would be certified.

159. *Coleman v. American General Financial Services*,
[2008 WL 803039](#) (Ohio Ct. App. 2008)

Class action that seeks penalties against lender for failure to file a termination statement in transactions secured by consumer goods was not subject to arbitration even though the arbitration clause in the loan agreement expressly covered statutory claims and expressly applied after the loan was paid, because the agreement was effectively extinguished when the loan was paid in full.

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160. *McDaniel v. 162 Columbia Heights Housing Corps.*,
[863 N.Y.S.2d 346](#) (N.Y. Sup. Ct. 2008)
Lender who claimed to have common-law lien on co-op unit was not a secured party and was liable for \$500 in statutory damages for her unauthorized filing of financing statement and ordered to terminate the filing.
161. *Garten v. Sherman & Sterling, LLP*,
[859 N.Y.S.2d 80](#) (N.Y. App. Div. 2008)
Secured party who was unable to recover the amount owed stated cause of action against attorneys who prepared the loan documents but who neither obtained termination statement from prior lender nor advised the secured party of the hazard of proceeding without it.
162. *In re Baker*,
[390 B.R. 524](#) (Bankr. D. Del. 2008)
Creditor violated discharge injunction by repossessing collateral shortly after the debtors' bankruptcy case was closed based solely on the debtors' filing because the *ipso facto* clause in the security agreement was not enforceable. Court offered no citation or support for this conclusion. *Cf. In re Dumont*, [383 B.R. 481](#) (9th Cir. BAP 2008) (refusing to exercise jurisdiction to determine whether *ipso facto* clause is enforceable under state law); *Fees v. Ford Motor Credit Corp*, [2008 WL 4630668](#) (D. Idaho 2008) (same).
163. *Rhino Fund, LLLP v. Hutchins*,
[2008 WL 2522308](#) (Colo. Ct. App. 2008)
Owner/manager of borrower was personally liable for intentionally converting collateral, as well as for treble damages, despite language in loan documents that disclaimed liability for directors, officers, employees, and stockholders because exculpatory provision is against public policy and void to the extent it applies to intentional or reckless conduct.
164. *Shapiro v. Silverstein*,
[889 N.E.2d 981](#) (Mass. Ct. App. 2008)
Sufficient evidence supported jury verdict for defendant in malpractice case against creditor's attorney who failed either to take steps to ensure continuation statement was filed or to advise client of the need to file a continuation statement.
165. *First American Bank & Trust v. Farmers State Bank of Canton*,
[756 N.W.2d 19](#) (S.D. 2008)
Senior secured party had no actionable negligence claim against its own lender for purporting to assign senior secured party's security interest or against purported assignee for refusing to acknowledge senior secured party's priority because creditors owe no duty to each other.

BANKRUPTCY***Eligibility***

166. *In re Estate of the Assignment for the Benefit of Creditors of May*,
[2008 WL 2201977](#) (Bankr. E.D. Mich. 2008)
Liquidating trust created under state ABC law is not a business trust and thus is not eligible to be a bankruptcy debtor.

Property of the Estate

167. *In re AB&C Group, Inc.*,
[2008 WL 2727154](#) (Bankr. N.D.W. Va. 2008)
Funds loaned to debtor for the purpose of paying employees shortly before involuntary Chapter 7 petition was filed were property of the estate that the Trustee could use for any proper purpose; the funds were not held in trust for the employees and were not part of the lender's collateral.
168. *In re Alpine PCS, Inc.*,
[2008 WL 5076983](#) (Bankr. D.D.C. 2008)
Broadcast licenses issued by FCC were automatically cancelled upon nonpayment of a required installment and thus were not part of the bankruptcy estate of the broadcaster whose petition was filed subsequently.
169. *In re Whitehall Jewelers Holdings, Inc.*,
[2008 WL 2951974](#) (Bankr. D. Del. 2008)
Debtor cannot sell consigned inventory under § 363(f)(4) because the debtor had not proven that such inventory was property of the estate; an adversary proceeding is required under Rule 7001(2) to determine the extent of the consignors' interests.

Claims

170. *In re SI Restructuring, Inc.*,
[532 F.3d 355](#) (5th Cir. 2008)
Secured claims of former insiders for loans made to alleviate liquidity problems could not be equitably subordinated, even if the insiders had engaged in inequitable conduct and gained an unfair advantage by terms of loans, without evidence that the loans harmed the debtor or its unsecured creditors. Equitable subordination is remedial, not punitive.

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171. *In re Kreisler*,
[546 F.3d 863](#) (7th Cir. 2008)
Equitable subordination is improper if there has been no harm to other creditors. Accordingly, even though conduct of debtors who formed a corporation that purchased a secured creditor's claim at a steep discount may have underhanded, claim would not be subordinated.
172. *In re Oelkers*,
[2008 WL 4877149](#) (Bankr. D. Neb. 2008)
Claim of secured lender against guarantor *might* be subject to equitable subordination if creditor demanded and received collateral from the guarantor while not intending to fulfill its promises to make additional loans to the borrower. *See also In re Thurston*, [2008 WL 4866180](#) (Bankr. D. Neb. 2008) (companion case).
173. *In re Adelphia Communications Corp.*,
[2008 WL 3919198](#) (S.D.N.Y. 2008)
Lenders are entitled to grid interest based on borrower's actual Leverage Ratio, not the Leverage Ratio reflected in its materially false financial statements, because the difference is the proper measure of their breach of contract claim; Lenders' right to a default rate of interest was not an exclusive remedy.
174. *Phar-Mor, Inc. v. McKesson Corp.*,
[534 F.3d 502](#) (6th Cir. 2008)
Vendor's reclamation rights had priority over creditor's security interest, and thus vendor was entitled to administrative expense claim after goods was sold and proceeds were paid to the secured creditor.
175. *In re Repository Technologies, Inc.*,
[381 B.R. 852](#) (N.D. Ill. 2008)
Bankruptcy Court did not clearly err in concluding that advances by insider above cap on line of credit approved by the debtor's Board of Directors should be re-characterized as equity rather than debt.
176. *In re First NCL Financial Services, LLC*,
[396 B.R. 562](#) (Bankr. S.D. Fla. 2008)
Secured loan that was to be converted to an equity investment upon receipt of regulatory approval could be re-characterized as equity even though that regulatory approval was not received.

177. *In re NETtel Corp.*,

[2008 WL 1932075](#) (Bankr. D. Del. 2008)

Trustee in converted case could object to lenders' liens because cash collateral order provided that time to object would start to run when the order became final and no final order was ever entered because the case was converted to Chapter 7. Even though the trustee may be time barred by § 546(a), from attempting to avoid the liens, trustee may raise the issue in an objection to the lenders' claims and may challenge their right to a replacement lien under the interim cash collateral order. Lenders cannot show that deposits on hand on the date of the petition were proceeds of collateral because some may have been funds they had loaned and under old Article 9 they could not have a security interest in a deposit account as original collateral. Lenders could also not show that postpetition deposits into a lock box were proceeds of its collateral because, even though the debtor acted as DIP for only 25 days, some of the deposits may have been for postpetition services. As a result, lenders had not demonstrated that their collateral had been diminished, entitling them to a replacement lien on preference recoveries.

178. *In re AppliedTheory Corp.*,

[2008 WL 1869770](#) (Bankr. S.D.N.Y. 2008)

Proposed settlement with lenders which would use unencumbered assets to cover diminution in cash collateral was denied because there was no diminution; cash collateral includes cash received postpetition from sales of other collateral and if the lenders did not want such proceeds to be regarded as cash collateral in the cash collateral orders, they should have sought an express exclusion for them.

179. *GECC v. Future Media Productions, Inc.*,

520 F.3d 1178 (9th Cir. 2008), *modified*, [536 F.3d 969](#) (9th Cir. 2008), *modified*, [547 F.3d 956](#) (9th Cir. 2008)

Oversecured creditor is entitled to postpetition interest at the default rate under its contract.

180. *Urban Communicators PCS Ltd. Partnership v. Gabriel Capital, L.P.*,

[394 B.R. 325](#) (S.D.N.Y. 2008)

Creditor's security interest in proceeds of debtor's FCC licenses was sufficient to entitle it to postpetition interest even for the period before the debtor contracted to sell its licenses, and thus arguably before the security interest could attach.

181. *JP Morgan Chase Bank v. ELL 11, LLC*,

[2008 WL 4682263](#) (M.D. Ga. 2008)

Oversecured creditor was entitled to postpetition attorney's fees provided for in promissory note despite failure to provide required state-law notification of the intent to collect such fees.

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182. *In re Dick Cepek, Inc.*,
[300 Fed. Appx. 497](#) (9th Cir. 2008)
Law firm's disclosure of an "advance" on its application for employment by Chapter 11 debtor did not adequately claim a security interest in the retainer and therefore the firm was properly required to disgorge the advance to equalize recoveries by administrative expense claimants.
183. *In re Nowak*,
[385 B.R. 799](#) (6th Cir. BAP 2008)
Secured creditor's motion for relief from stay and for abandonment did not qualify as an informal proof of claim; it would be inequitable to allow a creditor who failed to file a formal proof of claim within 30 days of when its lien was voided to participate in the bankruptcy distribution.
184. *In re Spurling*,
[391 B.R. 783](#) (Bankr. E.D. Tenn. 2008)
Secured creditors who filed proofs of secured claims in Chapter 7 proceeding before the bar date could amend their claims after the bar date to show the unsecured deficiency.
185. *Borrego Springs Bank v. Skuna River Lumber, LLC*,
[381 B.R. 211](#) (N.D. Miss. 2008)
Senior secured creditor who purchased collateral with a credit bid at a § 363 sale could be surcharged under § 506(c) for the expenses of the sale arranged by the junior secured party.
186. *In re Thorne*,
[2008 WL 2385991](#) (Bankr. M.D.N.C. 2008)
Secured party who, without notice of the debtor's bankruptcy filing earlier in the day, started to disassemble the collateral as part of repossession efforts, but who then spent \$5,225 to re-assemble the collateral upon learning of the filing, was not entitled to an administrative expense claim for such costs.
187. *In re Barbara K. Enterprises, Inc.*,
[2008 WL 2439649](#) (Bankr. S.D.N.Y. 2008)
Creditor's prepetition security interest in debtor's trademarks extends to royalties from postpetition licenses of the trademarks.
188. *In re Pan American General Hospital, LLC*,
[385 B.R. 855](#) (Bankr. W.D. Tex. 2008)
Creditor who was undersecured in debtor's first Chapter 11 bankruptcy and thereby could not recover post-petition fees and costs, but who was oversecured in second bankruptcy reorganization because the collateral had appreciated, could recover fees and costs incurred after the first petition because the confirmed plan in the first case entitled the creditor "to exercise ordinary covenants of its security agreement" if the debtor defaulted under the plan, and the debtor did so default.

189. *In re Hayes*,

[393 B.R. 259](#) (Bankr. D. Mass. 2008)

Purported mortgage servicer failed to trace mortgage from original servicer to itself and thus had no standing to respond to debtor's claim objection or to seek relief from the stay. *See also In re Nosek*, [386 B.R. 374](#) (Bankr. D. Mass. 2008) (sanctioning attorneys and putative creditors for misrepresentations about who owned a mortgage loan).

DIP Financing

190. *In re Berry Good, LLC*,

[400 B.R. 741](#) (Bankr. D. Ariz. 2008)

Debtor may not use secured DIP financing from its main prepetition lender to pay down the prepetition debt to that lender because the DIP loan was secured by different collateral and that would effectively improve the lender's prepetition position.

Automatic Stay & Discharge Injunction

191. *Reusser v. Wachovia Bank*,

[525 F.3d 855](#) (9th Cir. 2008)

Relief from the stay requested and obtained by agent of mortgagee was effective to permit mortgagee to foreclose even though the order did not name the mortgagee. Bankruptcy jurisdiction is *in rem*, and what matters is that the order addressed the deed of trust, not that it named the current mortgage lender.

192. *In re Windwood Heights, Inc.*,

[385 B.R. 832](#) (Bankr. W.D.W. Va. 2008)

The protections in § 362(d)(3) for secured creditors in single asset real estate cases apply to judgment lienors as well as to mortgagees.

193. *In re Plastech Engineered Products, Inc.*,

[382 B.R. 90](#) (Bankr. E.D. Mich. 2008)

Debtor's possessory interest in tools used to produce parts for customer – even if not an ownership interest – is sufficient to bring tools into the estate and make the automatic stay applicable to them. Although the customer will suffer significant harm if relief from the stay is not granted to allow it to take possession of the tools, because such relief would effectively destroy the debtor's business and any chance of reorganization, and balancing the interests at stake in the early days of the bankruptcy case, there is no cause to lift the stay.

194. *In re Bryan Road, LLC*,

[382 B.R. 844](#) (Bankr. S.D. Fla. 2008)

Debtor's prepetition waiver of automatic stay in return for two-month forbearance is enforceable given that debtor's reorganization plan was not feasible.

195. *In re Chesapeake Contractors, Inc.*,

[2008 WL 5216338](#) (Bankr. D. Md. 2008)

Order denying creditor's motion for relief from stay because of creditor's failure to produce evidence of a security agreement was res judicata, thus and creditor's second motion – which attached previously missing page from financing agreement – would also be denied. Creditor was not entitled to relief under F.R.C.P. 60(b) because the missing page could have been produced at the hearing on the first motion.

196. *In re Paul*,

[534 F.3d 1303](#) (10th Cir. 2008)

Creditor did not violate discharge injunction by suing corporation and seeking discovery – and later sanctions for noncompliance – from individual stockholder who was winding up the corporation and who had received a bankruptcy discharge. As long as the creditor's actions are not designed to coerce the debtor into paying discharged debts, they are permissible.

197. *In re Crabtree*,

[2008 WL 5339108](#) (Bankr. E.D. Okla. 2008)

Bank did not violate either the automatic stay or the discharge injunction by seeking contempt sanctions against an individual bankruptcy debtor, in her capacity as corporate president, for failing to turn over property in which corporation had granted a security interest to the bank.

Discharge & Dischargeability

198. *In re Strack*,

[524 F.3d 493](#) (4th Cir. 2008)

Because security agreement required corporate debtor to segregate proceeds of collateral and “hold them in trust” for the secured party, debtor's CEO/majority shareholder had a fiduciary obligation to the secured party and his failure to remit the proceeds to the secured party made his debt on a guaranty nondischargeable under § 523(a)(4) as a defalcation while acting in a fiduciary capacity.

199. *In re Bartlett*,

[397 B.R. 610](#) (Bankr. D. Mass. 2008)

Principals of corporation who extracted funds to pay down their own loan to the corporation rather than use the money to pay a supplier entitled to PACA trust, and to whom they had issued a personal guaranty, had committed defalcation and therefore their obligation was nondischargeable under § 523(a)(4).

200. *In re Kjoller*,
[395 B.R. 845](#) (Bankr. W.D.N.Y. 2008)
Individual Chapter 13 debtor's use of proceeds of accounts does not constitute embezzlement or larceny under § 523(a)(4), but debtor's unauthorized post-petition use of cash collateral does violate the explicit statutory trust created by §§ 1304 and 363(c) and might qualify as defalcation under § 523(a)(4).
201. *In re Fayad*,
[2008 WL 160647](#) (Bankr. D. Mass. 2008)
Purposeful failure of corporate officer to give insider a promissory note and security interest, despite agreement to do so, caused a willful and malicious injury that excepts the debt from discharge.
202. *In re Kakde*,
[382 B.R. 411](#) (Bankr. S.D. Ohio 2008)
Corporate president who had guaranteed corporation's loan from bank and who had authorized diversion of receivables in contemplation of bankruptcy, and thus should have known that this would require execution of false borrowing-base certificates, but who had otherwise fully cooperated with all requests of the bank did not have the requisite intent to deceive bank to render his liability on the guaranty nondischargeable under § 523(a)(2).

Leases & Executory Contracts

203. *In re Monitor Single Lift I, Ltd.*,
[381 B.R. 455](#) (Bankr. S.D.N.Y. 2008)
Court would not abstain in voluntarily filed Chapter 11 despite pending dissolution proceedings in Scotland and the Cayman Islands, largely because those proceedings would not allow the debtors to assume and assign certain executory contracts with *ipso facto* clauses.
204. *In re Northwest Airlines, Corp.*,
[383 B.R. 575](#) (Bankr. S.D.N.Y. 2008)
Owner Trustee of aircraft leased to debtor, rather than Indenture Trustee, was property party to assert claim for lease rejection damages because Indenture Trustee had foreclosed on the aircraft but not foreclosed its security interest in the lease. Indenture Trustee retained its interest in Owner Trustee's claim.
205. *In re Penn Traffic Co.*,
[524 F.3d 373](#) (2d Cir. 2008)
Non-debtor party to contract that is executory when bankruptcy commences cannot, by postpetition tender of all its outstanding obligations, render the contract not executory, and thereby deprive the debtor of the right to reject the contract.

206. *In re Monahan Ford Corp. of Flushing*,
390 B.R. 493 (Bankr. E.D.N.Y. 2008)

Law firm representing debtor in possession prior to conversion to Chapter 7 committed malpractice by allowing critical leases to automatically be rejected without moving to assume them or seeking an extension of time to do so.

Avoidance Powers

207. *In re Straightline Investments, Inc.*,
525 F.3d 870 (9th Cir. 2008)

Postpetition factoring of accounts was not in the ordinary course of the debtor's business and thus was both unauthorized and avoidable under § 549, regardless of whether it diminished the estate. Factor was entitled to no setoff, recoupment, or defense for the amount it paid for the accounts.

208. *In re Marrero*,
382 B.R. 861 (1st Cir. BAP 2008)

Mortgagee who obtained relief from the stay to foreclosure, but who instead engaged in unauthorized postpetition refinancing with the debtor, could have its mortgage avoided under § 549, with the result that it became unsecured because its old mortgages were cancelled and its new mortgage was avoided.

209. *In re Schwartz*,
383 B.R. 119 (8th Cir. BAP 2008)

Mortgagee whose mortgage was recorded in a preferential manner but who was paid off by the debtor's unauthorized postpetition refinancing was liable for a money judgment for the value of the preferential transfer of the mortgage.

210. *In re Hedrick*,
524 F.3d 1175 (11th Cir. 2008)

Lender in refinancing whose mortgage was recorded after the 10-day period in § 547(e) was insulated from avoidance because under state law it became equitably subordinated to the original mortgagee within the 10-day period and there was no point during which a bona fide purchaser could have taken free of its interest.

211. *In re Fisher*,
296 Fed. Appx. 494 (6th Cir. 2008)

Trustee had standing to avoid as fraudulent a transfer made by a corporation owned by the debtor because the corporation was the debtor's alter ego.

212. *In re Entringer Bakeries, Inc.*,

[548 F.3d 344](#) (5th Cir. 2008)

Earmarking doctrine did not insulate from avoidance as a preferential transfer a pay off of bank with funds provided by refinancing lender because the debtor had control of the funds before making the payment and because the debtor had never stipulated to the refinancing lender that it would use the funds to pay off the bank. The § 547(c)(2) defense did not apply because the bank's loan was inconsistent with the bank's loan policies, and thus was not made in the ordinary course of business.

213. *In re Marshall*,

[550 F.3d 1251](#) (10th Cir. 2009)

Balance transfer from one credit card issuer to another was a transfer of an interest in the debtor's property during the preference period. The earmarking, even if it extends beyond the co-debtor context, protects the preferred creditor only if the new lender requires the funds be used to pay a specific debt, which was not the case here.

214. *In re Lee*,

[530 F.3d 458](#) (6th Cir. 2008)

Earmarking doctrine does not protect from avoidance the refinancing of a mortgage which was recorded after the ten-day period in § 547(e) because the earmarking doctrine applies only to the transfer of funds, not to the transfer of liens. Refinancing is better viewed as multiple transfers – one of the payment and another of the lien – than as a unitary transaction because otherwise § 547(e) would be meaningless. *See also In re King*, [397 B.R. 544](#) (6th Cir. BAP 2008) (following *Lee* and ruling that the preference created by delayed recording of a refinancing mortgage is not protected from avoidance by the contemporaneous exchange defense of § 547(c)(1)).

215. *In re Wells*,

[382 B.R. 355](#) (6th Cir. BAP 2008)

Debtor's payment to creditor during preference period through use of convenience checks drawn on credit card account was an avoidable transfer of the debtor's property and the earmarking doctrine did not apply because there was no agreement between the debtor and the credit card issuer to use the funds to pay any particular creditor. *See also In re Dilworth*, [2008 WL 649064](#) (6th Cir. BAP 2008) (same).

216. *In re Fox*,

[382 B.R. 800](#) (Bankr. D. Kan. 2008)

Debtor's use of credit card checks to pay down the debt on a different credit card was an avoidable preference for which the earmarking doctrine is not applicable.

217. *In re Falcon Products, Inc.*,

[381 B.R. 543](#) (8th Cir. BAP 2008)

For the purpose of preference analysis, prepetition payment to insurance premium financier has no preferential effect if financier was fully secured by unearned premiums on the date the bankruptcy petition was filed. Thus, if the collateral dissipated between the time payment was made and the date of the petition, the payment may be avoidable.

218. *Velde v. Kirsch*,

[543 F.3d 469](#) (8th Cir. 2008)

Issuance within the preference period of a replacement check to soybean seller for goods sold was not an avoidable preference because the seller's secured lender did not release its security interest in the soybeans until the check was paid, and thus the check was a contemporaneous exchange for new value.

219. *In re Haberman*,

[516 F.3d 1207](#) (10th Cir. 2008)

Trustee, who avoided bank's unperfected lien and preserved the lien for the benefit of the estate, did not thereby acquire all of the bank's contractual rights against the debtor. Accordingly, the trustee was entitled to recoup from the bank the postpetition payments the debtor made to retain the collateral, but only up to the amount of the lien (*i.e.*, up to the value of the collateral).

220. *In re Taylor*,

[390 B.R. 654](#) (9th Cir. BAP 2008)

PMSI creditor's perfection 21 days after attachment of the security interest rendered the transfer preferential and avoidable despite state law that provided for a longer relation-back period. Because the collateral had depreciated after the petition but before the avoidance judgment, the trustee was entitled, as an alternative to avoidance of the security interest, to a money judgment for the value of the security interest on the date of the transfer [leaving the creditor with the security interest plus an unsecured claim].

221. *In re Cedar Funding, Inc.*,

[398 B.R. 346](#) (Bankr. N.D. Cal. 2008)

Investors who funded mortgage broker's origination of mortgage but who did not receive a signed copy of the note or an assignment until several years later and less than 90 days before the broker filed for bankruptcy protection *might* be entitled to an equitable lien that would be immune from avoidance as a preference.

222. *In re Trout*,

[392 B.R. 869](#) (Bankr. D. Colo. 2008)

When the transfer of a security interest is preferential and avoided, the lien is preserved for the benefit of the estate and an award for the value of the transfer is inappropriate.

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223. *In re PW, LLC*,
[391 B.R. 25](#) (9th Cir. BAP 2008)
Section 363(f) could not be used to sell property free and clear of junior lien unless there is a showing that some nonbankruptcy process exists which could require the junior lienor to accept nothing in exchange for discharging its lien. A free and clear sale conducted pursuant to a court order is final unless the order is stayed pending appeal, but the lien stripping aspect of the order is not rendered moot.
224. *Baylake Bank v. TCGC, LLC*,
[2008 WL 4525009](#) (Bankr. E.D. Wis. 2008)
Debtor whose real estate was subject to restrictive covenant requiring town's consent to sale to any entity who would take the property off the tax rolls could not sell the property free and clear of the town's interest under § 363(f).
225. *In re Schwartz*,
[383 B.R. 119](#) (8th Cir. BAP 2008)
Postpetition financing did not insulate prepetition grant of security interest from avoidance as a preference.
226. *Ta Chong Bank Ltd. v. Hitachi High Technologies, Inc.*,
[2008 WL 3843066](#) (N.D. Cal. 2008)
After creditor's unperfected security interest in accounts was avoided, creditor could not maintain an action against account debtor that paid the debtor before the petition was filed but after receiving instructions to pay the creditor directly.
227. *In re Decora*,
[396 B.R. 222](#) (W.D. Wis. 2008)
Trustee, using his status as lien creditor, cannot avoid allegedly unperfected security interest in tribal member's right to per capita distribution from Native American Nation because tribal law does not allow a judicial lien to attach to the distribution right.
228. *In re Baine*,
[393 B.R. 561](#) (Bankr. S.D. Ohio 2008)
Repossession of collateral after stay expires under § 362(h) is the functional equivalent of abandonment; it removes the collateral from the bankruptcy estate and terminates the trustee's ability to avoid security interest, which was unperfected.

229. *In re Martin Wright Electric Co.*,

[2008 WL 114926](#) (Bankr. W.D. Tex. 2008)

Lien releases executed by subcontractor did not provide new value to general contractor in exchange for payment because the encumbered property was not owned by the general contractor and the general contractor had already received full payment from the property owner. Whether the funds paid were trust funds under the Texas Construction Trust Fund Statute, and therefore not property of the debtor/general contractor, depends on whether the subcontractor can adequately trace them through the operating account in which they were commingled.

230. *In re AFI Holding, Inc.*,

[525 F.3d 700](#) (9th Cir. 2008)

Payment to investor by debtor who ran a Ponzi scheme is necessarily made with fraudulent intent. However, investor is entitled to good faith defense and, for that purpose, the investor gave reasonably equivalent value by implicitly relinquishing claim for restitution. Thus, investor was protected to the extent that payment returned his initial investment but was not protected to the extent the payment represented fictitious profits from the scheme.

231. *In re Slatkin*,

[525 F.3d 805](#) (9th Cir. 2008)

All payments to investors made by operator of Ponzi scheme and representing profit on their investments are avoidable fraudulent transfers. Transfers were not insulated from avoidance under § 546(e) because the debtor was not a stockbroker; although he had customers, he was not in the business of effecting securities transactions.

232. *In re Cyberco Holdings, Inc.*,

[382 B.R. 118](#) (Bankr. W.D. Mich. 2008)

Secured creditor's sweep of debtor's bank accounts could not result in a fraudulent transfer – even though the debtor allowed it in order to continue to deceive its other creditors and maintain its Ponzi scheme – because the sweeps did not diminish the debtor's estate and thus there was no transfer of an interest in the debtor's property.

233. *In re Plassein International Corp.*,

[2008 WL 1990315](#) (Bankr. D. Del. 2008)

Fees to investment advisors in connection with LBO transactions might be avoidable fraudulent transfers for less than reasonably equivalent value.

234. *Renn v. F.W. Financial Services, Inc.*,

[2008 WL 2324036](#) (Bankr. D. Or. 2007)

Transfer of all of the debtor's assets to its secured creditor in satisfaction of the \$130,000 secured obligation was not for reasonably equivalent value and thus was avoidable because the secured party immediately resold the assets to a buyer who was willing to pay that amount for merely the equipment and the customer lists but the transaction also included accounts with a face amount of \$1.1 million and on which the buyer netted more than \$300,000.

235. *In re Allou Distributors, Inc.*,

[392 B.R. 24](#) (Bankr. E.D.N.Y. 2008)

To maintain a fraudulent transfer action under § 544 and state law, the trustee must show the existence of an unsecured creditor at the time of the transfer who has an allowable claim in bankruptcy, but it is not necessary that the debt at those two times be the same or related; a trade creditor whose debt is paid off after the fraudulent transfer but to whom the debtor later becomes indebted again does give the trustee standing.

236. *In re Castiglione*,

[2008 WL 2038839](#) (Bankr. D.N.J. 2008)

Because quitclaim deed from insolvent wife to her husband of one-half interest in real estate was avoidable as a fraudulent transfer, husband's subsequent grant of a mortgage was also avoidable.

237. *In re Magwood*,

[2008 WL 509635](#) (Bankr. M.D. Ala. 2008)

Section 546(c) does not create a reclamation right, it merely imposes a limit on the trustee's avoiding powers.

238. *In re Nicolls*,

[384 B.R. 113](#) (Bankr. W.D. Pa. 2008)

Trustee could not avoid hospital's statutory lien on debtor's settlement with liability insurer under § 545(2) because even though the lien was created under the law of the jurisdiction in which the hospital was located – which was not the debtor's jurisdiction – a bona fide purchaser of the settlement claim would be expected to inquire if there were an outstanding debt to a medical provider and if that debt were secured, and thus such a purchaser would have notice of the lien.

239. *Adelphia Recovery Trust v. Bank of America*,

[390 B.R. 80](#) (S.D.N.Y. 2008)

Creditors had no standing to bring avoidance action or equitable subordination claim because they had been paid in full pursuant to a confirmed plan.

240. *In re Mansaray-Ruffin*,
530 F.3d 230 (3d Cir. 2008)

Chapter 13 debtor could not avoid mortgage lien by filing unsecured proof of claim for creditor and treating the creditor's claim as unsecured in the confirmed plan; an adversary proceeding is necessary to avoid the lien.

Reorganization Plans

241. *In re Mayco Plastics, Inc.*,
379 B.R. 691 (Bankr. E.D. Mich. 2008)

Postpetition secured financing that was given priority over administrative expenses was not itself an administrative expense and therefore lender was not entitled to object to the plan under § 1129(a)(9)(A), although the lender may be entitled to object to the plan if it violates the financing order.

242. *In re New Century TRS Holdings, Inc.*,
390 B.R. 140 (Bankr. D. Del. 2008)

Plan which divides all of the debtor corporations into three groups based on their function, classifies claims by debtor group, compromises inter-company claims, and provides that creditors with claims against multiple debtors in different groups receive 130% of the normal distribution from one group and 0% from the other(s) did not provide for substantive consolidation in either form or effect. Instead, it was a thoughtful compromise not designed to disadvantage any group of creditors and would be confirmed over the object of one small class of claimants.

GUARANTIES & RELATED MATTERS

243. *Wheeler v. Bluming*,
521 F.3d 1 (1st Cir. 2008)

Guarantor could not use alleged oral promise of creditor to seek recourse from guarantor only after going against the collateral to contradict the express terms of the guaranty and could not use fraud of the borrower to avoid liability on grounds of frustration of purpose.

244. *Henning v. Mainstreet Bank*,
538 F.3d 975 (8th Cir. 2008)

Provision in guaranty that would release mortgage when \$200,000 of principal had been "paid" was not triggered by payment of \$124,000 and creditor's collection of \$196,000 more from other collateral; buyers of collateral and account debtors did not "pay" the mortgage debt.

245. *Business Bank v. Hanson*,
[2008 WL 4705172](#) (Minn. Ct. App. 2008)

Guarantor stated valid defense of fraudulent inducement by claiming that bank representative assured him that the bank was “oversecured,” that there was “virtually no risk,” that signing the guaranty was a “no brainer,” and by failing to disclose that the principal obligor planned to file for bankruptcy protection.

LENDING, CONTRACTING & COMMERCIAL LITIGATION

246. *HA2003 Liquidating Trust v. Credit Suisse Securities LLC*,
[517 F.3d 454](#) (7th Cir. 2008)

Investment bank that gave fairness opinion on proposed purchase of business that ultimately bankrupted client was not liable for gross negligence because the investment bank was contractually entitled to rely on factual projections provided by the client and could not be expected to forecast future decline in equities markets.

247. *AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*,
[896 N.E.2d 61](#) (N.Y. 2008)

Indenture trustee could be liable for negligence – but not for breach of fiduciary duty – for its failure to perform a non-discretionary, ministerial duty to deliver a registration statement that arguably was necessary for lenders to have a security interest and which failure led to a multi-million dollar loss.

248. *Dahlgreb v. First National Bank of Holdrege*,
[533 F.3d 681](#) (8th Cir. 2008)

Bank had no RICO liability to creditors of one of its former customers because there was no evidence that the bank controlled the customer’s activities. However, bank was liable to those creditors who continued to conduct business with customer after relying on misrepresentation by bank president that “everything was fine” with customer after bank had ended its relationship with customer.

249. *Tradition Homes, LLC v. Textron Financial Corp.*,
[2008 WL 876975](#) (M.D. Fla. 2008)

Creditor whose representative informed another creditor of the debtor’s financial difficulties could be liable for intentional interference with business relations. Creditor could also be liable for sending “notice of lien” letters to debtor’s customers because, even though the creditor claimed a security interest in receivables from customers, the notice implied that the creditor claimed a security interest in the property the customers had purchased from the debtor.

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250. *Ramsey v. Bank of Oklahoma*,
[2008 WL 4936316](#) (N.D. Okla. 2008)
Investor, to whom bank had allegedly promised to provide advice as to which cattle companies to invest in, had no cause of action against bank for failing to disclose severe financial difficulties of one of bank's customers because such disclosure would violate the bank's duties to its depositor and any promise to make such disclosure is unenforceable.
251. *Sudden Service, Inc. v. Brockman Forklifts, Inc.*,
[2008 WL 2357724](#) (E.D. Mich. 2008)
Payments by insolvent corporation to insider were not avoidable under the Uniform Fraudulent Conveyances Act because the insider's contributions were properly classified as debt, making the transfers payments in partial satisfaction of a debt, and thus for reasonably equivalent value. *Cf.* UFTA § 5(b).
252. *Pa D'or Manufacturing Inc. v. Woodland Container Corp.*,
[2008 WL 3836630](#) (Minn. Ct. App. 2008)
Business made fraudulent transfer of goodwill – valued at \$200,000 on its balance sheet – by forming a new company owned by insiders to service the business's clients.
253. *BA Mortgage, LLC, v. Quail Creek Condominium Association, Inc.*,
[192 P.3d 447](#) (Colo. Ct. App. 2008)
Owners of mortgaged property need not know of or consent to subordination agreement for such agreement to be valid.
254. *Foundation Property Investments, LLC v. CTP, LLC*,
[186 P.3d 766](#) (Kan. 2008)
Creditor's repeated acceptance of late payments on promissory note that lacked an anti-waiver clause created a course of performance that prevented the creditor from accelerating the debt without first informing the debtor that it would no longer accept late payments.
255. *Renovator's Supply, Inc. v. Sovereign Bank*,
[892 N.E.2d 777](#) (Mass. Ct. App. 2008)
Bank's failure to inform business borrower, before existing line of credit had expired, of bank's decision not to renew line for credit except on less favorable terms, created an equitable estoppel; bank either had to renew line of credit on same terms or give borrower a reasonable period to seek alternative financing. However, such conduct did not violate the duty of good faith because that duty applies to the performance of existing contracts, not to the formation of new ones.
256. *DCR Fund I, LLC v. TS Family Ltd. Partnership*,
[261 Fed. Appx. 139](#) (10th Cir. 2008)
Alleged oral agreement to forebear by creditor on promissory note was not enforceable against transferee of the note because an Oklahoma statute of frauds intended to discourage lender liability.

257. *Western Filter Corp. v. Argan, Inc.*,
[540 F.3d 947](#) (9th Cir. 2008)

Terms in stock purchase agreement providing that representations and warranties “shall survive the Closing for a period of one year” served to limit when a breach occurs, not when an action could be brought, and actions for breach and misrepresentation could be commenced more than one year after the closing.

258. *In re Musicland Holding Corp.*,
[386 B.R. 428](#) (S.D.N.Y. 2008)

Trade creditors who had contractually subordinated their security interest to lenders with a revolving loan had no claim against lenders when the lenders amended their credit facility to include an unrelated terms loan by a single lender because the original loan documents contemplated later amendments and encompassed all types of indebtedness.

259. *Highland Crusader Offshore Partners, LP v. Lifecare Holdings, Inc.*,
[2008 WL 3925272](#) (N.D. Tex. 2008)

Lenders in credit facility have no contract claim against borrowers for offering to other lenders in the facility but not them an amendment on better terms than previously rejected offer. However, even absent a fiduciary relationship, those who voluntarily disclose information must speak the whole truth and must supplement the disclosure if new information makes the original representation misleading. Thus, the lenders’ misrepresentation claim would not be dismissed.

260. *Secured Equity Financial, LLC v. Washington Mutual Bank*,
[666 S.E.2d 554](#) (Ga. Ct. App. 2008)

Refinancing lender was not entitled to be equitably subrogated to senior mortgage lien because buyer purchased junior mortgage after senior lien was discharged and before refinancing mortgage lien was recorded, and thus had no notice of the possible senior lien.

261. *Acuity v. McGhee Engineering, Inc.*,
[2008 WL 5234743](#) (Tenn. Ct. App. 2008)

Surety that paid property owner when contractor defaulted was subrogated to owner’s rights, including claims against subcontractors for negligent performance and breach of contract.

262. *Lone Star Air Partners, LLC v. Delta Air Lines, Inc.*,
[387 B.R. 426](#) (S.D.N.Y. 2008)

Owner-participant in aircraft lease was entitled to indemnification from debtor-lessee for tax loss resulting when owner-participant sold its interest because the sale was “attributable” to the exercise of foreclosure remedies.

263. *Belfor USA Group, Inc. v. Bray & Gillespie LLC*,
[2008 WL 276022](#) (M.D. Fla. 2008)

Lender who was loss payee on insurance policy and who received insurance payment for damage to insured hotels was not unjustly enriched by contractor who repaired the property but was not paid; Florida law does not recognize the mere increase in value of collateral as a direct benefit in claims for unjust enrichment unless the secured party has a right to possess the collateral.

264. *Wilmington Trust Co. v. Tropicana Entertainment, LLC*,
[2008 WL 555914](#) (Del. Ch. Ct. 2008)

Loss of gaming license by subsidiary and appointment under state law of conservator to manage casino assets was a prohibited “transfer or other disposition” of assets under the indenture agreement, and thus qualified as an event of default even though loss or non-renewal of the gaming license was not expressly listed as an event of default.

265. *Kiski Area School District v. Mid-state Surety Corp.*,
[967 A.2d 368](#) (Pa. 2008)

School district’s general release of contractor from damages or further performance resulting from delay and allegedly unworkmanlike construction, while simultaneously paying contractor balance due, operated to also release issuer of surety bond even though the school district was already in litigation with the surety and clearly did not intend to release it.

266. *Spector v. Melee Entertainment LLC*,
[2008 WL 362125](#) (Del. Super. Ct. 2008)

Federal bankruptcy law does not preempt California statute that makes preferences avoidable in connection with an assignment for the benefit of creditors.

267. *In re Old Summit Manufacturing, LLC*,
[523 F.3d 134](#) (3d Cir. 2008)

Checks received by seller of business before closing but which cleared after the closing were not accounts receivable at the time of the sale and thus not part of the assets sold; they therefore remain the property of the seller.

268. *In re World Health Alternatives, Inc.*,
[385 B.R. 576](#) (Bankr. D. Del. 2008)

Trustee stated a cause of action against general counsel for corporation for breach of fiduciary duty, waste of corporate assets, aiding and abetting such breaches of fiduciary duty and waste of corporate assets, fraud, negligent misrepresentation, and professional negligence by alleging that counsel failed to discover and report wrongdoing of other officers.

269. *Postal Instant Press, Inc. v. Kaswa Corp.*,

[77 Cal. Rptr. 3d 96](#) (Cal. Ct. App. 2008)

Outside reverse piercing of corporate veil will not be allowed, and thus corporation's assets are not available to satisfy the personal liability of a shareholder because otherwise corporate creditors and other shareholders could be harmed.

270. *Brack v. Omno Loan Co.*,

[80 Cal. Rptr. 3d 275](#) (Cal. Ct. App. 2008)

Choice-of-law clause in consumer loan agreements with non-resident members of the military was unenforceable because it violated fundamental policy of the State of California, as reflected in its Finance Lenders Law.

271. *USB Securities LLC v. Finish Line, Inc.*,

[2008 WL 536616](#) (S.D.N.Y. 2008)

Lender who committed to finance \$1.5 billion acquisition was not entitled to dismissal of declaratory action against it for refusing to finance the merger at a lower price, despite lender's argument that a lower price would be material and adverse to its interests and that lender could, in its reasonable discretion, withhold consent to the amendment.

272. *In re Spinnaker Industries, Inc.*,

[2008 WL 3153931](#) (6th Cir. 2008)

Contractual obligations of buyer of business to (i) pay no more than \$1.25 million of the seller's professional fees; and (ii) to reimburse seller for costs of DIP financing should be read together, so that amounts borrowed under DIP financing order to pay professional fees were subject to the \$1.25 million cap.