

Commercial Law Developments

2009

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SECURED TRANSACTIONS

Scope Issues

1. *Kennedy v. Healthone Staffing, LLC*,
[2009 WL 281777](#) (Cal. Ct. App. 2009)
Secured party did not need to file a financing statement because he received an assignment of a single account in satisfaction of a pre-existing debt and thus Article 9 did not apply under § 9-109(d)(7). Even if Article 9 did apply, the security interest would likely have been automatically perfected under § 9-309(2).
2. *In re Gateway Ethanol, L.L.C.*,
[415 B.R. 486](#) (Bankr. D. Kan. 2009)
Five-year lease of \$5 million boiler with a \$600,000 purchase option at the end of the lease term was a true lease. The transaction failed the bright-line test of former § 1-201(37) because the option price was not nominal because the cost of returning the boiler was only \$200,000–\$250,000 and the predicted value of the boiler was \$600,000. The transaction remained a lease after examining all the facts and circumstances because the boiler had a useful life of 15-20 years and the lessor would have been able to market the boiler had the lessee returned it.
3. *Gangloff Industries, Inc. v. Generic Financing and Leasing, Corp.*,
[907 N.E.2d 1059](#) (Ind. Ct. App. 2009)
Eight-year lease of truck for \$1,100/month with an option to purchase at the end for \$3,200 was not a true lease, but a sale with a retained security interest. Accordingly, entity that had repaired the truck at the lessee's request and which still had possession of the truck had a mechanic's lien on the truck with priority over the lessor's security interest under § 9-333.
4. *In re Phoenix Equipment, Inc.*,
[2009 WL 3188684](#) (Bankr. D. Ariz. 2009)
Equipment leases that contained an oral option to purchase at the end of the lease term for 10% of the purchase price were security agreements. Although the lessee had not proven that the option price was nominal, and thus the bright-line rule was not satisfied, characterization of the transactions as security arrangements was supported by the fact that: (i) the option price was the same for each lease, regardless of the duration of the lease or the nature or age of the equipment; (ii) the debtor had never failed to exercise an option; and (iii) the debtor needed the equipment to operate its business.

5. *In re St. James Inc.*,[402 B.R. 209](#) (Bankr. E.D. Mich. 2009)

Although Article 9 does not cover security interests in unearned insurance premiums, creditor did have a security interest in the debtor's rights to cancel the insurance policy and receive a refund of unearned premiums pursuant to a state statute governing insurance premium financing. That security interest was effective upon funding of the policy, not cancellation of the policy.

6. *In re Silver State Helicopters, LLC*,[403 B.R. 849](#) (Bankr. D. Nev. 2009)

To have a valid and prior lien on unearned insurance premiums, the premium financier must obtain from the insured an assignment of the unearned premiums and the right to cancel the policy and the financier must notify the insurer of the assignment, but the financier need not take possession of the policy or file a UCC financing statement.

7. *In re Downey Creations, LLC*,[414 B.R. 463](#) (Bankr. D. Ind. 2009)

Putative consignor bears burden of proof on whether transaction fails to qualify as an Article 9 consignment because the consignee is "generally known by its creditors to be substantially engaged in selling the goods of others." Because this requires evidence that a majority or creditors – determined by their number, not the amount owed to them – knew that the debtor was substantially engaged in selling the goods of others, and the consignor here was unable to make such a showing, the transaction created a security interest.

8. *In re Niblett*,[2009 WL 3930448](#) (Bankr. E.D. Va. 2009)

Because there was no testimony that the debtor told any of his creditors that he was selling other peoples' goods in his antique store, the creditors did not generally know that the debtor was substantially engaged in the business of selling goods of others. Therefore, with the exception of one consignment of a painting that was consumer goods in the hands of the consignor, and consigned goods were part of the bankruptcy estate and available to the debtor's creditors.

9. *Fariba v. Dealer Services Corp.*,[100 Cal. Rptr. 3d 219](#) (Cal. Ct. App. 2009)

Consignor of automobiles to car dealer had priority over dealer's secured creditor because secured creditor had actual knowledge that the dealer was substantially engaged in selling the goods of others, even though the consignor did not present evidence of either what the dealer's creditors generally knew or that the secured creditor knew of the consignor's arrangement with the dealer. Consignor also won because it had reacquired possession of the automobiles when the debtor separated the cars from the remainder of its inventory and gave the keys to cars to the consignor's personnel.

10. *Baker Construction Co., Inc. v. City of Burlington*,
[683 S.E.2d 790](#) (N.C. Ct. App. 2009)

Underground water and sewer lines were ordinary building materials, not fixtures, and thus became the real property in which they were installed. Therefore no security interest could attach to them and all rights to them transferred when a mortgage on the real estate was foreclosed.

Attachment Issues

– Existence of Security Agreement

11. *Richmond Material Co. v. Dredge La Concha*,
[2009 WL 2407952](#) (S.D. Tex. 2009)

Lender who unilaterally had title to dredge placed in name of a company he owned did not have a valid security interest in the vessel because there was no written agreement evidencing the debtors' intent to pledge the vessel.

12. *In re Covenant at South Hills, Inc.*,
[410 B.R. 426](#) (Bankr. W.D. Pa. 2009)

Creditor that received assignment of rights from bank that issued letter of credit did not have a security interest in the debtor/applicant's assets because there was no document granting such a security interest to the bank. Although an intercreditor agreement provided that "the Bank and the Trustee shall both have a first lien on and security interest in the Shared Collateral," and the debtor signed the intercreditor agreement and agreed to be bound by its terms, that agreement did not actually grant a security interest.

13. *In re Okigbo*,
[2009 WL 5227844](#) (Bankr. D. Md. 2009)

Credit Union could not setoff funds in consumer's deposit account against credit card debt because that is permissible only if the credit union has a security interest in the deposit account and, the Official Staff Commentary on Regulation Z indicates that to have such a security interest, the consumer must specifically intend to grant a security interest in a deposit account, a fact which can be evidenced by: (i) a separate signature or initials on the agreement indicating that a security interest is being given; (ii) separating the security interest provisions from other contract and disclosure provisions; or (iii) reference to a specific amount of deposited funds or to a specific deposit account number.

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14. *In re Nacio Systems, Inc.*,
[410 B.R. 38](#) (Bankr. N.D. Cal. 2009)
Confirmed reorganization plan – which the debtor signed – providing that all the debtor’s assets would secure up to \$500,000 in post-confirmation financing, could function as a security agreement, but was limited to the \$500,000 mentioned, not the greater amount actually loaned, and did not cover after-acquired assets. The security interest was not perfected in registered copyrights.
15. *In re Stearns*,
[2009 WL 4330832](#) (Bankr. N.D.N.Y. 2009)
Unsigned loan receipt that described the intended collateral and provided that by endorsing the loan check the borrower agreed to have the described property secure the loan, coupled with endorsed check, were not sufficient as a security agreement in the absence of clear evidence that the borrower negotiated the check with knowledge of the language printed on the receipt or that the parties’ course of conduct corroborated the requisite “present intent.”
16. *Vanderhorst v. 6105 N. Dixie Drive, LLC*,
[2009 WL 4893184](#) (Ohio Ct. App. 2009)
Whether assignment of membership interest in limited liability company was outright or for security was a factual issue not appropriate for summary judgment.

– Description of the Collateral

17. *Goldberg & Connolly v. New York Community Bancorp, Inc.*,
[565 F.3d 66](#) (2d Cir. 2009)
Security agreement’s assignment of “all sums recovered” from judgment constituted an assignment of money or proceeds received from the judgment, not an assignment of the judgment itself, and thus security interest could be perfected only by taking possession of the money.
18. *Charlotte Development Partners, LLC v. Tricom Pictures & Productions, Inc.*,
[2009 WL 4282939](#) (Fla. Dist. Ct. App. 2009)
Security agreement that described the collateral as “Accounts, Chattel Paper, Contract Rights, Inventory, Equipment, Fixtures, General Intangibles, Deposit Accounts, Documents, Instruments, Investment Property and Financial Assets” did not cover cash bond returned by court to the debtor’s attorney because the cash bond was money. Even if the security agreement had covered the money, the security interest would not have been perfected by the filed financing statement because the only way to perfect a security interest in money is by possession.

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19. *In re Lifestyle Home Furnishings, LLC*,
[2009 WL 1270317](#) (Bankr. D. Id. 2009)
Loan agreement that described the collateral as “All of Grantor’s Personal Property [and] The property described in Exhibits (if any) attached hereto” was effective because even though the first clause was overly broad, the second clause encompassed a description in a disclosure statement which defined “All of Grantor’s Personal Property” to include, by an express listing, all of the Article 9 classifications of collateral.
20. *Alston v. Regions Bank*,
[2009 WL 152142](#) (W.D. Tenn. 2009)
Error in one digit in vehicle identification number for one car and in model number for another car did not invalidate security agreements. Although loan officer may have committed fraud in helping car buyers procure their loans, and such fraud might be a defense to enforcement of the car loan or a basis for rescission, it is not a defense to a replevin action.
21. *CNH Capital America, LLC v. Southeastern Aggregate, Inc.*,
[2009 WL 3172353](#) (S.D. Ga. 2009)
Description in the sale and security agreement of the goods as a model “W130” loader when in fact it was model “W130TC” loader did not render the agreement unenforceable, particularly given that the goods had been received and accepted.
22. *In re Excalibur Machine Co., Inc.*,
[404 B.R. 834](#) (Bankr. W.D. Pa. 2009)
Agreement by which steel supplier consigned steel plate to machine manufacturer was really a security agreement because the parties did not really intended that the steel would be sold to third parties. The security interest in the steel plate did not extend to the machines made therefrom, or the accounts generated from the sale of such machines, because the security agreement did not so provide.
23. *Conley v. Public Safety Group, Inc.*,
[771 N.W.2d 653](#) (Iowa Ct. App. 2009)
Claims of corporation against former employees for breach of fiduciary duty were commercial tort claims, not contract claims, and therefore generic reference in the security agreement to “proceeds from any lawsuit due or pending” was insufficient to create a valid security interest in those claims. Accordingly, a sheriff’s sale of those claims to the defendants pursuant to a writ of execution transferred those all of the rights to those claims to the defendants, who then had the right to have them dismissed.

24. *In re American Cartage, Inc.*,

[2009 WL 4780972](#) (Bankr. D. Mass. 2009)

Security agreement that covered existing and after-acquired general intangibles did not extend to subsequent commercial tort claim because the security agreement did not describe the claim, the after-acquired property clause is not permitted to cover it, and the claim was not proceeds of other collateral but merely a claim for generalized harm to the debtor's business. In addition, claims arising out of damage to the collateral are proceeds only "to the extent of the value of the collateral," but here debt had been paid in full and thus there was no value to the collateral despite sale of the collateral.

25. *In re Cascade Grain Products, LLC*,

[2009 WL 2843365](#) (Bankr. D. Or. 2009)

Creditors had security interest in equity sponsor's contractual obligation to provide further funding to the debtor because the security agreement expressly covered general intangibles, even though the agreement expressly referenced certain project contracts of the debtor but not the debtor's financing contract with the equity sponsor.

26. *In re TOUSA, Inc.*,

[406 B.R. 421](#) (Bankr. S.D. Fla. 2009)

Security interest in existing and after-acquired general intangibles attached to the debtor's right to tax refund arising from the carryback of a net operating loss at the end of the taxable year in which the net operating loss arose.

– Rights in the Collateral

27. *Settlement Funding, LLC v. Transamerica Occidental Life Insurance Co.*,

[555 F.3d 422](#) (5th Cir. 2009)

While beneficiary of annuity contract may have rights in settlement agreement, beneficiary has no rights in annuity obtained and owned by the federal government (the other party to the settlement agreement) and issued by an insurance company, and thus could not assign the right to annuity payments.

28. *Metropolitan Life Ins. Co. v. Muldoon*,

[2009 WL 635044](#) (D. Kan. 2009)

Beneficiary of annuity issued as part of structured settlement had no ownership interest in annuity itself and thus could not grant security interest in future annuity payments so as to bind annuity issuer.

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29. *321 Henderson Receivables Origination LLC v. Sioteco*,
[93 Cal. Rptr. 3d 321](#) (Cal. Ct. App. 2009)
Section 9-408 authorizes the assignment of the right to payment under a structured settlement because such rights are general intangibles and California has not excluded interests in insurance policies from the scope of the California Commercial Code. For this reason, public policy does not prohibit such an assignment. Although the annuity issuer or settlement obligor might be able to enforce the contractual anti-assignment provisions, they may have waived that right by failing to object after receiving notification of the proposed assignment.
30. *Symetra National Life Insurance Co. v. Rapid Settlements, Ltd.*,
[2009 WL 1057339](#) (Tex. Ct. App. 2009)
Assignee of payments from structured settlement violated public policy by using arbitration scheme to bypass state statutory requirement of judicial approval for the assignment.
31. *Symetra National Life Insurance Co. v. Rapid Settlements, Ltd.*,
[657 F. Supp. 2d 795](#) (S.D. Tex. 2009)
Factor was permanently enjoined from effectuating a transfer of rights to payment under structured settlements through the use of arbitration rather than by complying with state statutes on transfer.
32. *American State Bank v. Van De Nieuwegiessen*,
[2009 WL 3152927](#) (W.D. Okla. 2009)
Dairy farmer had sufficient rights for a security interest to attach to cattle and equipment allegedly owned by his mother because he possessed the cattle and equipment at issue, held himself out as the owner thereof, used them in the dairy operation, made all decisions regarding their use, sale, and management, consistently represented to the putative secured party that he was the sole owner of the property, and made no attempt to segregate his cattle from those allegedly belonging to his mother.
33. *Credit Suisse Securities (USA) LLC v. West Coast Opportunity Fund, LLC*,
[2009 WL 2356881](#) (Del. Ch. Ct. 2009)
Individual who signed in his individual capacity a lockup agreement promising not to pledge “directly or indirectly” certain corporate stock for one year did not thereby prevent LLC which owned the stock and of which he was the sole member and manager from pledging the stock to its broker. While the individual may have breached the lockup agreement, that did not impair the validity of the pledge.
34. *In re Courson*,
[409 B.R. 516](#) (Bankr. E.D. Wash. 2009)
Boat seller’s secured party did not have a security interest in money paid by insurer to secured party of buyer because the money was not payable to either the debtor (now the buyer) or the seller’s secured party, and thus the money did not constitute proceeds of the boat.

35. *United States v. First National of Nebraska, Inc.*

[2009 WL 324177](#) (D. Neb. 2009)

Federal funds in the hands of a grantee may remain the property of the federal government unless and until expended in accordance with the terms of the grant, in which case the grantee cannot create a security interest in the funds.

36. *In re Badour,*

[2009 WL 1139409](#) (Bankr. N.D.W. Va. 2009)

Even though funds in debtor's general deposit account – in which depositary had both contractual setoff rights and a security interest – may have been transferred from his Keogh account, the funds were not special deposits immune from the depositary's setoff rights. The debtor's right to exempt funds on deposit was ineffective against the depositary's security interest.

37. *Summit Financial Resources L.P. v. Big Dog Enterprises Logistics, LLC,*

[2009 WL 901159](#) (S.D. Ill. 2009)

Freight broker who arranged for carriers to transport goods for shippers and paid carriers with funds provided by shippers after retaining a commission, was able to grant a security interest in the receivables due from shippers to cover its commission but not in the remainder of the receivables from shippers if they were held in an express or implied trust, unless the secured party qualifies as a bona fide purchaser without notice of the trusts.

38. *In re M & S Grading, Inc.,*

[2009 WL 2497101](#) (Bankr. D. Neb. 2009)

Funds commingled in debtor's deposit accounts did not become property of the debtor's employees or of taxing authorities merely because the debtor had made entries on its payroll records showing that tax withholding occurred. Until there was an actual transfer of the monies, the debtor's secured creditor retained a security interest in the funds on deposit.

39. *In re Team America, Inc.,*

[414 B.R. 237](#) (S.D. Ohio 2009)

Funds provided by employer to company that managed its payroll and related personal management services were not held in trust, and thus were subject to setoff by depositary bank that had a security interest in the company's deposits.

40. *In re Propex, Inc.,*

[415 B.R. 321](#) (Bankr. E.D. Tenn. 2009)

If under applicable regulations the debtors do not have property rights in "their air quality and storm water discharge permits, no security interest in those permits could have attached even if the permits did fall within the scope of the security interest's description of the collateral.

– Other

41. *In re Franklin Equipment Co.*,
418 B.R. 176 (Bankr. E.D. Va. 2009)
Summary judgment denied on whether security agreement granting insider a security interest in a life insurance policy to secure “the obligations and liabilities of [the debtor] to [the insider] pursuant to the [April 23, 2008] Note and the loans evidenced thereby, whether now existing or hereafter incurred” covered the debtor’s obligations on 26 separate promissory notes allegedly used to fund the April 23rd note.
42. *U.S. v. Two Bank Accounts In amount of \$197,524.99 at Bank of America*,
2009 WL 803615 (D.S.D. 2009)
Security agreement by which corporation pledged deposit accounts to secure debt owed by sole shareholder violated public policy and was void, as was corporation’s guaranty of the debt. Even if the security interest had attached, because it was unperfected, the secured party lacked standing to intervene in a forfeiture action brought by the United States.

Perfection Issues

– Choice of Law

43. *In re SemCrude, L.P.*,
407 B.R. 82 (Bankr. D. Del. 2009)
407 B.R. 112 (Bankr. D. Del. 2009)
Although Kansas and Texas law gives lessors of mineral rights a perfected, first-priority security interest in certain in extracted oil and gas, such laws do not govern because the debtors are located in Delaware (and their depository banks are located in Oklahoma). As a result, compliance with the non-uniform rules in Kansas or Texas on attachment and perfection was immaterial and the secured parties who filed in Delaware are entitled to priority. Decisions certified for direct appeal to the Third Circuit.
44. *In re SemCrude, L.P.*,
407 B.R. 140 (Bankr. D. Del. 2009)
The Oklahoma Production Revenue Standards Act does not impose a constructive trust in revenue from oil and gas wells in favor of lessors of mineral rights; it provides instead for a statutory lien and that lien does not have priority over previously perfected security interests. Decision certified for direct appeal to the Third Circuit.

45. *In re Trafford Distributing Center, Inc.*,
[414 B.R. 849](#) (Bankr. S.D. Fla. 2009)
Factor that had purchased account and filed financing statement against the debtor in Pennsylvania was unperfected because the debtor was incorporated in Florida and thus the financing statement should have been filed there. No discussion of § 9-309(2) and whether the account was a significant part of the debtor's accounts.
46. *Metro Construction Co., LLC v. Sim Attractions, LLC*,
[2009 WL 1605558](#) (Tenn. Ct. App. 2009)
Putative lessor that filed a precautionary financing statement in Wisconsin held a perfected security interest in a multi-ton race car simulator located in Tennessee because the simulator was not a fixture and thus the proper place to file was Wisconsin, the jurisdiction in which the debtor was organized.

– **Method of Perfection**

47. *In re Kanoff*,
[408 B.R. 53](#) (Bankr. M.D. Pa. 2009)
Because a liquor license is a general intangible, a creditor with security interest in the license could not perfect by possession of the license certificate or by “control” over the license through payment of renewal and transfer fees.
48. *In re Troutt*,
[2009 WL 2905923](#) (Bankr. S.D. Ill. 2009)
Insulation installed in attic of house was a fixture and thus a fixture filing or recorded mortgage was needed to perfect even though the creditor had a PMSI and the insulation was consumer goods.

– **Adequacy of Financing Statement**

49. *In re C.W. Mining Co.*,
[2009 WL 2601246](#) (Bankr. D. Utah 2009)
Financing statements identifying the debtor as “CW Mining Company” instead of “C. W. Mining Company” were ineffective to perfect because a search by the filing office under the debtor's registered name did not reveal the filings that lacked the periods and space. Advance payment agreement, by which debtor purported to sell coal to buyer immediately upon mining it, was a security agreement, not a sale, because no price, quantity, or delivery terms were provided and the putative buyer had the right to elect payment in cash or in kind.

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50. *In re EDM Corp.*,
[2009 WL 367773](#) (Bankr. D. Neb 2009)
Financing statement listing the debtor as “EDM Corporation d/b/a EDM Equipment” instead of its registered name, “EDM Corporation,” was ineffective because it was undisputed that a search under the registered name using the filing office’s standard search engine does not reveal the filing.
51. *In re Alvo Grain and Feed, Inc.*,
[2009 WL 1609385](#) (Bankr. D. Neb. 2009)
Summary judgment denied on whether financing statement listing the debtor as “Alvo Grain & Feed, Inc.” instead of its registered name, “Alvo Grain and Feed, Inc.,” was effective to perfect because there was conflicting evidence of whether a search using the filing office’s standard search engine would reveal the filing. Specifically, there was evidence that a search by a filing officer would reveal the filing but an internet search did not.
52. *ProGrowth Bank, Inc. v. Wells Fargo Bank*,
[558 F.3d 809](#) (8th Cir. 2009)
Financing statement describing the collateral as “[a]ll of Debtor's right, title, and interest in and to, assets and rights of Debtor, wherever located and whether now owned or hereafter acquired or arising, and all proceeds and products in that certain Annuity Contract No.: LE900015 issued by Lincoln Benefit Life” was effective even though the annuity in question was issued by another company because the opening phrase covered all assets and was not limited to interests in the described annuity. Even if the phrase was ambiguous, that would be sufficient to serve the notice function of a financing statement.
53. *Quad City Bank and Trust Co. v. United States*,
[2009 WL 2105982](#) (S.D. Iowa 2009)
Financing statement that described the collateral as: Assignment of Consulting Agreement Payments. See Attached Exhibit “A”.; whether any of the foregoing is owned now or acquired later,” as sufficient to cover payments due under a consulting agreement other than the one attached as Exhibit A because the last phrase encompassed other collateral of the same type.
54. *In re U.S. Insurance Group, LLC*,
[2009 WL 4723466](#) (Bankr. E.D. Tenn 2009)
Financing statement that described the collateral as “accounts” perfected a security interest in debtor’s right to earned insurance commissions and renewal commissions because such rights are expressly included in the Article 9 definition of accounts and the security interest is not excluded from Article 9 by as an interest in a policy of insurance. Financing statement describing the collateral as “all records of any kind relating to” commission accounts was sufficient to perfect a security interest in the debtor records, which were general intangibles.

55. *ProGrowth Bank, Inc. v. Wells Fargo Bank*,
[2009 WL 2982939](#) (D. Minn. 2009)

Financing statement against “all assets” was authorized to the extent that the filer had a security interest, and thus was effective to perfect a security interest in a single annuity.

– Authorization of Termination Statement

56. *In re A.F. Evans Co., Inc.*,
[2009 WL 2821510](#) (Bankr. N.D. Cal. 2009)

Secured party that authorized escrow agent to file amendment to financing statement releasing some collateral, to facilitate the debtor’s sale of such collateral, did not authorize the escrow agent to terminate the financing statement, and therefore the secured party’s security interest remained perfected. Moreover, because both the termination box and the release of collateral box were checked on the filed amendment, and the latter would be superfluous if the former were intended, the amendment was patently ambiguous. Under the “seriously misleading” standard of § 9-506(a), this filing would raise a red flag to anyone conducting a search.

57. *In re S.J. Cox Enterprises, Inc.*,
[2009 WL 939573](#) (Bankr. E.D. Ky. 2009)

Although only the secured party of record is authorized to file a termination statement, the termination statement filed by a later secured party did terminate an earlier secured party’s “security interest” and the later secured party was liable for the damages caused thereby.

– Control

58. *In re Hawaiian Telcom Communications, Inc.*,
[2009 WL 2575663](#) (Bankr. D. Haw. 2009)

Collateral agent for lender group was not perfected in debtor’s deposit accounts because it lacked a control agreement with the depository bank, even though the depository was a member of the lender a group.

59. *FTC v. Transcontinental Warranty, Inc.*,
[2009 WL 5166216](#) (N.D. Ill. 2009)

Clearinghouse’s standard agreement with bank and debtor for the processing of credit card charges that required bank to maintain a reserve account and which granted the clearinghouse a security interest in the reserve account did not perfect the clearinghouse’s security interest by control, because the agreement did not require the bank to comply with the instructions of the clearinghouse.

– **Securitized Debt**

60. *SEC v. Byers*,

[671 F. Supp. 2d 531](#) (S.D.N.Y. 2009)

Bank that held, sold, and then re-acquired participation in mortgage loan was not perfected vis-s-vis creditors of the buyer-seller because the collateral was the mortgage loan represented by an instrument – not the participation interest itself, which might be a payment intangible – the bank had not filed a financing statement, and after the bank re-acquired the interest, the loan servicer did not authenticate a record acknowledging that it held the loan documents for the bank’s benefit.

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

61. *In re Ritchie*,

[416 B.R. 638](#) (6th Cir. BAP 2009)

Creditor with a mortgage on real estate who acquired security interest in replacement manufactured home that debtor purchased after original was destroyed by fire was unperfected because its interest was not noted on the certificate of title. Neither the creditor’s mortgage nor its lis pendens, which specifically referred to the manufactured home, perfected its security interest because the debtor had not complied with state law to convert the manufactured home from personal to real property.

62. *In re Green*,

[410 B.R. 904](#) (Bankr. D. Idaho 2009)

Creditor who submitted documentation to Department of Transportation to have its purchase-money security interest noted on the certificate of title for a financed motorcycle was not perfected because the Department never issued the certificate due to a discrepancy in the odometer reading between what the creditor submitted and what the seller’s endorsed certificate of title indicated.

63. *In re Jones*,

[2009 WL 4907028](#) (Bankr. E.D. Ky. 2009)

Lender’s security interest in mobile home was unperfected because the interest was not noted on the certificate of title and the mobile home did not become part of real estate by filing an affidavit of conversion to real estate and surrendering the certificate of title.

64. *In re Phillips*,

[420 B.R. 530](#) (Bankr. D. Kan. 2009)

Lender’s security interest in debtor’s mobile home that was permanently affixed to the real estate was not perfect by recorded mortgage because even though the records of the Department of Motor Vehicles indicated that the certificate of title for the mobile home had been “stopped,” apparently pursuant to an application to cancel the certificate, the application had not been recorded in the real estate records, as the statute requires.

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65. *In re My Type, Inc.*,
[407 B.R. 329](#) (Bankr. C.D. Ill. 2009)
Putative lessor who was listed as owner of vehicles on their certificates of title was perfected when leases were re-characterized as secured transactions because substantial compliance with the certificate of title law is all that is necessary and no creditor could be misled.
66. *In re Drahn*,
[405 B.R. 470](#) (Bankr. N.D. Iowa 2009)
Secured party who was listed as the owner, rather than as a lienholder, on the certificate of title for the collateral was perfected.
67. *In re Hutchins*,
[400 B.R. 403](#) (Bankr. D. Vt. 2009), *aff'd*, [409 B.R. 680](#) (D. Vt. 2009)
Security interest of lender who refinanced debtor's truck loan was unperfected because the interest was not noted on the certificate of title for the truck. Even though the security interest of the creditor whose loan was paid off was still noted on the certificate of title, the refinancing lender was not subrogated to the original creditor's lien because the refinancing lender was not required to pay off the debt to that creditor, the refinancing lender did not take even the most obvious commercially reasonable steps to perfect its lien, and subrogation would harm the unsecured creditors.
68. *In re Johnson*,
[407 B.R. 364](#) (Bankr. E.D. Ark. 2009)
Security interest in motor vehicle that was perfected by notation on the vehicle's certificate of title remained perfected after assignment even though the assignment was not noted on the certificate because the certificate of title statute did not expressly provide to the contrary. *See also In re Gaines*, [414 B.R. 494](#) (Bankr. E.D. Ark. 2009); *In re Andrew*, [2009 WL 3666653](#) (Bankr. E.D. Ark. 2009) (both following *Johnson*).
69. *In re McHaddon*,
[2009 WL 1586698](#) (Bankr. N.D. Ohio 2009)
Secured party listed as lienor on replacement certificate of title was perfected even though the debtor still had possession of the original certificate on which the secured party's lien was not listed and the applicable titling statute does not provide for the issuance of replacement certificates.
70. *In re Owen*,
[2009 WL 2145705](#) (Bankr. D. Id. 2009)
Security interest perfected by compliance with California certificate of title act remained perfected after the debtor moved the car to Idaho and applied for an Idaho certificate of title and the state issued a new certificate noting the security interest, even though the governing law changed when the application was filed and the new certificate was not issued until a week or two later.

71. *Ist Source Bank v. Best-One Tire of Crossville, Inc.*,
[2009 WL 2170167](#) (E.D. Tenn. 2009)

Notation on certificates of title, which perfected creditor's security interest in trucks, also perfected its security interest in tire, rims, and lug nuts because such property constituted accessions to the trucks.

72. *In re Hartline*,
[2009 WL 2971762](#) (Bankr. M.D. Tenn. 2009)

Creditor's security interest was perfected when application for certificate of title that identified the lien was filed. The fact that several years later, after the original certificate was lost, the county clerk issued a duplicate certificate that failed to note the lien, and then replaced that with a second duplicate that did note the lien, was merely an administrative error that had no bearing on perfection.

– Other

73. *In re W.B. Care Center, LLC*,
[419 B.R. 62](#) (S.D. Fla. 2009)

Debtor's stipulation to perfection in settlement agreement was unenforceable. The parties may do what they want but their private agreement cannot change the law, and perfection is a legal question. Even if the stipulation were a waiver of the debtor's right to challenge perfection, it would not bind a bankruptcy trustee.

PMSI Status

74. *In re EDM Corp.*,
[2009 WL 367773](#) (Bankr. D. Neb 2009)

Secured creditor whose advances were made directly to the seller who supplied inventory to the debtor had a PMSI in the equipment even though the advances were made under a previously established but unused line of credit. The debtor's "obligation" was not "incurred" when the line of credit was created, but when advances were made. The PMSI, which was perfected by a filed financing statement even though the property was subject to a certificate of title statute because the debtor held the collateral as inventory, had priority over a subsequent landlord's lien.

75. *In re T & R Flagg Logging, Inc.*,
[399 B.R. 334](#) (Bankr. D. Me. 2009)

Seller of logging equipment who retained title but never filed a financing statement did not have PMSI priority over existing secured party. Lender who later provided the debtor with financing for the purchase and who filed more than one month after the sale did not have a PMSI, even if the lender and debtor had subjectively expected to enter into the financing arrangement at the time of the sale.

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76. *In re Johnson*,
[2009 WL 962193](#) (Bankr. E.D.N.C. 2009)
Creditor had PMSI in one item of logging equipment because the loan, as evidenced by the promissory note, and the bill of sale were contemporaneous, even though the debtor had possession of the equipment for several months before the loan was made, presumably pursuant to a lease.
77. *In re Dale*,
[582 F.3d 568](#) (5th Cir. 2009)
Amounts financed to cover negative equity in trade-in vehicle, gap insurance, and extended warranty protection are all part of the purchase-money obligation.
78. *In re Mierkowski*,
[580 F.3d 740](#) (8th Cir. 2009)
Amount financed to cover negative equity in trade-in vehicle is part of the price of the new car and therefore part of the purchase-money obligation. Lengthy dissent. *See also In re Callicott*, [580 F.3d 753](#) (8th Cir. 2009) (following *Mierkowski*).
79. *In re Ford*,
[574 F.3d 1279](#) (10th Cir. 2009)
Negative equity in trade-in vehicle that was financed in connection with purchase of new car is part of the purchase-money obligation. Lengthy dissent.
80. *In re Price*,
[562 F.3d 618](#) (4th Cir. 2009)
PMSI status for the purpose of § 1325(a) of the Bankruptcy Code is governed by state law. Financing of negative equity in trade-in vehicle is value given to enable the debtor to purchase the new vehicle and thus is part of the purchase-money obligation.
81. *In re Peaslee*,
[913 N.E.2d 387](#) (N.Y. 2009)
The portion of the financing of an automobile purchase attributable to a trade-in vehicle's negative equity is both part of the price of the vehicle and value given to enable the debtor to acquire the new vehicle, and thus is part of the purchase money obligation.
82. *In re Miller*,
[2009 WL 3863337](#) (10th Cir. BAP 2009)
Although the financing of negative equity in trade-in vehicle is part of the price of a new car and thus covered by a PMSI, amounts financed to pay for gap insurance and a service contract are not; the agreement expressly made such amounts optional and therefore they do not have a close nexus with the purchase of the new car. In contrast, amounts financed to cover the dealer's administrative fee are covered part of the purchase-money obligation.

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83. *In re Padgett*,
[408 B.R. 374](#) (10th Cir. BAP 2009)
The financing of negative equity in trade-in vehicle is part of the price of the new automobile and thus covered by a purchase-money security interest.
84. *In re Porch*,
[2009 WL 3614439](#) (Bankr. W.D. Pa. 2009)
Negative equity financed in connection with the purchase of a new car is secured by a purchase-money security interest.
85. *In re Morey*,
[414 B.R. 473](#) (Bankr. E.D. Wis. 2009)
Negative equity in trade-in vehicle that is financed in connection with purchase of new car is part of the purchase money obligation.
86. *In re Knepper*,
[405 B.R. 568](#) (Bankr. W.D. Pa. 2009)
Financing of negative equity in trade-in vehicle is part of the purchase-money obligation on the new car.
87. *In re Sanders*,
[403 B.R. 435](#) (W.D. Tex. 2009)
Financing of negative equity in trade-in vehicle is part of the price of the new vehicle and thus is part of the purchase-money obligation.
88. *In re Howard*,
[405 B.R. 901](#) (Bankr. N.D. Ill. 2009)
Negative equity in trade-in vehicle that is financed in connection with purchase of new vehicle is part of the price of the new vehicle and thus is part of the purchase-money obligation.
89. *In re Whipple*,
[417 B.R. 86](#) (Bankr. C.D. Ill. 2009)
PMSI status for the purpose of § 1325 of the Bankruptcy Code is determined as a matter of federal law. Amount financed to cover negative equity in trade in vehicle is covered by a purchase-money security interest. *See also In re Van Dyke*, [2009 WL 5206449](#) (Bankr. C.D. Ill. 2009) (following *Whipple*).
90. *In re White*,
[417 B.R. 102](#) (Bankr. S.D. Ind. 2009)
Negative equity in trade-in vehicle is antecedent debt assumed by the new lender, and thus is neither part of the price of the new car nor value given to enable the debtor to acquire rights in or the use of the new car. As such, it does not part of the purchase-money obligation.

91. *Bledsoe Dodge, LLC v. Kuberski*,
[279 S.W.3d 839](#) (Tex. Ct. Civ. App. 2009)
Negative equity in trade-in vehicle is not part of the price of the new vehicle and therefore the seller did not violate the Texas Finance Code by selling the vehicle for more than the “cash price.”

Priority Issues

– Tax Liens

92. *Rich Financial, LLC v. United States*,
[2009 WL 87606](#) (D. Utah 2009)
Dragnet clause in security agreement covered amounts owed by related entities and which the debtor orally guaranteed. While the debtor might have a statute of frauds defense to the oral guaranty, third parties do not. Therefore, amount owing on guaranty was secured by accounts in which secured party had a perfected interest that pre-dated a notice of federal tax lien. However, the security interest in the debtor’s claim against the state for underpayment of Medicaid services was inchoate when the notice of tax lien was filed. That claim was not clearly proceeds of accounts.
93. *In re Crystal Cascades Civil, LLC*,
[415 B.R. 403](#) (9th Cir. BAP 2009)
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 “Crystal Cascades Civil, LLC, a Nevada limited liability company,” and while a professional searcher would have discovered the notice using a proprietary title plant, in this locality a reasonable non-professional searcher using the real estate records would not have.
94. *In re Corrosion Control Systems, LLC*,
[2009 WL 3074734](#) (Bankr. W.D. La. 2009)
Neither the minimum purchasing fee nor the annual facility fee to which factor was entitled under factoring agreement qualified as “carrying charges” under I.R.C. § 6323(e) and thus did not have priority over a federal tax lien to the extent such fees accrued more than 45 days after the notice of federal tax lien was filed.
95. *State, ex rel. Davis v. A&F Construction*,
[2009 WL 499421](#) (Tenn Ct. App. 2009)
Lenders with perfected PMSIs in tractors did not have priority over county for subsequent ad valorem property taxes.

– Buyers of Goods

96. *In re Dorsey Trailer Co., Inc.*,
[2009 WL 764572](#) (Bankr. M.D. Ala. 2009)
Prepaying buyer of fifteen trailers was a buyer in ordinary course of business that took free of the security interest of the seller's main lender because, even though the seller still had possession of the trailers, because at the time of the sale it was a seller's market, cover would have been impossible, and thus the buyer had a right to specific performance under § 2-716.
97. *In re Carolina Wine Co., Inc.*,
[2009 WL 2399944](#) (Bankr. E.D.N.C. 2009)
Prepaying buyers of wine did not take free of lender's security interest in seller's inventory because seller did not segregate or identify the wine sold, title had not passed, and given that the wine was not unique, the buyers had no right to specific performance.
98. *In re Sunbelt Grain WKS, LLC*,
[406 B.R. 918](#) (Bankr. D. Kan. 2009)
Prepaying buyer of corn from grain elevator did not have priority over elevator's secured party in the grain or its proceeds because the sales contracts were futures contracts that did not transfer title to the grain until delivery. The interest of the secured party, who had swept the elevator's deposit accounts shortly after the buyer paid, was not equitably subordinated because there was no evidence that the secured party engaged in fraud, breached a fiduciary duty, or controlled the elevator.
99. *Indianapolis Car Exchange, Inc. v. Alderson*,
[910 N.E.2d 802](#) (Ind. Ct. App. 2009)
Buyers who purchased truck from used car dealer, which in turn purchased the truck from the debtor, another used car dealer, took free of the rights of creditor with a perfected security interest in the debtor's inventory because both the buyers and their seller qualified as buyers in ordinary course of business.

– Competing Security Interests

100. *Absolute Machine Tools, Inc. v. Liberty Precision Industries, Ltd.*,
[2009 WL 2858092](#) (Ohio Ct. App. 2009)
Creditor with perfected PMSI in large machines acquired by debtor for customization and resale did not have priority over lender with earlier perfected security interest because PMSI lender did not send lender notification of the PSMI transaction prior to delivery of the machines, and even though the machines were shipped by the seller directly to debtor's customer – and were never located at the debtor's facility – the debtor had possession.

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101. *Ohio Graphco, Inc. v. RCA Capital Corp.*,
[2009 WL 3739460](#) (W.D. Ky. 2009)
Seller of printing press who retained title and filed a financing statement two months after delivery did not have priority over assignee of lender that entered into a sale-leaseback transaction with the debtor and which filed a financing statement before the seller did.
102. *In re Lombardo's Ravioli Kitchen, Inc.*,
[2009 WL 3257492](#) (Bankr. D. Conn. 2009)
Secured party that received assignment of seller's security interest in assets of debtor's business did not have priority over bank with a similar perfected security interest with respect to restated notes because the seller had expressly subordinated its security interest and did not have priority with respect to later bank loans because the bank's financing statement was filed first. No discussion of PMSI priority.
103. *Excel Bank v. National Bank of Kansas City*,
[290 S.W.3d 801](#) (Mo. Ct. App. 2009)
Bank that consigned cars to used car dealer and retained the certificates of title but did not file a financing statement had only an unperfected PMSI and therefore lost priority to dealer's floor plan financier, which held a perfected security interest in the dealer's inventory.
104. *Woven Treasures, Inc. v. Hudson Capital, LLC*,
[2009 WL 4980283](#) (Ala. 2009)
Consignor of carpets that consented to a transfer of the consignment from one business entity to another owned by the same individual had only an unperfected security interest because the consignor never filed a financing statement. The consignor therefore lost priority to a secured creditor of the consignee that sold the carpets and then filed a financing statement covering the proceeds.
105. *In re Roser*,
[2009 WL 1973507](#) (D. Colo. 2009)
Lender with PMSI in car and which submitted application for notation of its security interest on the certificate of title 19 days after the purchase but one day after the debtor's bankruptcy petition was filed lost priority to the bankruptcy trustee. The lender could not claim the benefit of § 9-317(e) because the certificate of title statute preempts Article 9's filing rules.
106. *Royale Pigments & Chemicals LLC v. Bomanite Corp.*,
[2009 WL 800911](#) (E.D. Cal. 2009)
Seller of goods who, after delivery, agreed with buyer to convert sale contract into a consignment agreement did not have priority over buyer's secured lender because lender's security interest attached to the goods sold and was perfected. The seller neither filed a financing statement nor provided notice to the lender.

107. *In re Jersey Tractor Trailer Training, Inc.*,
[580 F.3d 147](#) (3d Cir. 2009)

Purchaser of accounts did not act in bad faith merely because it had searched under an abbreviated name of the debtor and therefore failed to discover a proper filing by a previous secured party, even though a lack of secured financing would be odd for a debtor facing a severe liquidity problems. Good faith is about fair dealing, not reasonable care.

108. *In re National Gas Distributors, LLC*,
[2009 WL 1954836](#) (Bankr. E.D.N.C. 2009)

Supplier of natural gas to a distributor who had the distributor instruct its customer to pay the supplier directly did not thereby create a principal-agent relationship or prevent the receivable from being property of the distributor. The only right the supplier obtained was a security interest in the receivable, which was unperfected and thus subordinate to the distributor's secured lender.

109. *Settlement Capital Corp., Inc. v. Pagan*,
[649 F. Supp. 2d 545](#) (N.D. Tex. 2009)

First purchaser of a single, specified payment under annuity contract had priority over later purchaser who had obtained a court order authorizing the transaction. The later purchaser had no standing to raise the effect of the anti-assignment clause in the contract and both parties to the contract had waived the effect of the anti-assignment clause.

– Other

110. *In re Cumberland Molded Products, LLC*,
[2009 WL 2208582](#) (Bankr. M.D. Tenn. 2009)

Bankruptcy trustee took free of bank's perfected security interest in funds on deposit when bank honored a check drawn on the deposit account and paid the funds to trustee.

111. *In re Mitkem Technologies*,
[2009 WL 2843287](#) (Bankr. D. Mass. 2009)

Bankruptcy trustee did not take free under § 9-332(b) of creditor's perfected security interest in deposit accounts because the trustee merely had the rights of a lien creditor, even though the trustee closed the deposit accounts and deposited the funds in a new trustee account.

112. *Safeco Ins. Co. v. Wheaton Bank and Trust Co.*,
[2009 WL 2407740](#) (N.D. Ill. 2009)

Contractor's surety may have priority in contractor's deposit accounts over depositary bank's perfected security interest, and it stated a claim against bank for conversion of those funds and for a constructive trust by alleging that the bank knew the source of the funds.

113. *One CW, LLC v. Cartridge World North America, LLC*,
[661 F. Supp. 2d 931](#) (N.D. Ill. 2009)

Although Bank's perfected security interest in debtor's deposit account had priority over judicial lien of garnishor, Bank could not decline to declare a default and allow the debtor to continue to access the funds. The Bank's failure to freeze the deposit account also operated as a waiver of the Bank's setoff rights.

114. *Myers v. Christensen*,
[776 N.W.2d 201](#) (Neb. 2009)

Bank's perfected security interest in debtor's deposit account to secure debt in excess of deposit account balance meant that the bank was not "indebted to" or "holding property of" the debtor at the time it received a writ of garnishment, and therefore the bank incurred no liability to the garnishor by continuing to allow the debtor to access to the deposits by honoring checks drawn on the deposit account.

115. *Full Throttle Films, Inc. v. National Mobile Television, Inc.*,
[103 Cal. Rptr. 3d 560](#) (Cal. Ct. App. 2009)

Evidence was insufficient to establish that secured creditor had priority in deposit accounts upon which judgment creditor had attempted to levy upon because even though the creditor had a control agreement for two deposit accounts, no evidence was presented about whether the judgment creditor had levied on either of those accounts. The secured creditor did not have priority under § 9-317(a)(2)(B) because its financing statement was filed in Delaware, where the debtor was located, not in California, whose law governed the deposit accounts.

116. *TD Bank v. Electrical Wholesalers, Inc.*,
[2009 WL 2603126](#) (Ct. Super. Ct. 2009)

Bank with perfected security interest in debtor's accounts is entitled to recover from garnishor proceeds of an account successfully garnished directly from the debtor even though the bank received notification of the garnishment action and failed to object.

117. *In re Publishers Consortium, Inc.*,
[345 Fed. Appx. 710](#) (2d Cir. 2009)

Creditor with perfected security interest in accounts has priority over third party beneficiary of debtor's contract with account debtor because the security agreement predated the contract creating third-party beneficiary status.

118. *Shuffle Master, Inc. v. Smart Shoes, Inc.*,
[2009 WL 3336115](#) (D. Nev. 2009)

Federal courts lack subject matter jurisdiction to determine priority between a secured party and a buyer of a patent.

119. *Delta Engineered Plastics, LLC v. Autolign Mfg. Group, Inc.*,
[777 N.W.2d 502](#) (Mich. Ct. App. 2009)
lender's perfected security interest in debtor's plastic molds was subordinate to possessory lien created by statute in favor of companies that had contracted with the debtor to use the molds to manufacture auto parts.
120. *Longaberger Co. v. Kolt*,
[586 F.3d 459](#) (6th Cir. 2009)
Employer's ERISA lien on tort recovery for reimbursement of medical expenses paid has priority over lien of employee's attorney whose work led to the recovery.

Enforcement Issues

– Default

121. *Walters v. M&I Marshall & Isley Bank*,
[2009 WL 2069581](#) (W.D. Mo. 2009)
Debtor was not entitled to a temporary restraining order preventing the secured party from liquidating the collateralized securities because the secured party had given the contractually required 30-days notice of its intent not to renew the debtor's line of credit and thus was unlikely to have breached the duty of good faith.

– Replevin & Repossession

122. *North Carolina Mutual Life Insurance Co. v. Employers Direct Health, Inc.*,
[2009 WL 2365444](#) (N.D. Tex. 2009)
Secured party was not entitled to temporary restraining order preventing the debtors from transferring the collateralized stock because the secured party could not show any irreparable injury from such an action (no discussion of replevin).
123. *Northern Healthcare Capital, LLC v. Brandywine Health Services of Mississippi, Inc.*
[2009 WL 3647346](#) (N.D. Miss. 2009)
Secured party was not entitled to temporary restraining order preventing the debtor from diverting the proceeds of accounts receivable into a government lock box because the debt is guaranteed and the only injury can be undone with monetary relief, and thus the secured party had not shown irreparable injury.
124. *Textron Financial Corp. v. Crabtree RV Center, Inc.*,
[2009 WL 1098944](#) (W.D. Ark. 2009)
Secured party that financed RV dealer's inventory was, upon alleging default and posting a bond, entitled to temporary restraining order enjoining the debtor from selling the collateral.

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125. *GMAC, LLC v. Gustman Chevrolet-Olds-Cadillac, Inc.*,
[2009 WL 1544757](#) (E.D. Wis. 2009)
Secured party was not entitled to pre-judgment writ of replevin because it was oversecured and failed to show that it will be irreparably harmed by any delay, a threshold requirement for preliminary injunctive relief.
126. *Center Capital Corp. v. Gulfstream Crane, LLC*,
[2009 WL 4909430](#) (S.D. Fla. 2009) (also cited as [2009 WL 5062438](#))
Secure creditor's replevin action had to be dismissed because the claim is one *in rem* and the collateral was not located in the jurisdiction. While the creditor may be entitled to an order requiring the debtor to assemble and deliver the collateral, it could not seek such an order under a cause of action entitled "replevin."
127. *Deere Park & Associates v. C H Furniture Source, LLC*,
[674 S.E.2d 635](#) (Ga. Ct. App. 2009)
Trial court erred in not awarding secured party a pre-judgment writ of possession after debtor failed to post required bond.
128. *Pollock v. Daniels*,
[2009 WL 261232](#) (N.D.N.Y. 2009)
Debtor's § 1983 claim against sheriff's deputy for allegedly assisting in repossession would not be dismissed. There was a material question of fact as to whether the deputy physically restrained the debtor, thereby preventing him from objecting to the repossession.
129. *Albertorio-Santiago v. Reliable Financial Services*,
[612 F. Supp. 2d 159](#) (D.P.R. 2009)
Presence of police during repossession can turn repossession into state action for the purpose of § 1983 action if the police take an active role that either affirmatively assists the repossession over the debtor's objection or intentionally intimidates the debtor.
130. *Pete v. U.S. Bank*,
[2009 WL 532611](#) (Ariz. Ct. App. 2009)
Repossession of mobile home by did not comply with governing Navajo law because neither the debtor's consent nor a court order was obtained.
131. *Johnson v. Americredit Financial Services, Inc.*,
[2009 WL 2929396](#) (M.D. Tenn. 2009)
Forced entry, including unauthorized entry into a closed or locked garage, constitutes breach of the peace.

– Waiving Rights

132. *Kraenzler v. Brace*,
[773 N.W.2d 481](#) (Wis. Ct. App. 2009)
Clause in security agreement which provided that the ownership of the collateralized equipment transferred to the secured creditor upon default was unenforceable because the parties cannot in the security agreement waive the debtor's rights to require the secured party to conduct a commercially reasonable disposition and apply the proceeds to the secured obligation.
133. *Royal Palm Senior Investors, LLC v. Carbon Capital II, Inc.*,
[2009 WL 1941862](#) (S.D.N.Y. 2009)
Settlement agreement, by which debtor agreed that upon failure to pay the debt by a specified date its previously pledged membership interests in an LLC would automatically transfer to the secured party, was enforceable and thus secured party became the owner of the LLC and could assume management of the business.
134. *Barunstein v. Pickens*,
[593 F. Supp. 2d 834](#) (D.S.C. 2009)
Debtor remained liable to secured creditor despite clause in settlement agreement that indicated that debtor "shall not remain personally liable for any deficiency" because debtor never endorsed the collateralized stock certificate when it delivered it to the creditor and creditor never sold the stock.
135. *Thomas v. Bank*,
[2009 WL 1410289](#) (M.D. Ga. 2009)
Lender could enforce security interest granted by husband for loan extended to him and his wife, and for all renewals thereof, even though wife executed renewal agreement after divorce that husband did not sign because husband remained liable for the debt.
136. *In re Kuhn*,
[408 B.R. 528](#) (Bankr. D. Kan. 2009)
Secured party that obtained a judgment on the debt did not thereby lose its lien on the collateral despite some cases applying the one-action rule.
137. *Banc of America Leasing & Capital, LLC v. Walker Aircraft, LLC*,
[2009 WL 3283885](#) (D. Minn. 2009)
Secured party was entitled to judgment to full amount of accelerated debt even though it had already replevied the collateral. No double recovery would result because the secured party must apply any proceeds of a disposition to the secured obligation.

138. *Suntrust Equipment Finance & Leasing Corp. v. A & E Salvage, Inc.*,
[2009 WL 3584333](#) (E.D. Tenn. 2009)

Secured party could maintain action against the debtor and the guarantors for the full amount of the debt even though the secured party had repossessed but not sold the collateral. There was no constructive strict foreclosure, the debt will be appropriately credited if the secured party does sell the collateral, and the guarantors will have subrogation rights if the collateral is not sold.

139. *National Loan Exchange, Inc. v. LR Receivables Corp.*,
[2009 WL 466459](#) (S.D. Ill. 2009)

Secured party could bring action on the debt and was not limited to seeking to enforce its security interest. However, debtor did not waive arbitration clause by removing the case to federal court, filing an answer, and raising a “perfunctory, easily disposed-of challenge” to the merits of the secured party’s claims.

140. *Motion Control Industries, Inc. v. Brake Resources, Inc.*,
[2009 WL 1564170](#) (W.D. Va. 2009)

Arbitration clause in manufacturing agreement was enforceable and was not waived even though creditor had sought replevin pursuant to contemporaneous security agreement executed by the parties.

141. *TransMontaigne Product Services, Inc. v. M/V Wilbur R. Clark*,
[679 F. Supp. 2d 1308](#) (S.D. Ala. 2009)

Lender with preferred ship mortgage was not precluded from asserting its lien on the vessels or their proceeds by the doctrine of laches because it entered into a forbearance agreement with the debtor in exchange for partial payment, nor did it waive its security interest by looking to income from the vessels or the guarantors for payment.

– Notification of Disposition

142. *Pivnick v. White, Getgey & Meyer Co.*,
[552 F.3d 479](#) (6th Cir. 2009)

Letter to debtor which stated that secured party reserved the right to take possession of the collateral “for the purposes of resale, either at public auction or by private treaty” if debtor did not pay within two weeks was adequate notification of a private sale conducted two months later. Even if the notification were inadequate, the debtor, who has the burden of proving consequential damages, could not show any damages because the debtor lacked the requisite funds to pay the debt and stop the sale.

143. *Dearborn Capital Corp. v. Bravo*,
[2009 WL 3013077](#) (Mich. Ct. App. 2009)
Secured creditor's settlement – approved by bankruptcy court – of priority dispute with another creditor over the proceeds of the collateral amounted to a disposition of the proceeds. Because the secured creditor did not provide the guarantor with advance notification of the settlement/disposition pursuant to § 9-611, the secured creditor's claim against the guarantor was barred.
144. *Moore v. Wells Fargo Construction*,
[903 N.E.2d 525](#) (Ind. Ct. App. 2009)
Although guarantor cannot waive in guaranty agreement his right to notification of the a disposition, guarantor did waive in the guaranty agreement any suretyship defense arising from a commercially unreasonable disposition. Notification of a public internet sale that includes the web address of the auction and the physical address of the auction company satisfies the requirement that it identify the location of the sale.
145. *C&J Leasing Corp. v. Beasley Investments, Inc.*,
[767 N.W.2d 420](#) (Iowa Ct. App. 2009)
Secured party who failed to give notification of disposition was not entitled to any deficiency judgment because it failed to rebut the presumption that, had it given proper notification, there would have been no deficiency.
146. *Key Equipment Finance, Inc. v. Hawkins*,
[985 A.2d 1139](#) (Me. 2009)
Secured party who failed to give notification of disposition to a guarantor was entitled to a deficiency judgment against the guarantor because the guarantor was aware of the sale and had identified potential buyers, and thus the secured party had rebutted the presumption that notification would have yielded proceeds equal to the amount of the secured obligation. The guarantor had no defense for impairment of collateral because the sale had been approved by a bankruptcy court and thus under § 9-627(c)(1) is conclusively deemed to have been conducted in a commercially reasonable manner.

– Conducting a Commercially Reasonable Disposition

147. *Bremer Bank, Nat. Ass'n v. John Hancock Life Ins. Co.*,
[2009 WL 702009](#) (D. Minn. 2009)
Secured party conducted commercially reasonable disposition of aircraft despite the short time between the acceleration notice and the sale, the fact that the aircraft was unavailable for inspection, and the allegedly misleading description of the aircraft to prospective bidders, because it was understood that any buyer would likely continue to lease the aircraft to the airline that had been leasing it. Moreover, the creditor contacted 448 entities that it thought might be interested in purchasing the aircraft and has follow-up discussions with 31 potential bidders who had submitted inquiries

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148. *Moore v. Wells Fargo Construction*,
[907 N.E.2d 1038](#) (Ind. Ct. App. 2009) (reconsidering earlier decision)
Guarantor did not waive right to a commercially reasonable disposition of the collateral. Disposition was commercially reasonable because secured party: (i) conducted research before setting a price; (ii) investigated the condition of the collateral, the cost of necessary repairs, and the cost of transporting it; (iii) performed the repairs necessary to make the collateral minimally operational; and (iv) twice listed the collateral for sale before finding a buyer.
149. *Financial Federal Credit, Inc. v. Wills*,
[2009 WL 4045136](#) (D. Neb. 2009)
Guarantor was liable for deficiency because secured party disposed of the collateral in a manner that the security agreement expressly provided would be commercially reasonable. No discussion of whether the guarantor agreed to such standards.
150. *Atchley v. Pepperidge Farm, Inc.*,
[2009 WL 672986](#) (E.D. Wash. 2009)
Creditor conducted commercially reasonable disposition of distributorship even though it received a low price because it had extensively advertised the distributorship for sale and the debtor had soured the market for the distributorship by making negative comments about it to former customers and prospective buyers.
151. *Hicklin v. Onyx Acceptance Corp.*,
[970 A.2d 244](#) (Del. Super. Ct. 2009)
The mere fact that a disposition through a private auction grossed over 50% of the collateral's value does not establish that the sale was conducted in a commercially reasonable manner. To establish that, the secured party must either show that every aspect of the sale was commercially reasonable or one of the safe harbors in § 9-627 applies. Even if private auctions generally result in higher sales prices than other methods, the secured party introduced no evidence that the specific auction procedures used (*e.g.*, advertising, location) would likely result in higher prices. The absolute bar rules applies to consumer transactions.

152. *Commercial Credit Group, Inc. v. Barber*,
682 S.E.2d 760 (N.C. Ct. App. 2009)

Creditor failed to comply with standards included in security agreement for conducting a commercially reasonable disposition because the standards specified that the sale be “upon terms of 25% cash down with the balance payable in good funds within 24 hours” but the terms stated in both the advertisement and at the start of the auction were that the creditor could, in its sole discretion, require full immediate payment. The sale was not commercially reasonable because the creditor sold the goods “as is” and while inoperable without explaining that the goods were covered by a warranty. Moreover, advertising for the sale was not commercially reasonable because the goods had a narrow commercial use yet the creditor ran advertisements for the auction in two general circulation newspapers just two days before and one day after the Christmas holiday. Such advertising for and scheduling of the sale was not designed to enhance competitive bidding.

153. *Textron Financial Corp. v. Lentine Marine Inc.*,
630 F. Supp. 2d 1352 (S.D. Fla. 2009)

Although low price alone does not render a disposition commercially unreasonable, the debtor’s allegation of low price is sufficient to put commercial reasonableness at issue and require the secured party to prove that every aspect of the disposition was reasonable. There is also a factual issue about the reasonableness of the notification of disposition because the notifications sent to the debtor and guarantors were returned undeliverable and the secured party provided no information about whether it took any other steps to provide notice.

154. *Wallander v. Texoma Community Credit Union*,
2009 WL 1650110 (Tex. Ct. App. 2009)

Although a secured party seeking to collect a deficiency has the burden of proving that the disposition was conducted in a commercially reasonable manner, the debtor’s general denial of liability is insufficient to put commercial reasonableness at issue and thus prevent summary judgment.

155. *John Deere Construction & Forestry Co. v. Mark Merritt Construction, Inc.*,
678 S.E.2d 183 (Ga. Ct. App. 2009)

Affidavit by secured party’s employee – based on his person knowledge and experience in the industry that disposition was conducted in commercially reasonable manner and that sales price was fair and reasonable – was sufficient to deny summary judgment against the secured party on the commercial reasonableness of the disposition.

156. *Lyon Financial Services, Inc. v. Oxford Maxillofacial Surgery, Inc.*,
2009 WL 2170999 (D. Minn. 2009)

Duty of lessor in finance lease to mitigate damages is much like a secured party’s obligation to conduct a disposition in a commercially reasonable manner. Lessee’s objection to sale of leased laser for \$12,000, 6% of its original value, while the same type of laser was being offered for sale for \$75,000 and \$130,000 was sufficient to raise factual issue as to whether sale was commercially reasonable.

157. *Okefenokee Aircraft, Inc. v. Primesouth Bank*,
[676 S.E.2d 394](#) (Ga. Ct. App. 2009)
Secured party that had repossessed but not yet disposed of collateralized aircraft was entitled to judgment on the debt even though the debtor may have a cause of action for failing to act in a commercially reasonable manner.
158. *United States v. B.C. Enterprises, Inc.*,
[667 F. Supp. 2d 650](#) (E.D. Va. 2009)
Lienor who sells collateral owned by a member of the military while the servicemember is on active duty or within 90 days thereafter is strictly liable for the resulting damages, regardless of whether the lienor knew of the debtor's military status.

– Collecting on Collateral

159. *University System of Maryland v. Mooney*,
[966 A.2d 418](#) (Md. 2009)
Secured party's action against government account debtor for sending payment to debtor after receiving instruction to pay the account debtor had to be dismissed because account debtor failed to first pursue administrative remedies.
160. *Nabers v. Mississippi State Tax Commission*,
[665 F. Supp. 2d 692](#) (S.D. Miss. 2009)
Tax Injunction Act does not bar action by secured creditor to enjoin taxing authority from collecting the debtor/taxpayer's accounts because the action is not an attempt to prevent the collection of taxes, merely to establish the priority of the secured creditor's lien. The Eleventh Amendment similarly does not bar the action or the creditor's attempt to recover amounts already collected by the taxing authority.
161. *JD Factors LLC v. Freightco LLC*,
[2009 WL 2509145](#) (N.D. Ind. 2009)
Regardless of whether secured party had purchased the debtor's accounts or merely made a loan secured by them, secured party was the real party in interest in action against account debtor and therefore diversity of citizenship depends on the secured party's location, not the debtor's location.
162. *Bank of West, Inc. v. Organic Grain & Mill., Inc.*,
[2009 WL 4671930](#) (D. Ariz. 2009)
Neither debtor nor secondary obligors were indispensable parties in action by secured creditor against account debtor, even though account debtor sought to set off against its obligation certain claims it asserted against the debtor.

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163. *Arnold v. City of San Antonio*,
[2009 WL 2983038](#) (W.D. Tex. 2009)
Creditor with a security interest in lawyer's accounts could not intervene in action brought by lawyer on behalf of a client, even though the defendants had settled the case and paid the settlement amount to the court. The creditor has no interest in the claim that formed the basis of the litigation and could protect its interests by bringing an action against the lawyer.
164. *Elsa State Bank & Trust Co. v. Trevino*,
[2009 WL 1089462](#) (Tex. Ct. App. 2009)
Secured creditor of subcontractor had no cause of action against contractor who had issued checks payable to only subcontractor after receiving instructions from secured party to make payments jointly to subcontractor and secured party. The decision makes no reference to Article 9.
165. *In re Bill Heard Enterprises, Inc.*,
[400 B.R. 813](#) (Bankr. N.D. Ala. 2009)
Lender's security interest in all assets of automobile dealer included credit balance with manufacturer but was subject to manufacturer's right of recoupment and setoff.
166. *Hunts Point Co-op Market, Inc. v. Madison Financial LLC*,
[2009 WL 2700169](#) (3d Cir. 2009)
Account debtor received consideration for agreeing to waive defenses: the funding provided to the debtor which would expedite the debtor's performance of the construction contract with the account debtor. Because of the waiver of defenses, under both traditional contract law and Article 9, the account debtor had to pay the factor that had purchased the accounts.
167. *Vander v. Safeway Ins. Co. of LA*,
[5 So. 3d 968](#) (La. Ct. App. 2009)
Debtor who reached settlement with insurer for damage to the collateral was not entitled to be listed as the only payee of the settlement check; the secured party was entitled to those funds.
168. *Commerce Bank, N.A. v. AMCO Ins. Co.*,
[2009 WL 702220](#) (S.D. Ill. 2009)
Secured creditor listed as loss payee in policy insuring the collateral had cause of action against insurer for issuing check payable only to the debtor following destruction of the collateral by fire. The contractual requirement that actions "under this insurance" be commenced within one year applied only to litigation related to whether a loss is covered, not to any action under the *policy* and specifically not to this claim for breach of contract.
169. *U.S. Claims, Inc. v. Yehuda Smolar, PC*,
[602 F. Supp. 2d 590](#) (E.D. Pa. 2009)
Debtor breached contract with and was liable to first accounts financier even though second accounts financier had priority.

170. *In re Delta Mills, Inc.*,

[404 B.R. 95](#) (Bankr. D. Del. 2009)

Factor that had generally assumed liability for nonpayment by approved account debtors was permitted to charge back account owed by unapproved affiliate of approved account debtor. Even though the factor had reviewed the financial information of both the approved account debtor and its affiliates and regularly accepted payment from the unapproved affiliate, it never approved the affiliate and was unaware that the debtor had begun selling to the unapproved affiliate because the debtor submitted invoices to the factor through an electronic data interchange system and used the customer identification number for the approved account debtor even for sales to the unapproved affiliate.

171. *Diessner v. Mortgage Electronic Registration Systems*,

[618 F. Supp. 2d 1184](#) (D. Ariz. 2009)

Mortgage servicer was not required to present the promissory note, or even to have possession of it, in order to nonjudicial foreclosure.

– Standing Issues

172. *Sky Technologies LLC v. SAP AG*,

[576 F.3d 1374](#) (Fed. Cir. 2009)

Entity that purchased patents from secured party, after secured party acquired them at a foreclosure sale, has standing to bring infringement action. Although an assignment of a patent must be in writing, the foreclosure in compliance with the UCC effected a valid transfer by operation of law.

– Statute of Limitations

173. *Arvelo v. Park Finance of Broward, Inc.*,

[15 So. 3d 660](#) (Fla. Ct. App. 2009)

Statute of limitations on secured creditor's deficiency claim began to run when debtor defaulted and creditor accelerated the debt, not when the creditor later disposed of the collateral.

174. *Farmers Coop. Co. v. Swift Pork Co.*,

[602 F. Supp. 2d 1095](#) (N.D. Iowa 2009)

Statute of limitations applicable to “secured interests” in farm products applied not merely to “security interests, but also to nonconsensual agricultural liens.

Liability Issues

175. *United States v. Mikell*,
344 Fed. Appx. 218 (6th Cir. 2009)
Substantial evidence supported verdict that principals of debtor were guilty of money laundering and wire fraud by selling collateralized inventory at substantially below market price – after misrepresenting to the secured party that it would be sold at the market price to induce the secured party to lift an injunction – repurchasing the inventory for their own account from the buyer for slightly more, and then selling it at the market price, thereby reaping most of its value for themselves.
176. *Elvis Presley Enterprises, Inc. v. Passport Video*,
334 Fed. Appx. 810 (9th Cir. 2009)
Substantial evidence supports the imposition of successor liability because the buyer of the debtor's assets at a foreclosure sale was a mere continuation of the business and the sale was part of a series of fraudulent transfers undertaken to avoid liability to creditors.
177. *Bischoff v. LCG Blue, Inc.*,
2009 WL 148519 (Cal. Ct. App. 2009)
Buyer of assets of defunct bar could be liable for conversion to creditors who held a security interest in all the bar's tangible and intangible assets. However, there was no liability for assuming the liquor license because under California law no security interest can attach to a liquor license. Moreover, although there could be tort liability for the unauthorized receipt of goodwill, in this case the goodwill was worth nothing because the bar was not operating and there were no historical profits upon which a capitalized value of goodwill could be calculated.
178. *Gibson v. Regions Financial Corp.*,
557 F.3d 842 (8th Cir. 2009)
Secured creditor was not liable for abuse of process for providing police with a replevin affidavit stating that debtor had sold vehicles out of trust and informing the police that the debtor regularly put cash and car titles in the briefcase he carried home at night. Abuse of process requires a willful act after the process issues and the secured creditor did nothing after police decided to search the debtor's home pursuant to a search warrant.
179. *Hardmon v. CCC Van Wert Credit Union*,
2009 WL 4895538 (Ohio Ct. App. 2009)
Secured creditor that peaceably repossessed car after debtor had paid the secured obligation was liable for conversion but not for intentional infliction of emotional distress because its conduct was not outrageous: at the time the creditor repossessed the car it believed that an outstanding balance remained on the loan, it had informed the debtor the car would be repossessed if he did not pay the debt, and the debtor who thought the debt had been paid, thereafter made two additional payments, further confusing the issue.

180. *Fifth Third Bank v. Lincoln Financial Securities Corp.*,
[2009 WL 2523444](#) (W.D. Ky. 2009)

Securities broker breached control agreement with customer's secured party by either: (i) misrepresenting the value of the customer's account by including in the stated value securities purchased with funds from a check that was later dishonored; or (ii) reversing trades after the check was dishonored despite a clause in control agreement by which broker "waive[d] and release[d] all liens, encumbrances, claims and rights of setoff it may have." The control agreement was not rendered unenforceable for lack of consideration or mutuality, mutual mistake, or the customer's fraud.

181. *Diesel Props S.R.L. v. Greystone Business Credit II LLC*,
[2009 WL 2514033](#) (S.D.N.Y. 2009)

Secured creditor that entered into tripartite agreement with debtor and debtor's supplier to pay supplier directly for certain matched invoices was not liable for failing to pay unmatched invoices. Although secured creditor on several occasions breached duty to notify supplier's of debtor's default, supplier failed to prove this breach caused its damages given that the supplier frequently shipped goods after receiving notification of breach or without waiting for response to its inquiries. Supplier has no claim for unjust enrichment against secured creditor for the amounts collected from debtor's customers for goods shipped to the debtor on credit because there is nothing unjust about a creditor being repaid what is due. Supplier was liable to secured creditor for unjust enrichment for benefits inuring from and costs saved because of access to the debtor's customer list, which supplier purloined and in which the creditor had a security interest.

182. *Vengurlekar v. HSBC Bank USA*,
[2009 WL 362003](#) (S.D.N.Y. 2009)

Secured party who obtained order against debtor's dissipation of assets, all of which were proceeds of its collateral, and whose representative took possession of debtor's checkbook but had no authority to write checks or to direct payment, was not liable to debtor's employees whose 401k plan contributions went unpaid during this period.

183. *Ford Motor Credit Co. v. Dunham*,
[2009 WL 4981913](#) (La. Ct. App. 2009)

Assignee of car loan acted negligently by refusing to suspend collection efforts against putative co-signer who claimed her signature was a forgery unless co-signer executed an affidavit and filed a police report because the assignee could have examined the loan documents, on which the signatures of the debtor and co-signer appeared to be by the same person, or it could have contacted the dealer, which would have informed the assignee that it did not verify the signature of the co-signor.

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184. *Hinden v. American Bank of North*,
[2009 WL 4573909](#) (Minn. Ct. App. 2009)
Secured creditor's alleged oral post-default promise to forebear was not enforceable under Minnesota's statute of frauds, which requires that "an agreement to lend or forbear repayment of money . . . or to make any other financial accommodation" be in writing. Creditor was not liable for wrongful repossession because even though it had repeatedly accepted late payments, the creditor notified the debtor of its intention to repossess unless the debtor paid in full and did not accept a late payment after the notification.
185. *In re Gluth Bros. Construction, Inc.*,
[424 B.R. 379](#) (Bankr. N.D. Ill. 2009)
Bank that extended maturity of loan in exchange for a security interest in collateral and a guaranty from the debtor's principal had no liability to the debtor's unsecured creditors under principles of deepening insolvency, if such a cause of action exists in Illinois, because it did nothing fraudulent. The unsecured creditors also had no cause of action against the bank under principles of lender liability because the bank did not exert control over the debtor so as to dictate corporate policy and the disposition of assets, its actions were completely consistent with a debtor-creditor relationship.
186. *Ennis v. Nizan*,
[2009 WL 4685223](#) (Conn. Super. Ct. 2009)
Article 9 does not preempt claims against secured party and its agent for torts, including conversion and breach of fiduciary duty, arising from allegations that agent, who was hired to manage the debtor's business, failed to pay the secured debt, never informed the debtor, and then secretly repossessed and sold the collateral. *See also Ennis Management, LLC v. Ennis Property Management, Inc.*, [2009 WL 4685259](#) (Conn. Super. Ct. 2009) (same ruling in related case).
187. *In re B.C. Rogers Poultry, Inc.*,
[2009 WL 3856428](#) (Bankr. S.D. Miss. 2009)
Letter of credit applicants could be subrogated to the rights of the beneficiary after payment under the letters of the credit and, armed with such subrogation rights, could maintain an action against the beneficiary for failure to conduct a sale in a commercially reasonable manner.
188. *Gaymar Industries Inc. v. FirstMerit Bank*,
[311 Fed. Appx. 814](#) (6th Cir. 2009)
Unsecured credit seller had no cause of action for unjust enrichment or equitable subordination against the secured creditor of equipment buyer.

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189. *Tredit Tire & Wheel Co., Inc. v. Regency Conversions, LLC*,
[636 F. Supp. 2d 598](#) (E.D. Mich. 2009)
Unpaid supplier to limited liability company had pled claim, based on piercing corporate veil, against secured party that by foreclosure had become the only member of the LLC, replaced the LLC's president with its own employee, began running the company, and "made the tactical and strategic decisions about the LLC's business affairs," including which of its vendors would be paid.
190. *Kazan v. Dough Boys, Inc.*,
[201 P.3d 508](#) (Alaska 2009)
Seller of two businesses who refused to amend overly broad financing statement filed against buyer unless paid \$60,000 was not liable to return that sum, which the buyer had paid pursuant to a settlement agreement, because he had acted in good faith and the settlement agreement was not unconscionable, and was not liable for other damages because the buyer did not prove that it suffered any .
191. *Adkins v. Chrysler Financial Corp.*,
[344 Fed. Appx. 144](#) (6th Cir. 2009)
Automobile financier that maintained cash management account for car dealer and which succeeded in establishing the priority of its security interest in the account during a conversion action brought by another creditor of the car dealer, was not entitled to charge the account for the attorney's fees. Although the financier's security agreement provided for recovery of attorney's fees incurred "in connection with Secured Party's exercise of any of its rights and remedies under this Agreement," the litigation arose under state common law, rather than under the security agreement.
192. *Alexander v. Wells Fargo Financial Ohio 1, Inc.*,
[911 N.E.2d 286](#) (Ohio 2009)
Debtor's action against secured party for not filing a termination statement was subject to arbitration. *See also Vanyo v. Citifinancial, Inc.*, [2009 WL 2403565](#) (Ohio Ct. App. 2009) (following *Alexander*).
193. *Citifinancial Auto, Inc. v. Mike's Wrecker Service, Inc.*,
[206 P.3d 63](#) (Kan. Ct. App. 2009)
Summary judgment denied on whether due process rights of lienholder were violated when towing company in another state sold \$11,000 car to enforce its \$800 lien for towing services without notifying the lienholder. The towing company complied with Kansas law by asking the Kansas DMV for information about the ownership of the car. The towing company received no information back – because the car had been titled and registered in Nevada – yet it did not conduct a CARFAX search, which would have disclosed the state of titling and the existence of a lien. Following up with the Nevada Division of Vehicles would have yielded the names of the owner and lienholder.

194. *Broyhill Furniture Industries, Inc. v. Hudson Furniture Galleries, LLC*,
[877 N.Y.S.2d 72](#) (N.Y. App. Div. 2009)

Secured creditor's complete settlement with and general release of the debtor prevented it from seeking reimbursement for any amounts the creditor had to pay to another secured party who later added a fraudulent transfer claim against the creditor to a pending action against the debtor.

195. *J.M. Mazzitelli Financing, L.C. v. Whitfield & Eddy, P.C.*,
[771 N.W.2d 652](#) (Iowa Ct. App. 2009)

Although assignee of secured party lost opportunity to object to proposed redemption of collateral in bankruptcy case of the debtor because the assignee's attorney negligently filed the objection in the name of the original secured party, that did not cause the assignee to lose the ability to operate the debtor's business or otherwise suffer damages. The collateral consisted only of the debtor's equipment and inventory, not its franchise agreement, accounts, trademarks, or trade names, and thus the assignee had no right to operate the debtor's business.

196. *Brookridge Funding Corp. v. Aquamarine, Inc.*
[675 F. Supp. 2d 227](#) (D. Mass. 2009)

Secured creditor that financed fish broker's acquisition of fish to fill eleven orders had no cause of action against other broker that stepped in and filled the orders when the debtor abruptly went out of business. The evidence did not establish that the funds loaned by secured creditor were used to buy the fish to fill the financed orders, and thus there was no unjust enrichment.

197. *Hamden F.C.U. v. Glass*,
[2009 WL 2961243](#) (Conn. Super. Ct. 2009)

Secured creditor has no cause of action against vehicle seller for failing to note the creditor's lien on the certificate of title for the vehicle because the creditor was able to repossess and sell the car. Although the creditor was part of the class protected by a state statute that requires sellers to have the lender's security interests noted on the title certificate, the creditor suffered no injury of the type the statute was designed to prevent.

198. *Stewart v. All States Quality Foods, L.P.*,
[771 N.W.2d 652](#) (Iowa Ct. App. 2009)

Although undersecured mortgagee had the right to refuse to release its lien for less than full payment, it nevertheless tortiously interfered with the contract of the debtor's listing agent by first authorizing the issuance of a counter-offer to prospective buyers and then refusing to close after that counter-offer was accepted, in an apparent effort squeeze out as much net proceeds as possible by extracting concessions from the listing agent.

199. *U.S. v. Pompano Helicopters, Inc.*,
[2009 WL 1456745](#) (S.D. Fla. 2009)

Federal indictment sufficiently stated an offense for mail fraud by alleging that defendants sold a helicopter without the knowledge and required approval of the secured parties, kept the proceeds, and mailed a forged release to the FAA to have the helicopter de-registered to enable the defendants to provide clear title to the purchaser.

BANKRUPTCY

Eligibility

200. *In re N2N Commerce, Inc.*,
[405 B.R. 34](#) (Bankr. D. Mass. 2009)

Assignee for the benefit of corporation's creditors did not have authority to file voluntary bankruptcy petition on behalf of corporation.

201. *In re Orchards Village Investments, LLC*,
[405 B.R. 341](#) (Bankr. D. Or. 2009)

Despite appointment of receiver to administer assets of manager-managed LLC, manager could file bankruptcy petition for the LLC because that act was ratified by the LLC members. However, the receiver would not be required to turn the assets of the business over to the debtor in possession.

Core Proceedings

202. *In re Charter Communications*,
[409 B.R. 649](#) (Bankr. S.D.N.Y. 2009)

Action by agent for pre-petition lenders seeking declaration that non-monetary, pre-petition default had occurred on credit facility – in apparent strategic effort to head off reinstatement of the credit facility – was a core proceeding even though the action was based on state law and neither the agent nor the lenders had filed a proof of claim.

Property of the Estate

203. *In re Lehman Brothers Holdings Inc.*,
[404 B.R. 752](#) (Bankr. S.D.N.Y. 2009)

Transfer of funds to the debtor's deposit account from an affiliated entity's deposit account at the same bank, that was initiated prepetition but completed postpetition did not result in the bank having a basis for asserting setoff rights. The transfer occurred post-petition, with the result that there was no mutuality of obligation.

204. *In re Prebul Jeep, Inc.*,
[2009 WL 4348602](#) (Bankr. E.D. Tenn. 2009)
Secured creditor's status as holder in due course of a check drawn by the debtor prepetition cut off any other claims to the check but did not make the creditor the owner of the funds in the deposit account on which the check was drawn.

Claims & Expenses

205. *In re Ames Department Stores, Inc.*,
[582 F.3d 422](#) (2d Cir. 2009)
Section 502(d) does not disallow administrative expenses owed to a creditor who fails to return an avoided transfer.
206. *In re Goody's Family Clothing, Inc.*,
[401 B.R. 131](#) (Bankr. D. Del. 2009)
Services provided to the debtor shortly before the petition cannot qualify as an administrative expense under § 503(b)(9).
207. *In re Circuit City Stores, Inc.*,
[416 B.R. 531](#) (Bankr. E.D. Va. 2009)
The UCC definition of goods – and the predominant purpose test for dealing with hybrid transactions involving both goods and services – applies in determining whether a claim qualifies as an administrative expense under § 503(b)(9).
208. *In re Pilgrim's Pride Corp.*,
[421 B.R. 231](#) (Bankr. N.D. Tex. 2009)
The UCC definition of goods – unaffected by any state variations and without reference to the predominant purpose test – applies in determining whether a claim qualifies as an administrative expense under § 9-503(b)(9). Natural gas and water that debtor received within 20 days before the petition are goods for which the seller was entitled to an administrative expense claim under § 503(b)(9), but electricity is not.
209. *In re TI Acquisition, LLC*,
[410 B.R. 742](#) (Bankr. N.D. Ga. 2009)
Supplier was entitled to administrative expense claim for full value of goods delivered to the debtor within the 20 days preceding the bankruptcy petition, with no reduction for payments that it received during the same 20-day period on its earlier invoices. The administrative expense is not subject to disallowance under § 502(d) for failure to return an avoidable prepetition transfer.

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210. *In re Circuit City Stores, Inc.*,
[2009 WL 4755253](#) (Bankr. E.D. Va. 2009)
Chapter 11 debtor may setoff post-petition obligations, including administrative expenses, against prepetition receivables, and the debtor may allocate its setoff rights in a manner that maximizes the distribution to all creditors of the estate.
211. *In re G.I. Joe's Holding Corp.*,
[420 B.R. 208](#) (Bankr. D. Del. 2009)
Creditor's contingent claim for reimbursement of amounts due to vendors that it had guaranteed but not paid was covered by a provision of security agreement that made the collateral "secure the payment and performance of all of Debtors' obligations and indebtedness to Creditor" and was not disallowed under § 502(e)(1)(B).
212. *In re Ocean Blue Leasehold Property LLC*,
[414 B.R. 798](#) (Bankr. S.D. Fla. 2009)
Intercreditor agreement did not bar junior lender from obtaining administrative expense priority for legal fees and expenses it incurred and which benefitted the estate because the senior had effectively been paid by making a credit bid for the full amount of its debt and because the language of the agreement, which provides that "all payments or distributions upon or with respect to the Mezzanine Loan which are received by Mezzanine Lender shall be received and held in trust by the Mezzanine Lender for the benefit of Senior Lender" did not apply to the claim for administrative expenses.
213. *In re SNTL Corp.*,
[571 F.3d 826](#) (9th Cir. 2009)
Creditors' return of allegedly preferential payment pursuant to settlement agreement revives claim against guarantor. Such a revived claim of an unsecured creditor properly includes post-petition attorney's fees provided for in the prepetition contract even though the creditor's claim for such expenses is contingent and unliquidated on the petition date.
214. *Ogle v. Fidelity & Deposit Co. of Maryland*,
[586 F.3d 143](#) (2d Cir. 2009)
Post-petition attorney's fees incurred by unsecured creditor were an allowable claim pursuant to the creditor's pre-petition indemnity agreement with the debtor.
215. *In re Sun 'N Fun Waterpark LLC*,
[408 B.R. 361](#) (10th Cir. BAP 2009)
Both prepetition and post-petition attorney's fees of incurred by over-secured mortgagee after obtaining a judgment of foreclosure were part of mortgagee's claim because they were provided for in the mortgage and the foreclosure sale had not yet occurred, and thus the debt was not yet merged into the judgment.

216. *Tennessee Commerce Bank v. Hutchins*,

[409 B.R. 680](#) (D. Vt. 2009)

Bank that loaned funds to debtor to pay off truck loan but which failed to perfect its security interest in the truck could not be equitably subrogated to the perfected lien of the paid-off lender because the Bank was not secondarily liable on the original debt.

217. *In re Nosek*,

[406 B.R. 434](#) (D. Mass. 2009)

Bankruptcy did not err in sanctioning the attorneys and putative creditors who signed pleadings for misrepresentations about who owned a mortgage loan.

218. *In re Olio Dental, Inc.*,

[2009 WL 1475273](#) (Bankr. S.D. Ind. 2009)

Claim of creditor with blanket lien on all assets of corporation that operated a dentistry practice was to be valued as a going concern but discounted by the fact that the debtor's principal was not bound by an employment agreement or non-compete agreement, and thus he could walk away from this practice and open a new business across the street taking many of the debtor's customers with him.

219. *In re Franklin Equipment Co.*,

[416 B.R. 483](#) (Bankr. E.D. Va. 2009)

Loans made and acquired by insiders would not be recharacterized as equity because: (i) the documents clearly identified the advanced funds as loans and the formalities were otherwise respected; (ii) fixed interest payments were required (though not always made); (iii) payment was to come from cash flow, not profits; (iv) the loans were secured; (v) there was no evidence that the debtor was undercapitalized; (vi) the loans were not owned in the sale proportion that the stock was; and (vii) the loaned funds were used to meet daily operating expenses, not to acquire capital assets.

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

[399 B.R. 388](#) (Bankr. D. Del. 2009)

Even if contract between creditor and affiliated debtors permits triangular setoff of debts owed by any affiliate against obligations of the creditor, § 553 prohibits the setoff the obligations owed to and by affiliated debtors because they are not mutual.

221. *In re Garden Ridge Corp.*,

[399 B.R. 135](#) (D. Del. 2009)

Former employee's claim against one debtor could not be setoff against employee's obligation to affiliated debtor even though the bankruptcy cases of the two debtors had been substantively consolidated. Substantive consolidation does not create mutuality of obligation were it does not otherwise exist.

222. *In re Lifestyle Furnishings, LLC*,

[418 B.R. 382](#) (Bankr. D. Idaho 2009)

Bank that inadvertently released to trustee funds subject to the bank's setoff rights and then waited two months to inform the trustee of its error and more than a year to seek their return and had waived its setoff rights.

Automatic Stay & Injunctions

223. *Thompson v. General Motors Acceptance Corp., LLC*,

[566 F.3d 699](#) (7th Cir. 2009)

Secured creditor who repossessed property prepetition exercises control over the property and thereby violates the stay by not returning it to the debtor. Upon the debtor's request, the secured creditor must first return the seized asset and then, if necessary, seek adequate protection of its interests.

224. *In re Wardrobe*,

[559 F.3d 932](#) (9th Cir. 2009)

Creditor who obtained relief from the stay to proceed with action against debtor's bonding companies and to compel the debtor to appear as a witness did not have authority to amend complaint and obtain default judgment against the debtor for fraudulent misrepresentation, and thus state court judgment was not entitled to preclusive effect in creditor's § 523(a)(2) action against the debtor.

225. *In re Pacific Lifestyle Homes, Inc.*,

[2009 WL 688606](#) (Bankr. W.D. Wash. 2009)

Secured creditor of bankruptcy debtor would be enjoined from proceeding against insider guarantor so that guarantor could use his funds to provide funds needed to a successful reorganization.

226. *In re Aznoe Agribiz, Inc.*,

[416 B.R. 755](#) (Bankr. D. Mont. 2009)

Creditor did not violate stay by perfecting agricultural lien post-petition despite debtor's argument – based on statutory language – that the creditor's lien did not attach until filing, and therefore §§ 546(b) and 362(b)(3) should not be applicable.

227. *In re Rafter Seven Ranches L.P.*,

[414 B.R. 722](#) (10th Cir. BAP 2009)

A limited partnership is not an "individual," entitled to damages for willful violations of automatic stay.

Sales of Assets

228. *In re Chrysler, LLC,*

[576 F.3d 108](#) (2d Cir. 2009)

Section 363 sale of substantially all of the debtor's assets was not an impermissible *sub rosa* plan because the equity in the new entity that, as part of the sale transaction, would be provided to unions with unsecured claims was coming from governmental loans and thus was not property of the bankruptcy estate and the transaction was necessary to preserve value for all creditors. Moreover, the secured creditors were bound by their collateral agent's consent to a release of their liens.

229. *In re Pacific Lumber Co.,*

[584 F.3d 229](#) (5th Cir. 2009)

Reorganization plan that involved a sale of noteholders' collateral could be crammed down even though it did not give the noteholders an opportunity to credit bid because it provided of the "indubitable equivalent" of their allowed secured claims: cash in excess of the value of the collateral.

230. *In re Philadelphia Newspapers, LLC,*

[418 B.R. 548](#) (E.D. Pa. 2009)

Debtor may auction assets without allowing secured claimants to credit bid if the secured claimants are to receive the indubitable equivalent of their claims.

231. *In re LWD, Inc.*

[2009 WL 367738](#) (W.D. Ky. 2009)

Section 363 order authorizing sale of corporate debtor's assets free and clear of liens and claims did not bar action against individuals who were alter egos of debtor for personal liability for wrongful conversion of an improperly endorsed check.

232. *In re Farmland Industries, Inc.,*

[408 B.R. 497](#) (8th Cir. BAP 2009)

Section 363(m) barred claims for tortious interference with business and conspiracy by unsuccessful bidder against the buyer, the buyer's chief executive officer, and officers of the debtor because even though the claim did not seek to unwind the sale, they attacked integral and essential provisions of the sale order and the sale transaction.

233. *In re Jolan,*

[403 B.R. 866](#) (Bankr. W.D. Wash. 2009)

Numerous statutes – including sections 9-615 and 9-617 of the UCC – provide for a sale of property under conditions in which a junior lienor can be compelled to accept a money satisfaction in exchange for its lien, and thus set the stage for a sale under § 363(f)(5) of the Bankruptcy Code.

234. *In re Gulf Coast Oil Corp.*,

[404 B.R. 407](#) (Bankr. S.D. Tex. 2009)

Although lender holding a lien on all of the debtor's assets was substantially undersecured, and thus the sale price of a § 363 sales would not really matter, there was no need to conduct an immediate sale of substantially all of the assets through a process that would not necessarily produce a fair price.

235. *In re Distributed Energy Systems Corp.*,

[2009 WL 1458175](#) (Bankr. D. Del. 2009)

Settlement agreement among debtor, secured party, and creditors' committee, which provided for the sale of collateralized assets and the diversion of some of the proceeds to the general, unsecured claimants, thereby bypassing priority claimants, did not violate the absolute priority rule; the diverted assets were the property of the secured party, not property of the estate.

Discharge & Dischargeability

236. *In re Schoen*,

[407 B.R. 420](#) (Bankr. W.D. Okla. 2009)

Language in security agreement between hospital and patient and her spouse providing that any health insurance proceeds received by the patient or spouse "shall be deemed to be held in trust by [them] for and as the property of the Hospital" was insufficient to create a true trust relationship, in part because the trust res did not exist at the time the agreement was made. As a result, the debt for health care services was not rendered nondischargeable under § 523(a)(4) for failing to remit the proceeds to the hospital.

237. *In re Hanley*,

[2009 WL 2827952](#) (Bankr. D. Mass. 2009)

Creditor's allegation that debtor failed to record mortgage to be granted by debtor's sister was sufficient basis for complaint under § 523(a)(2); because of the creditor's long-term friendship with the debtor, the creditor was not required to allege that he performed the type of due diligence required of a stranger to a transaction before advancing funds to establish justifiable reliance.

238. *Alkenbrack v. Green Tree Servicing, L.L.C.*,

[2009 WL 4756349](#) (Ohio Ct. App. 2009)

Debtor's fraud claim against secured creditor for billing debtor and accepting payments post-discharge were subject to arbitration. Even though the debt was discharged, the security interest survived, the claim arose out of the parties' contract, and the claim was within the scope of the arbitration clause.

Leases & Executory Contracts

239. *In re Particle Drilling Technologies, Inc.*,
2009 WL 2382030 (Bankr. S.D. Tex. 2009)

Agreement by which the debtor, a patent owner, agreed to pay royalties was not an executory contract because neither party had any unperformed obligations other than the payment of money. Moreover, the royalty obligation is not a covenant that “runs with” the patent, and the language in the agreement purporting to bind future assignees is nothing more than an unperfected security interest. Accordingly, the debtor could sell the patent free and clear of the royalty obligation.

Avoidance Powers**– Preferences**

240. *In re Bremer*,
408 B.R. 355 (10th Cir. BAP 2009)

Because avoided preferential lien is automatically preserved for the benefit of the estate, the trustee is not also entitled to a money judgment for the value of the property transferred. Although a money judgment is appropriate in some circumstances – such as when the collateral has been sold or has depreciated substantially – in most cases lien avoidance and a money judgment are mutually exclusive remedies.

241. *In re Winstar Communications, Inc.*,
554 F.3d 382 (3d Cir. 2009)

Creditor that did not qualify as an “insider” under any of the examples listed in § 101(31) was nevertheless an insider because it had the ability to coerce the debtor into making unnecessary purchases and used the debtor “as a mere instrumentality to inflate [its] own revenues.” The earmarking defense could not protect the payment to the creditor because the lender that supplied the funds had not required that the debtor use the money to pay off the creditor. While the creditor’s claim could be equitably subordinated to other claims, it could not be subordinated to equity interests.

242. *In re Dilworth*,
560 F.3d 562 (6th Cir. 2009)

Balance transfer from one credit card issuer to another conducted via balance transfer check was a transfer of an interest in the debtor’s property during the preference period the diminished the bankruptcy estate. The earmarking, did not protect the creditor paid because the debtor initiated and controlled the disposition of the funds.

243. *In re Wells*[561 F.3d 633](#) (6th Cir. 2009)

Payment of one credit card debt using “convenience checks” drawn on second credit card account was a transfer of an interest in the debtor’s property and avoidable as a preference. The earmarking, did not protect the creditor paid because the debtor initiated and controlled the disposition of the funds.

244. *In re USA Detergents, Inc.,*[418 B.R. 533](#) (Bankr. D. Del. 2009)

Guarantor’s waiver of subrogation, contribution, indemnity, and reimbursement rights did not prevent it from being a creditor of the debtor for the purposes of a preference action.

245. *In re Villarreal,*[413 B.R. 633](#) (Bankr. S.D. Tex. 2009)

Creditor’s purchase of mortgaged property worth in excess of \$3 million for \$70,000 at a properly conducted foreclosure sale was an avoidable preference because it enabled the creditor to receive more than what it would have received in a Chapter 7 liquidation.

246. *In re Pillowtex Corp.,*[416 B.R. 123](#) (Bankr. D. Del. 2009)

New value defense in § 547(c)(4) does not require that the new value remain unpaid. As a result, a creditor who during the preference period makes several new advances after each old advance is paid does not become liable for the sum of all the payments.

247. *In re Felt Mfg. Co., Inc.,*[2009 WL 3348300](#) (Bankr. D.N.H. 2009)

Supplier provide new value for the purpose of § 547(c)(4) not when it shipped goods to the debtor but later when, pursuant to the parties consignment agreement, it authorized the debtor to withdraw the goods from the railcars sitting at the debtor’s facility.

248. *In re Falcon Products, Inc.,*[2009 WL 248596](#) (Bankr. E.D. Mich. 2009)

Although prepetition payment to insurance premium financier satisfied the prima facie case for an avoidable preference, it was protected from avoidance as a contemporaneous exchange for new value because the financier released an equivalent amount of its interest in the unearned premiums.

249. *In re Enron Creditors Recovery Corp.,*[407 B.R. 17](#) (S.D.N.Y.), *rev’d*, [2009 WL 5174119](#) (S.D.N.Y. 2009)

Debtor’s early redemption of commercial paper at significantly above-market price were not payments in the ordinary course of business and, if made to retire the debt, would also not be “settlement payments” under § 546(e).

250. *In re Enron Creditors Recovery Corp.*,

[422 B.R. 423](#) (S.D.N.Y. 2009)

Debtor's early redemption of short-term commercial paper through a financial intermediary at significantly above-market price were "settlement payments" under § 546(e) even though not conducted in the ordinary course of business and even though there may not have been a purchase or sale of the commercial paper. The commercial paper qualified as a "security" under the Bankruptcy Code, even though it was not a "security" under the 1934 Act, and the redemption was a "transaction" in securities.

251. *In re Motion Marketing Solutions, Inc.*,

[403 B.R. 403](#) (Bankr. N.D. Tex. 2009)

Even though the IRS filed its notice of tax lien within the preference period, the tax lien cannot be avoided as a preference; although § 547(c)(6) protects the "fixing of a statutory lien," that language covers the perfection of the lien as well.

– Strong-Arm Powers

252. *In re Barnhill's Buffet, Inc.*,

[421 B.R. 602](#) (6th Cir. BAP 2009)

To the extent that contractor, who had not complied with mechanic's lien statute, had an equitable lien on the debtor's property for prepetition repair work, such lien was cutoff by the bankruptcy petition and the debtor-in-possession's strong-arm powers.

253. *In re Katz*,

[2009 WL 4269604](#) (6th Cir. BAP 2009)

Lender that refinanced debtor's home mortgage but failed to record its own deed of trust could not be equitable subrogated to the rights of the prior mortgagee whose lien had been released. Subrogation is not available if it would work any injustice to the rights of a junior lienholder and while an *existing* junior lienholder would not have been harmed by equitable subrogation, the trustee's strong-arm powers give the trustee the status of a lienor *as of the date of the bankruptcy petition*. Because the public record disclosed no lien at that time, subrogation would be prejudice the trustee's rights.

– **Fraudulent Transfers**

254. *Boyer v. Crown Stock Distribution, Inc.*,
[587 F.3d 787](#) (7th Cir. 2009)

The sale of all the assets of a business to a newly formed corporation that financed the purchase by incurring massive debt was an avoidable fraudulent transfer because the new corporation did not receive reasonably equivalent value and was left with unreasonably small amount of assets to conduct the business. As a result, the shareholders of the seller had to disgorge the payments received, including a dividend of cash that the seller owned before the sale.

255. *In re Maryland Property Associates, Inc.*,
[309 Fed. Appx. 737](#) (4th Cir. 2009)

Payments to a creditor/bank can be avoided under the Uniform Fraudulent Conveyances Act for actual fraud if the bank has constructive knowledge – as opposed to actual knowledge – of the debtor’s fraud. The bank’s loan officer in this case knew of the unusual nature of transactions, participated in creating misleading audit documents, and produced dummy account statements for the debtor (a former director and shareholder of the bank). Even though neither the loan officer nor the bank had any financial incentive in the fraud, the loan officer was not merely “incredibly stupid.”

256. *Gredd v. Bear, Stearns Securities Corp.*,
[328 Fed. Appx. 709](#) (2d Cir. 2009)

Good faith of broker who received margin payments from client engaged in a massive Ponzi scheme could be assessed overall – based on its investigation after receiving information that put it on inquiry notice of the problems – and need not be decided on a transfer-by-transfer basis.

257. *Alexander v. Holden Business Forms, Inc.*,
[2009 WL 1406242](#) (N.D. Tex. 2009)

Payments by insolvent company to creditor with insider guaranty were not avoidable under the Uniform Fraudulent Transfer Act even though they may have benefitted insider guarantors because resulting reduction in debt was reasonably equivalent value and creditor was not an insider.

258. *In re Plassein International Corp.*,
[405 B.R. 402](#) (Bankr. D. Del. 2009)

Fees paid by debtor pursuant to contracts entered into at arms length with investment advisors in connection with leveraged acquisitions were for reasonably equivalent value.

259. *Citizens Bank v. Brown*,
[898 N.E.2d 889](#) (Mass. Ct. App. 2009)

The transfer of fully encumbered property cannot be an avoidable fraudulent transfer even though the property might later appreciate and be worth more than the debt it secures.

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260. *In re Jones*,
403 B.R. 228 (Bankr. D. Conn. 2009)
Prepetition transfer of mortgaged home cannot be avoided as a fraudulent transfer under state law because there was no evidence that the value of the home exceeded the combined amount of all encumbrances and the applicable homestead exemption.
261. *In re All American Bottled Water Corp.*,
2009 WL 722994 (Bankr. W.D. Wash. 2009)
Transaction in which debtor acquired \$32 million in debt but only \$25 million in cash, because the remainder was paid back as points, was nevertheless for reasonably equivalent value because, taking the transaction as a whole, the debtor received significant intangible or non-monetary benefits from the nonrecourse bridge loan, including the opportunity to profit.
262. *In re Brobeck, Phleger & Harrison LLP*,
408 B.R. 318 (Bankr. N.D. Cal. 2009)
Insolvent partnership's waiver of right to profits from unfinished business was a transfer for which it received no reasonably equivalent value in exchange, and thus was avoidable. Assistance in collecting pre-dissolution receivables, relieving the partnership of the duty to complete unfinished business and avoiding malpractice liability were not provided in exchange for the waiver.
263. *In re Short*,
2009 WL 2563469 (Bankr. D. Kan. 2009)
Debtor's prepetition agreement with sole tenant to discontinue charging rent after foreclosure proceedings began was a transfer of an interest in property for lack of reasonably equivalent value, and thus tenant was liable for total amount of unpaid rent.
264. *Mullins v. Testamerica Inc.*,
564 F.3d 386 (5th Cir. 2009)
Secured creditor's allocation of a portion of the proceeds from debtor's sale of assets to a favored unsecured creditor was not a "transfer" of the debtor's assets under the UFTA and thus could not be avoided as fraudulent by another unsecured creditor.
265. *ASARCO LLC v. Americas Mining Corp.*,
404 B.R. 150 (S.D. Tex. 2009)
Recipient of fraudulent transfer of stock was liable for return the stock, dividends received, and prejudgment interest, but not for damages for the transferor's loss of control because creditors of the transferor would not have been able to realize a premium for control due to transfer restrictions and encumbrances on the stock.

– Protection for Settlement Payments

266. *In re Plassein Int'l Corp.*,
[590 F.3d 252](#) (3d Cir. 2009)
Debtor's buyout payments to shareholders of acquired corporations were "settlement payments" protected from avoidance even though the securities in question were privately-held.
267. *Contemporary Industries Corp. v. Frost*,
[564 F.3d 981](#) (8th Cir. 2009)
Payments to bank in settlement of obligation to sellers of closely-held stock in connection with leveraged buyout was immune from avoidance under § 546(e) even though the bank had no beneficial interest in the funds and even though the transaction did not involve the public securities markets.
268. *In re QSI Holdings, Inc.*,
[571 F.3d 545](#) (6th Cir. 2009), *cert. denied*, [2010 WL 154962](#) (2010)
Payments made through bank to shareholders of corporation in connection with prepetition leveraged buyout were immune from avoidance even though the target was a privately held entity.

Reorganization Plans

269. *Wiese v. Community Bank of Central Wisconsin*,
[552 F.3d 584](#) (7th Cir. 2009)
Bankruptcy court did not err in finding cause to treat terms in confirmed plan – whereby secured party gave up lien on escrowed funds in return for release of lender liability claims – as binding even after the debtor later chose to dismiss their Chapter 12 case.
270. *In re Pacific Lumber Co.*,
[584 F.3d 229](#) (5th Cir. 2009)
Paying secured creditors the full amount of the secured claim – as determined after a valuation hearing – is the "indubitable equivalent" of their claim for the purposes of cramdown under § 1129(b)(2)(A)(iii). The creditors need not be afforded the right to bid or be given the right to later appreciation of the collateral. Whether it was unfair discrimination for the plan to treat the creditors' deficiency claim differently from employee and trade creditor claims was an issue that was equitably moot. Plan could not absolve nondebtors (other than members of the creditors committee) of whatever liability they may have for negligence during bankruptcy.

271. *In re New Century TRS Holdings, Inc.*,
407 B.R. 576 (D. Del. 2009)

Bankruptcy court should have denied confirmation to 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). Even though the plan does not ignore inter-company liabilities, it substantively consolidates the debtors and the record did not show that such consolidation was warranted. The plan also discriminates among members of the same class.

272. *In re Journal Register Co.*,
407 B.R. 520 (Bankr. S.D.N.Y. 2009)

Plan by which secured creditors would “gift” some of their recovery to a select portion of the creditors in the class of general unsecured claimants did not discriminate among members of the same class and could be crammed down. Members of a class of creditors may have rights from third parties that other members of the class do not, and the fact that the plan provides for an administrator to make the distribution from the secured creditors and for the court to resolve any disputes does not implicate the classification scheme under the Plan.

273. *In re Charter Communications*,
419 B.R. 221 (Bankr. S.D.N.Y. 2009)

Plan that pays noteholders 32.7% of their claims while paying general unsecured claimants in full did not discriminate unfairly because the notes were convertible into equity and the noteholders enjoyed an alternate source of recovery unavailable to the general unsecured creditors.

274. *In re The Aspen Street Corp.*,
405 B.R. 767 (Bankr. E.D. Pa. 2009)

Statement in confirmed plan that the amount of secured creditor’s claim “shall be determined by taking the pre-petition principal balance plus interest at the non-default contract rate less adequate protection payments” precluded the creditor from adding post-petition attorney’s fees and post-petition late charges to its claim.

275. *In re Ion Media Networks, Inc.*,
419 B.R. 585 (Bankr. S.D.N.Y. 2009)

Creditor who purchased piece of second lien debt was bound by inter-creditor agreement and therefore lack standing to either: (i) challenge whether the debtors’ FCC licenses were encumbered by the first lien; or (ii) object to the plan.

276. *In re DBSD North America, Inc.*,

[421 B.R. 133](#) (Bankr. S.D.N.Y. 2009)

Vote would be designated under § 1126(e) for creditor with a \$250 million investment in debtor's competition and which, after the debtor proposed its reorganization plan, purchased all of the first lien debt at par and substantial amounts of the second lien debt from sellers who were not obligated to support the plan. The creditor's actions were an effort to acquire control of a strategic asset and thus not in good faith.

277. *In re Player Wire Wheels, Ltd.*,

[421 B.R. 851](#) (Bankr. N.D. Ohio 2009)

Creditor of LLC member with a security interest in the member's LLC interest was a party in interest the LLC's Chapter 11 bankruptcy because the creditor has a stake in how the membership interest is valued. However, the creditor cannot vote on the reorganization plan because the creditor is not a creditor of the LLC and, until the creditor forecloses on the membership interest, is also not an equity holder.

Other Bankruptcy Matters

278. *Philadelphia Newspapers, LLC v. Official Committee Of Unsecured Creditors*,

[408 B.R. 585](#) (E.D Pa. 2009)

Bankruptcy court erred in denying Chapter 11 debtor's request for appointment of special counsel to advise debtor of its legal rights regarding prepetition incident in which one secured creditor improperly tape recorded meeting with debtor about amending its credit facility and restructuring the debt.

GUARANTIES & RELATED MATTERS

279. *Rabo Agrifinance Inc. v. Terra XXI Ltd.*,

[583 F.3d 348](#) (5th Cir. 2009)

Guarantor who paid off first lien debt after it had been acquired by holder of second lien was not subrogated to the first lien position. Subrogation cannot prejudice a creditor and thus does not arise when the surety pays less than all the debt.

280. *SCR Joint Venture L.P. v. Warshawsky*,

[559 F.3d 133](#) (2d Cir. 2009)

Because subordination agreement prohibited junior creditor from trying to collect from guarantor until senior was paid in full, and guarantor had raised question of whether senior has been paid in full, junior was not entitled to summary judgment in action against guarantor.

281. *Highland Park CDO I Grantor Trust, Series A v. Wells Fargo Bank*,
[2009 WL 1834596](#) (S.D.N.Y. 2009)

Clause in intercreditor agreement that “Senior Lender shall be entitled to receive payment and performance in full of all amounts due or to become due to Senior Lender before Mezzanine Lender is entitled to receive any payment on account of the Mezzanine Loan” applied to payment from guarantors as well as from the debtor, and thus the Mezzanine Lender was enjoined from going after the guarantors until the Senior Lender was paid in full.

282. *LPP Mortgage, Ltd. v. Sugarman*,
[565 F.3d 28](#) (1st Cir. 2009)

Guaranty agreement that included preprinted term that allowed the creditor to release collateral but typed additional language that limited the guarantor’s liability “to the deficiency existing after sale of corporate assets securing the subject loan” was ambiguous and lower court’s decision to release guarantor because creditor has released or subordinated its position on much of the collateral without the guarantor’s consent was reasonable.

283. *Israel v. Chabra*,
[906 N.E.2d 374](#) (N.Y. 2009)

Guaranty agreement that consented in advance to “any change in the time, manner or place of payment” of the underlying obligation but which also required the guarantor’s written consent to amendments to the underlying obligation was enforceable because under traditional common-law principles of interpretation the first of two conflicting clauses controls and this principle was unaffected by New York General Obligations Law § 15-301(1) (which validates no-oral-modifications clauses).

284. *TW General Contracting Services, Inc. v. First Farmers Bank & Trust*,
[904 N.E.2d 1285](#) (Ind. Ct. App. 2009)

Guarantors who signed unlimited guarantees of all existing and future obligations of corporation to bank were liable for balance due on renewal and additional notes and cases holding that guarantors will be relieved of their obligations if the underlying debts are materially altered without their consent are inapposite.

285. *Cape Haze Investments, LTD v. Eilers*,
[2009 WL 454662](#) (W.D. Wash. 2009)

Guarantor of secured debt was not discharged when the secured party let perfection of its security interest lapse because nothing in the guaranty agreement required the secured party to go after the collateral before pursuing the guarantor and, in any event, the secured party did foreclose on the collateral.

286. *CapitalSource Finance, LLC v. Delco Oil, Inc.*,
[608 F. Supp. 2d 655](#) (D. Md. 2009)

Guarantor of secured debt had no defense merely because the creditor had not yet chosen to foreclose on the collateral.

287. *First International Bank & Trust v. Peterson*,
[776 N.W.2d 543](#) (N.D. 2009)

Guarantor of secured debt were discharged by bank's credit bid of the full amount of the debt at the foreclosure sale despite provisions in the guarantees that only full payment of the indebtedness would discharge the guarantors and the guarantor's liability would not be affected by any acceptance of collateral, and despite bank's letter to the guarantors, sent in advance of the foreclosure sale, which stated bank's intent to credit bid but still seek payment from the guarantors.

288. *In re Bill Heard Enterprises, Inc.*,
[406 B.R. 98](#) (Bankr. N.D. Ala. 2009)

Borrowers and guarantors had no cause of action or defense against lender's assignee for failure to record mortgage because there was no contractual promise to record the mortgage, no fiduciary relationship, and because the guarantors had waived both any requirement that the lender pursue the collateral before attempting to collect and any impairment of the collateral.

289. *Merrill Lynch Commercial Finance Corp. v. Omni Watch and Clock Co., LLC*,
[2009 WL 2244614](#) (N.D. Ill. 2009)

Creditor's alleged failure to perfect security interest on collateral in China did not impair its action against the debtor or the guarantors because the loan agreement expressly provided that the creditor had no duty or obligation to preserve or protect the collateral and the guaranties provided that the guarantors' liability would not be affected or impaired by the creditor's failure to realize upon or protect any collateral.

290. *Bank of Oklahoma v. Red Arrow Marina Sales & Service, Inc.*,
[224 P.3d 685](#) (Okla. 2009)

Anti-deficiency statute insulates the debtor from liability for a deficiency on a mortgage loan but does not insulate a guarantor. The guarantor remained liable because the guarantor waived suretyship defenses in the guaranty.

291. *Long John Silver's, Inc. v. DIWA III, Inc.*,
[650 F. Supp. 2d 612](#) (E.D. Ky. 2009)

Court had no personal jurisdiction over guarantor of franchisee's obligations even though the franchise agreement included a choice-of-forum clause and a consent to personal jurisdiction because the guaranty did not contain such clauses.

LENDING, CONTRACTING & COMMERCIAL LITIGATION

292. *Alliance Data Systems Corp. v. Blackstone Capital Partners V.L.P.*,
[963 A.2d 746](#) (Del. Ch. Ct. 2009)

Special purpose entity formed to acquire business, which promised: (i) to use reasonable best efforts to obtain regulatory approval for the merger, and (ii) that its parent company would not take any action to prevent or impair the merger, did not breach merely because its parent refused OCC demands to put its own credit at risk. The first promise was not breached because the SPE had made extensive efforts to obtain regulatory approval and the seller could not turn the second promise – a negative covenant with an accepted commercial meaning – into a wide-ranging promise to take any affirmative action necessary to obtain regulatory approval.

293. *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.*,
[983 A.2d 304](#) (Del. Ch. Ct.), *aff'd*, [981 A.2d 1173](#) (Del. 2009)

Board of Directors may approve as a “continuing director” persons nominated by stockholders and initially opposed by incumbent directors, thereby not triggering right of bondholders under the trust indenture to put notes back to the corporation at face.

294. *The Shipping Corporation of India Ltd. v. Jaldhi Overseas Pte, Ltd.*,
[585 F.3d 58](#) (2d Cir. 2009)

Electronic fund transfers being processed by an intermediary bank are not property subject to attachment under Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure, overruling *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002).

295. *Roswell Capital Partners LLC v. Alternative Construction Technologies*,
[2009 WL 497578](#) (S.D.N.Y. 2009)

Provision in loan agreement that required debtors to post a bond before alleging any “violation of the law” by the lenders as a justification for default would be interpreted to apply to all criminal and civil statutes – not merely criminal laws, as the debtor argued; not all common-law torts, as lender argued – and did not violate public policy.

296. *Hoosier Energy Rural Electric Cooperative, Inc. v. John Hancock Life Insurance Co.*,
[582 F.3d 721](#) (7th Cir. 2009)

Under NY law, lessor of energy plant in tax shelter arrangement was entitled to a preliminary injunction against lessee drawing on credit default swap after swap issuer’s credit rating fell to give lessor more time to find a replacement swap issuer. Finding a replacement swap issuer might be a duty (as opposed to a right) and might have been made impossible by the credit crunch, justifying the preliminary injunction. On remand, see [2009 WL 3245205](#) (S.D. Ind. 2009).

297. *Neuro-Rehab Associates, Inc. v. AMRESKO Commercial Finance, LLC*,
[2009 WL 649584](#) (D. Mass. 2009)

Lender acted in bad faith by attempting to accelerate debt after borrower defaulted by failing to give a required notification and failing to obtain lender's consent to a substitution of minor items of collateral, but because loan had since been repaid and borrower had shown no damages, borrower had no cause of action against lender.

298. *WIS-Bay City, LLC v. Bay City Partners, LLC*,
[2009 WL 1661649](#) (N.D. Ohio 2009)

\$4 million late payment penalty on \$9 million promissory note, even though not usurious under Ohio law, was unenforceable as a penalty.

299. *Highland Crusader Offshore Partners, L.P. v. Lifecare Holdings, Inc.*,
[2009 WL 1065212](#) (N.D. Tex. 2009)

Debtor did not commit fraud or misrepresentation during effort to obtain consent to amendment to credit facility by: (i) offering a 75 basis-point fee to most consenting lenders but secretly offering a 125 basis-point fee to two minor lenders; or (ii) after obtaining the consent of a sufficient number of lenders, deciding to pay all consenting lenders the higher fee. The debtor had no duty to disclose the higher fee because such a duty arises only when: (1) there is a fiduciary or confidential relationship between the parties; or (2) one voluntarily makes a representation, giving rise to a duty to disclose the whole truth, any new information making the prior representation untrue or misleading, or information necessary to correct a misleading partial disclosure.

300. *C and J Vantage Leasing Co. v. Wolfe*,
[778 N.W.2d 66](#) (Iowa Ct. App. 2009)

Equipment lease that contained a clause purporting to make the lease noncancelable was the equivalent of a finance lease with "hell or high water," and therefore the lessee had no defense to payment due to allegations of breach and fraud by the supplier. Concurrence would allow a defense based on fraud in the inducement but concluded that the facts for such a defense were not pleaded.

301. *JP Morgan Chase v. New Millennial, LC*,
[6 So. 3d 681](#) (Fla. Dis. Ct. App. 2009)

Statute that provides that no assignment of a mortgage upon real property shall be good against creditors or subsequent purchasers for a value and without notice, unless the assignment is recorded referred to creditors of or purchasers from the mortgagee, not the mortgagor. This is because the mortgagor has actual notice of the original mortgage, and anyone claiming under the mortgagor has constructive notice if the mortgage is recorded.

302. *Canada Life Assurance Co. v. Lapeter*,
[563 F.3d 837](#) (9th Cir. 2009)

Federal law governs the determination of whether to appoint a receiver in a diversity case. The most critical factors in the decision to appoint a receiver to collect rents are whether the creditor is undersecured and whether the debtor is insolvent. If the receiver is also to have the authority to manage the property, something more must be shown, such as the danger of waste or delay in foreclosure.

303. *Kortum-Managhan v. Herbergers NBGL*,
[204 P.3d 693](#) (Mont. 2009)

Although credit card issuer had the right to unilaterally amend the cardholder agreement by providing notice thereof to the card holder, the issuer's attempt to add an arbitration clause by including that new term in a "bill stuffer" did not provide sufficient notice to the card holder to infer express or implicit acceptance of that term.

304. *Davis v. Ford Motor Credit Co.*,
[101 Cal. Rptr. 3d 697](#) (Cal. Ct. App. 2009)

Lender's practice of applying payments from borrower to earlier installments that were already delinquent, rather than to current installments, thus causing the current installments to become delinquent and triggering additional late fees was not an unfair practice under applicable state law.

305. *Vons Companies, Inc. v. Lyle Parks, Jr., Inc.*,
[99 Cal. Rptr. 3d 562](#) (Cal. Ct. App. 2009)

Buyer of newly constructed building was not entitled to attorney's fees in successful action against builder because buyer received did not receive an assignment of the construction contract – which had an attorney's fees clause – merely an assignment of a post-construction warranty, which did not.

306. *Lurgi, Inc. v. Northeast Biofuels, LP*,
[2009 WL 910042](#) (N.D.N.Y. 2009)

Although LOC applicant that failed to clearly allege fraud in the transaction was not entitled to order enjoining bankrupt beneficiary from drawing on letter of credit, it was entitled to order requiring beneficiary to segregate a portion of the funds drawn so as to protect the applicant's claim that the draw was improper. Decision reversed contrary ruling by Bankruptcy Court. *See In re Northeast Biofuels, LP*, [2009 WL 2873073](#) (Bankr. N.D.N.Y. 2009).

307. *Zurich American Ins. Co. v. Felipe Grimberg Fine Art*,
[324 Fed. Appx. 117](#) (2d Cir. 2009)

Seller of expensive painting retained after delivery no insurable interest in the goods even if the transaction was voidable due to the buyer's fraud.

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308. *GE Commercial Finance Business Property Corp. v. Heard*,
[621 F. Supp. 2d 1305](#) (M.D. Ga. 2009)
Georgia statute that nullifies pre-lawsuit jury trial waivers applies in a breach of contract action in federal court based upon diversity of citizenship.
309. *Citigroup Global Markets, Inc. v. Bacon*
[562 F.3d 349](#) (5th Cir. 2009)
Following the Supreme Court's decision in *Hall Street Associates*, 128 S. Ct. 1369 (2008), manifest disregard of the law is not a ground for vacating an arbitration award.
310. *Comedy Club Inc. v. Improv West Assocs.*
[553 F.3d 1277](#) (9th Cir. 2009)
Manifest disregard of the law remains a basis for vacating an arbitration award because it is shorthand for § 10(a)(4) of the FAA, which states that the court may vacate when the arbitration award exceeds the arbitrator's powers.
311. *Cordova v. World Finance Corp. Of New Mexico*,
[208 P.3d 901](#) (N.M. 2009)
Lender's form arbitration provision that requires the borrower to arbitration all disputes while permitting the lender the option to access courts for all remedies the lender is most likely to pursue against a borrower is unconscionable.
312. *Doolim Corp. v. R Doll, LLC*,
[2009 WL 1514913](#) (S.D.N.Y. 2009)
Seller who manufactured trademarked apparel in response to an order from the trademark owner had an implied license to sell the trademarked goods in order to mitigate its damages after the trademark owner unjustifiably failed to accept or pay for the goods.
313. *Schmidt v. Bassett Furniture Industries*,
[2009 WL 3380354](#) (E.D. Wis. 2009)
Manufacturer might be liable for breach of the obligations of a franchisee/retailer to its customers under apparent agency because the manufacturer, Bassett Furniture, required the retailer to identify itself as "Bassett Furniture Direct," suggesting to customers that they were dealing with the manufacturer.
314. *State Security Check Cashing, Inc. v. American General Financial Services*,
[972 A.2d 882](#) (Md. 2009)
Check cashing store was holder in due course of \$18,000 check issued by lender to imposter. The store also exercised ordinary care in cashing the check.

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315. *Transcontinental Holding Ltd. v. First Banks, Inc.*,
299 S.W.3d 629 (Mo. Ct. App. 2009)
Bank that issued cashier's check on newly created deposit account that was provisionally funded with a transfer from another deposit account over which the customer lacked authority, could stop payment on the cashier's check after it reversed the provisional credit. Although cashier's checks are normally regarded as good as cash, the bank had a defense of a lack of consideration and the payee was not a holder in due course because it had misrepresented several facts in seeking to obtain the cashier's check and thus had not acted in good faith.
316. *In re Hake*,
419 B.R. 328 (6th Cir. BAP 2009)
Under Ohio law, agreement not to sell interests in two S corporations without obtaining the prior consent of the other shareholders constituted an unenforceable restraint on alienation.
317. *Learning Curve Intern., Inc. v. Seyfarth Shaw, LLP*,
911 N.E.2d 1073 (Ill. Ct. App. 2009)
Illinois law does not prohibit the assignment of a legal malpractice claim as part of a transfer of assets in a merger.
318. *First American Title Ins. Co. v. XWarehouse Lending Corp.*,
98 Cal. Rptr. 3d 801 (Cal. Ct. App. 2009)
Title insurer had no duty to defend warehouse lender to mortgage originator that had forged mortgage notes because clause in title insurance contract defining the "insured" to include "each successor in ownership of the indebtedness" did not apply since there was no mortgage debt. Title insurance protects against defects in the lien, not the nonexistence of a mortgage debt.
319. *Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*,
636 F. Supp. 2d 869 (D. Minn. 2009)
Commercial leases that required landlord to obtain liability insurance for common areas and lessee to pay its pro rata share of the premiums did not obligate the lessee to pay for self-insurance provided by the landlord's agent for losses within the insurance deductible amount.
320. *Lincoln National Life Insurance Co. v. The Gordon R.A. Fishman Irrevocable Life Trust*,
638 F. Supp. 2d 1170 (C.D. Cal. 2009)
Life insurance financing arrangement – the purpose of which was to pay individuals for their "unused capacity to acquire retail life insurance" – was in substance an illegal stranger-owned insurance policy but was nevertheless permissible because in form it was acquired by a trust created by the insured and only afterwards assigned to the lender.

321. *ReAmerica, S.A. v. Wells Fargo Bank Intern.*,
[577 F.3d 102](#) (2d Cir. 2009)

Letter to bank from its customer stating that fraudulent activity in deposit account had been discovered and asking that account be frozen, but which did not either identify the specific transactions that were fraudulent or state that any transactions would be disputed, did not qualify as an “objection to the payment[s]” under § 4A-505. As a result, the customer’s action for wrongful debiting of the account was untimely. Customer’s common-law action against bank for negligently transferring the test key data, which allegedly led to the unauthorized wire transfers, is inconsistent with the careful and delicate balancing of interests in Article 4A, and thus must be dismissed.

322. *Comerica Bank v. Stewart*,
[2009 WL 4646894](#) (E.D. Mich. 2009)

Even if parties can contract for a higher rate of post-judgment interest than that provided for in 28 U.S.C. § 1961, merely providing in a promissory note for a post-default rate of interest is insufficient to evidence agreement to a post-judgment rate of interest.

323. *ING Bank, FSB v. Mata*,
[2009 WL 4672797](#) (D. Ariz. 2009)

Mortgage lender’s claims against loan originator based on amount of defaulted loan were barred by lender’s credit bid at the foreclosure sale for the full amount of the debt, but the lender’s tort claims against the originator could be maintained.