

# **Commercial Law Developments**

**2010**

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## SECURED TRANSACTIONS

### *Scope Issues*

1. *In re Uni Imaging Holdings, LLC*  
[423 B.R. 406](#) (Bankr. N.D.N.Y. 2010)  
66-month lease of MRI with a \$175,000 purchase option at the end would not be re-characterized as a secured transaction because the purchase price was more than 50% of the expected fair market value of the machine at the end of the lease term and the cost of removing and shipping the machine back to the putative lessor was not more than \$26,000.
2. *Gibraltar Financial Corp. v. Prestige Equipment Corp.*,  
[925 N.E.2d 751](#) (Ind. Ct. App. 2010)  
Six-year lease of punch press with a useful life of 15-20 years was a true lease despite lessee's option at end of fifth year to purchase the punch press for \$78,500, and thereby save \$43,100 in later lease payments and \$19,500 in the cost of returning the punch press.
3. *In re Williamson*,  
[2010 WL 3369384](#) (Bankr. D. Neb. 2010)  
57-month car lease that included option to buy at the end of the lease term for \$386 was a sale with a security interest because the lease was not terminable by the lessee and the option price was nominal.
4. *In re Calloway*,  
[2010 WL 5597723](#) (Bankr. M.D.N.C. 2010)  
Five-year lease of new car with option to buy at end of lease term for \$12,723 was a true lease.
5. *In re Double G Trucking of the Arklatex, Inc.*,  
[432 B.R. 789](#) (Bankr. W.D. Ark. 2010)  
TRAC lease under which leased vehicles were to be sold at end of lease term and lessee was to receive proceeds in excess of stated amount and be liable to lessor for any deficiency from such amount was a true lease because of non-uniform amendment to Arkansas Commercial Code providing that a transaction is not to be regarded as a sale merely because the agreement contains such a clause.
6. *In re HP Distribution, LLP*,  
[436 B.R. 679](#) (Bankr. D. Kan. 2010)  
Five-year TRAC leases of refrigerated trailers with an 8-year useful life were true leases. The lessor retained a meaningful reversionary interest in the goods because, even though the leased trailers were to be sold at end of lease term, after which the lessee would be liable to lessor for any deficiency from a specified amount and would be entitled to receive any surplus, the lessor will retain the proceeds of the sale and will have the credit risk of the lessee's inability to pay the deficiency.

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7. *In re Lash*,  
[2010 WL 5128610](#) (Bankr. M.D.N.C. 2010)  
[2010 WL 5141760](#) (Bankr. M.D.N.C. 2010)  
Forty-two month TRAC lease of truck, after which the truck was to be sold and the lessee would be entitled to any surplus over a specified amount or liable to lessor for any deficiency, created a security interest, not a lease, because the lessor retained no meaningful reversionary interest in the truck.
  8. *In re Southeastern Materials, Inc.*,  
[433 B.R. 177](#) (Bankr. M.D.N.C. 2010)  
Equipment lease not subject to termination by the lessee and which contained an option to purchase for \$1 at the end of the lease term was a sale with a retained security interest. Because the seller (putative lessor) failed to perfect its interest within 20 days of delivery of the equipment to the lessee, and thus failed to obtain PMSI priority under § 9-324(a), the lessee's main secured lender had priority as the first to file or perfect.
  9. *Frontier Leasing Corp. v. Krueger*,  
[2010 WL 3894308](#) (Iowa Ct. App. 2010)  
Equipment lease that gave lessee the option to purchase at the end of the lease term for \$1 was a secured transaction. The hell-or-high-water clause in the agreement did not prevent the lessee from raising a claim of unconscionability or a defense to contract formation.
  10. *Frontier Leasing Corp. v. Waterford Golf Associates LLC*,  
[2010 WL 4484390](#) (Iowa Ct. App. 2010)  
Equipment lease that gave lessee the option to purchase at the end of the lease term for \$1, and which in one place indicated that the putative lessee would have title upon delivery, was a secured transaction. Clause waiving defenses will cut off lessee's fraud defenses unless the assignee had notice of the defense when it took the assignment.
  11. *In re Kinds*,  
[2010 WL 4386929](#) (Bankr. N.D. Miss. 2010)  
Five-year lease of mobile home that was terminable at will by the lessee was a true lease even though the lessee was listed as owner on the certificate of title, ostensibly in order to enable the lessee to acquire insurance and to facilitate the payment of the personal property taxes.
  12. *American Bank of the North v. Jelinski*,  
[2010 WL 1753245](#) (Minn. Ct. App. 2010)  
Understanding between financier who purchased equipment and debtor who used it that once the debtor paid the purchase price, the equipment would belong to the debtor made the transaction a security interest, not a lease.

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13. *In re C&S Electric, Inc.*,  
[433 B.R. 782](#) (Bankr. D. Haw. 2010)  
Joint check agreement under which general contractor agreed to pay subcontractor and its supplier jointly did not create a security interest in favor of the supplier. Instead it was a payment mechanism that specified how the general contractor would perform its own obligation to ensure that all third-and lower tier parties were paid. The bank with a security interest in the subcontractor's accounts took its interest subject to the joint check agreement and therefore its interest did not attach to the amounts the general contractor owed to the supplier.
14. *Randle v. AmeriCash Loans, LLC*,  
[932 N.E.2d 1200](#) (Ill. Ct. App. 2010)  
EFT authorization form that borrower signed when taking out the loan and that authorized the lender to debit borrower's checking account upon a default constituted a security interest in her checking account.
15. *Rayfield Investment Co. v. Kreps*,  
[35 So. 3d 63](#) (Fla. Ct. App. 2010)  
Consignor of painting to art dealer had only an unperfected security interest, and therefore lost priority to the dealer's inventory lender. While the inventory lender knew that some of the dealer's inventory was consigned, the consignor presented no evidence that the dealer was generally known by its creditors to be substantially engaged in selling the goods of others, a standard requiring that a majority of creditors know and that at least 20% of the inventory is consigned.
16. *Quality Leasing Co. v. Dealer Services Corp.*,  
[927 N.E.2d 431](#) (Ind. Ct. App. 2010)  
Business that consigned sports car to auto dealer had only an unperfected security interest, even though it was listed as the owner on the certificate of title, and thus lost priority to the auto dealer's secured lender.
17. *In re WFG, LLC*,  
[2010 WL 4607614](#) (Bankr. E.D. Tenn. 2010)  
Question of material fact existed as to whether jewelry was delivered to the debtor for the purpose of sale – which would be a consignment governed by Article 9 and would make the jewelry property of the debtor's bankruptcy estate – or merely for display. *See also In re WFG, LLC*, [2010 WL 4607660](#) (Bankr. E.D. Tenn. 2010) (same regarding jewelry provided by a different supplier).

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18. *In re Belak*,  
[2010 WL 1839350](#) (Bankr. D. Conn. 2010)  
“Collateral Agreement,” by which tenant in default transferred to landlord the right to sell items of personal property, required the landlord to give the tenant an accounting of property sold, and provided tenant with a right to redeem the property, was a sale, not a security device because the tenant had no right to remove the property during the term of the agreement and the tenant understood that he was transferring title to the property.
19. *In re DBSI, Inc.*,  
[432 B.R. 126](#) (Bankr. D. Del. 2010)  
Bond trustee that had filed financing statements did not have perfected security interest in real property leases because such an interest is excluded from Article 9 of the Idaho Commercial Code and can be perfected only by recording in the real property records. While the leases were recorded, no assignment of the leases was recorded.
20. *In re Carlos F. Escribano & Co.*,  
[433 B.R. 59](#) (Bankr. D.P.R. 2010)  
A federal tax lien is not a security interest governed by Article 9 and therefore Puerto Rico’s Article 9 does not provide the place for filing a notice of federal tax lien against a Puerto Rican taxpayer.
21. *In re Stephens*,  
[2010 WL 4286186](#) (E.D. Mich. 2010)  
Attorney’s fee agreement that purported to give the attorney “an attorney’s lien on any asset owed or due to the Client” did not in fact give the attorney a lien on the client’s rental income because the rental income was not earned as a result of the attorney’s services.
22. *In re Arcadia Enterprises, Inc.*,  
[2010 WL 4340694](#) (Bankr. D. Mass. 2010)  
Developer’s permits to develop housing project run with the land and therefore mortgagee became the owner of the permits when it acquired the land at a foreclosure sale. Mortgagee’s failure to file a financing statement was immaterial.

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**Attachment Issues****– Existence of Security Agreement**

23. *In re Giaimo*,  
[2010 WL 5364612](#) (6th Cir. BAP)  
Signed application for certificate of title and certificate itself, both of which indicated grandmother's security interest in vehicle, were sufficient to satisfy the requirement of a written security agreement because "unlike simple financing statements, which are often filed in anticipation of a *possible* loan, . . . an application for a certificate of title is not completed unless there is an actual purchase or transfer of a motor vehicle."
24. *Horob v. Farm Credit Services of North Dakota ACA*,  
[777 N.W.2d 611](#) (N.D. 2010)  
Despite debtor's claim that he did not intend cattle that secured equipment loan to also secure existing real estate loan, the security unambiguously covered "all existing and future loans, advances, indebtedness and payment . . . obligations owed or owing to [the secured party]," and this dragnet clause was enforceable. The debtor was not entitled to additional time for discovery or to review response provided to discovery request.
25. *Assets Resolution Corp. v. Che LLC*,  
[2010 WL 1345284](#) (W.D. Ark. 2010)  
Individual member of LLC who signed note and security agreement on behalf of LLC lacked authority under the LLC operating agreement and therefore was personally liable but did not bind the LLC.
26. *In re Keisler*,  
[2010 WL 4627892](#) (Bankr. E.D. Tenn. 2010)  
Spouse who failed to co-sign the security agreements for several of the subordinated lenders nevertheless had granted a security interest in her rights in the stock of a closely held corporation because she had agreed to do so and because she had signed the security agreement in favor of the lead subordinate lender, which had possession of the stock certificate for the benefit of the entire group of subordinate lenders.
27. *Development Specialists, Inc. v. R.E. Loans, LLC*,  
[2010 WL 4055570](#) (N.D. Cal. 2010)  
Although Agreement Letter was signed by individual "for: R.E. Loans, LLC, B-4 Partners, LLC, Bar-K, Inc.," three separate entities, extrinsic evidence indicates that the latter two entities signed merely as members of the first. All the invoices identified only the first named entity as the debtor, the subsequent security agreement did not mention the latter two parties in its text, the security agreement was not signed at all by the third entity, and the signature line on the security agreement identified the second entity as "managing member" of the first entity.

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28. *In re Adirondack Timber Enterprise, Inc.*,  
[2010 WL 1741378](#) (Bankr. N.D.N.Y. 2010)  
Debtor that authenticated agreement granting security interest to farm implements manufacturer to secure all obligations owed to the manufacturer and its affiliates did not grant a security interest to the bank subsidiary of the manufacturer, and thus the bank was not entitled to adequate protection. Even if the bank did have a security interest, that interest was not perfected by the manufacturer's filing.
29. *Palmatier v. Wells Fargo Financial National Bank*,  
[2010 WL 2516577](#) (N.D.N.Y. 2010)  
Sales order ticket that buyer signed and which described both the furniture purchased and the buyer's agreement to give creditor a purchase money security interest in the purchased goods, and which incorporated the terms of the credit card agreement that also purported to grant creditor a security interest, was sufficient as security agreement.
30. *Roswell Capital Partners LLC v. Alternative Construction Technologies*,  
[2010 WL 3452378](#) (S.D.N.Y. 2010)  
Lender's security interest in debtor's assets was extinguished when the lender converted the debtor's notes to equity, and that security interest did not reattach when the lender exercised his right to re-convert the equity to debt.
31. *In re Burival*,  
[2010 WL 2774830](#) (Bankr. D. Neb. 2010)  
Creditor who filed financing statement but who had no security agreement with the debtor had no security interest.
32. *In re Supplies & Services Inc.*,  
[2010 WL 5072586](#) (D.P.R. 2010)  
Secured creditor whose financing statement lapsed was no longer secured.
33. *In re Kaminsky*,  
[2010 WL 4026378](#) (Bankr. E.D. N.Y. 2010)  
Brokerage house failed to demonstrate that it was a secured creditor of the debtor by submitting unsigned copy of brokerage agreement that failed to identify debtor by name.
34. *In re Colonial Bancgroup, Inc.*,  
[436 B.R. 713](#) (Bankr. M.D. Ala. 2010)  
Bank holding company's agreement with FDIC to "take appropriate steps to ensure that the Bank complies" with a cease and desist order and to utilize "its financial and managerial resources to assist" the bank did not make the holding company a guarantor of the bank's obligations to maintain specified capital ratios, impose liability on the holding company in the event the bank failed to reach required capital ratios, or pledge any assets to secure a capital deficiency. Consequently, the FDIC had no security interest in or setoff rights with respect to bank holding company's deposit accounts.

35. *In re Lyon,*[2010 WL 3777827](#) (Bankr. D. Ariz. 2010)

Credit Union could setoff funds in consumers' deposit account against credit card debt because the credit union had a security interest in the deposit account. Because the debtors' signature on the form appeared directly above the language purporting to grant a security interest and that language was in capital letters and bold type, the form satisfied Regulation Z.

**– Description of the Collateral**

36. *Monticello Banking Co. v. Flener,*[2010 WL 5158989](#) (W.D. Ky. 2010)

Security agreement describing the collateral as "all Debtor's . . . [deposit] accounts maintained at . . . [any] financial institution . . . , including, but not limited to, those deposit accounts styled and numbered as follows: . . . Certificate of Deposit # -9536 at Monticello Banking Company . . . [;] . . . Certificate of Deposit # -2581 at CDARS; . . . together with current [and future] deposits in the deposit account(s) . . . as well as all rights, title, interests and choices in actions associated with the deposit account(s)" was insufficient to cover debtor's interest in deposits managed through the Certificate of Deposit Account Registry Service because the debtor's rights were a security entitlement and the language did not mention "security entitlements," "investment property," or describe the "underlying financial asset."

37. *One Carter, LLC v. CapitalSource Finance, LLC,*[2010 WL 4112193](#) (Cal. Ct. App. 2010)

Language in trust deed granted by real estate developers defining the collateral to include "intangible property and rights relating to the [real] property, . . . including . . . development rights, permits and approvals, . . . and other similar land use permits, approvals or entitlements," was sufficient to cover actions brought by developers against a city seeking approval and permits for development. Such actions were also covered by language in trust deed defining the collateral to include "general intangibles" as defined in the UCC.

38. *LOL Finance Co. v. Paul Johnson & Sons Cattle Co.,*[2010 WL 5422621](#) (D. Neb. 2010)

Security agreement describing the collateral as cattle "placed . . . with" cattle management company was sufficient to cover cattle under management company's services but located at an independent feedlot.



39. *FSL Acquisition Corp. v. Freeland Systems, LLC*,  
[686 F. Supp. 2d 921](#) (D. Minn. 2010)

Security agreement's description of the collateral as "(i) all Purchased Assets identified on the Bill of Sale [and] (ii) all renewals, substitutions, replacements, accessions, proceeds, and products of the Purchased Assets" was adequate to cover software and customer lists because such items identified in the Bill of Sale and were thus "objectively determinable." Although the Bill of Sale indicated that the software and customer lists would be on a DVD provided at closing, and the debtor claimed no DVD was provided, that did not render the collateral description inadequate. However, the collateral description did not cover software and customer lists developed or acquired after the closing. Such things are not "products" even though the debtor could not have developed the customers without the software purchased: customers are not products of collateral. Such things are not replacements because even though old software and customer lists may be superseded, they are not displaced. Moreover, parol evidence indicated that proposed language covering "additions" to the purchased assets and "present and future general intangibles" was discussed but rejected.

40. *Mac Naughton v. Harmelech*,  
[2010 WL 3810846](#) (D.N.J. 2010)

Security agreement purportedly granting a security interest in "all of [the debtor's] right, title and interest in any and all real or personal property wherever located" was ineffective because the super-generic language did not reasonably describe the collateral.

41. *In re Heilman*,  
[2010 WL 3909167](#) (Bankr. D.S.D. 2010)

Language in security agreement purporting to give lender a security interest in "all . . . personal property of every kind and nature whatsoever located on or about" the debtor's farm, along with all products and proceeds thereof, was sufficient to cover the debtor's cows. As a result, the security interest covered the debtor's post-petition milk because milk is a product of the cows.

42. *In re Pizzano*,  
[439 B.R. 445](#) (Bank. W.D. Mich. 2010)

While law of the debtor's location governs perfection and the effect of perfection, the law chosen in the security agreement governs attachment and because the parties' choice of law was limited to contractual issues, the law of the forum governs tort claims. Debtor's claim for conversion of corvette resulting from repossession failed because the car was goods and the security agreement expressly covered "goods." That term is a type of collateral defined in Article 9, not an impermissible super-generic. Although greater specificity is needed when describing consumer goods in a consumer transaction, and here the car was consumer goods, the transaction was not a consumer transaction.

43. *Inliner Americas, Inc. v. Macomb Funding Group, LLC*,  
[2010 WL 2853886](#) (Tex. Ct. App. 2010)

Security agreement that described the collateral to include now owned and hereafter acquired “causes of action” and “[a]ll products and proceeds” thereof did not include a later-accruing legal malpractice claim against the debtor’s attorneys because public policy prohibits the assignment of legal malpractice claims. The settlement proceeds of the malpractice claims were also not collateral because the creditor had not argued that the security agreement listed them as a distinct asset independent of such claims, but merely as proceeds of the claim. No discussion of § 9-204(b)(2).

44. *In re American Cartage, Inc.*,  
[438 B.R. 1](#) (D. Mass. 2010)

Security agreement’s after-acquired property clause cannot encompass commercial tort claims that did not exist when the security agreement was entered into. Standing to pursue commercial tort claims cannot be encumbered as proceeds of other collateral because that would undermine the prohibition on after-acquired commercial tort claims and the mandate that commercial tort claims be described with particularity.

45. *United States v. Stuber*,  
[2010 WL 3430499](#) (W.D. Wash. 2010)

Security agreement describing the collateral as equipment, inventory, accounts, and general intangibles was insufficient to cover deposit accounts. Deposit account agreement that expressly granted depositary bank a right of setoff might be a security agreement but was nevertheless inadequate to prevent forfeiture to the government because the depositor had conceded that the deposited funds were proceeds of criminal activity.

#### – Rights in the Collateral

46. *Miko Enterprises, Inc. v. Allegan Nursing Home, LLC*,  
[2010 WL 148659](#) (W.D. Mich. 2010)

Lenders to owner of nursing home facility that was operated by related entity did not have a security interest in the accounts of the operator because the operator was not a party to the security agreement and the owner of the facility did not own the accounts.

47. *TYCO Ventures, L.L.C. v. Wiggins*,  
[32 So. 3d 1168](#) (La. Ct. App. 2010)

Evidence established that debtor paid off loan secured by tractor and then sold the tractor before purporting to re-pledging the tractor to the original secured party. As a result, the debtor had no rights in the collateral at the time of the purported re-pledge and no security interest attached. The putative secured party converted the tractor by refusing to return it to the buyer.

48. *DBS Construction Inc. v. New Equipment Leasing, Inc.*,  
[2010 WL 3672220](#) (N.D. Ind. 2010)

Although loader that creditor repossessed had debtor's logo on it, evidence showed that it was owned by the father of the debtor's owner, not by the debtor, and hence no security interest attached.

49. *In re Snyder*,  
[436 B.R. 81](#) (Bankr. C.D. Ill. 2010)

Married couple presumptively shared ownership of crops grown by only the husband on their joint land. Therefore creditor whose security agreement was signed by only the husband had a security interest in only the husband's interest (one half of the proceeds of the crops).

50. *In re S & A Restaurant Corp.*,  
[2010 WL 3619779](#) (Bankr. E.D. Tex. 2010)

Because New Jersey law prohibits liens on liquor licences, landlord that had advanced \$100,000 to tenant to finance the acquisition of liquor licenses did not in fact acquire a security interest in the tenant's liquor licences. Transaction would not be re-characterized as a joint venture or partnership because there was no sharing of profits and losses, merely a loan. Landlord was not entitled to an equitable lien on the proceeds of the liquor licenses.

51. *In re Tracy Broadcasting Corp.*,  
[438 B.R. 323](#) (Bankr. D. Colo. 2010)

Because federal law provides that no broadcast license be "transferred, assigned or disposed of in any manner," without approval of the FCC, such licences are not property to which a security interest may attach. While it may be possible to grant a security interest in the right to future proceeds from an approved sale of a license, if, on the petition date, there is no contract for sale approved by the FCC, § 552(a) prevents the security interest from reaching any postpetition sale proceeds.

52. *In re Johnson*,  
[439 B.R. 416](#) (Bankr. E.D. Mich. 2010)

Debtor's right to receive disability payments pursuant to employee welfare benefit plan were contract rights, not an interest in or under an insurance policy or a beneficial interest in a trust, and thus lender's security purported security interest was governed by old Article 9, which invalidated anti-alienation clause and permitted security interest to attach.

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– Other

53. *In re Las Vegas Monorail Co.*,  
[429 B.R. 317](#) (Bankr. D. Nev. 2010)  
Revenues generated from the operation of a monorail were not proceeds of the debtor's franchise agreement permitting it to operate the monorail. The security interest of the bond trustee in the debtor's "net revenue" subordinated it to operating expenses and left it with a security interest only in the funds deposited with the trustee, not in cash on hand held by the debtor's agent or funds previously diverted into a different deposit account. This security interest in net revenue is not proceeds of other collateral, and therefore to the extent arising postpetition, is cut off by § 552(a).
54. *McCourt v. Triplett*,  
[2010 WL 3422458](#) (Ark. Ct. App. 2010)  
Secured party did not meet its burden in attempting to establish that deposit account contained identifiable proceeds of collateralized accounts and inventory because its only evidence was testimony of the debtor's president that most of the deposits came from such sources. Accordingly, judgment creditor was entitled to all the funds.
55. *Westfield Insurance Co. v. Cubbage*,  
[2010 WL 4683727](#) (N.D. W. Va. 2010)  
Summary judgment denied on whether secured party of equipment lessor was entitled to proceeds of personal property insurance procured by lessee because it was unclear what portion of the destroyed property was leased and what portion was owned by the lessee.
56. *In re Royal West Properties, Inc.*,  
[441 B.R. 158](#) (Bankr. S.D. Fla. 2010)  
Debtor that had granted security interest in mortgage receivables retained authority to settle the mortgage debts and release the mortgages because the secured parties never contacted the mortgagors (even though some secured parties had possession of the mortgage notes). The real property reacquired by the debtor through foreclosure or receipt of a deed in lieu of foreclosure were proceeds of the receivables to which the creditors' security interests attached, but those interests were not perfected beyond 20 days.
57. *Textron Financial Corp. v. RV Sales Of Broward, Inc.*,  
[2010 WL 4892859](#) (11th Cir. 2010)  
Secured inventory lender was entitled to interest from date of invoices, not date it actually paid the manufacturer, because that was what the invoices provided, the agreement bound the debtor to the invoice if the debtor did not object within ten days, and the debtor never objected.

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58. *In re Massey*,  
[2010 WL 99266](#) (Bankr. E.D. Okla. 2010)  
Because debtor signed loan documents that contained cross-collateralization clauses, debtor's motor vehicle secured unrelated debts even though debtor had paid off the motor vehicle loan.
59. *Harvard Drug Group, L.L.C. v. Senior Respiratory Solutions, Inc.*,  
[2010 WL 148670](#) (E.D. Mich 2010)  
Security agreement executed by buyer in favor of seller in connection with credit application was not extinguished by subsequent prime vendor agreement that purported to "cancel[] and supersede[] all earlier agreements, written or oral relating to the subject matter hereof," because the vendor agreement did not discuss the security interest and thus the security interest did not relate to the subject matter of the prime vendor agreement. For the same reason, the prime vendor agreement did not extinguish the personal guaranty of the buyer's owner.
60. *Texas Lottery Commission v. First State Bank of DeQueen*,  
[325 S.W.3d 628](#) (Tex. 2010)  
Section 9-406(f) trumps statute prohibiting assignment of state lottery winnings even though that statute was more recent and more specific because § 9-406(f) makes clear that it takes precedence over other law. Although Article 9 defers to consumer protection statutes, the lottery act's anti-assignment provision is not a consumer protection statute because it is not limited to consumers. Thus, lottery winner could assign his right to receive payments.
61. *In re EDG Holdings, Inc.*,  
[438 B.R. 154](#) (Bankr. S.D. Ill. 2010)  
State statute restricting method by which owner of contaminated property may assign its right to partial reimbursement from state clean-up fund did not restrict subsequent assignment of accounts by contractor who performed clean-up services, even though those accounts included the contractor's interest in the owner's right to reimbursement from the fund.
62. *Becher v. Freeman-Waag*,  
[2010 WL 3545656](#) (Minn. Ct. App. 2010)  
Restriction against assignment in LLC membership control agreement was not manifestly unreasonable and thus was enforceable under Minnesota law. As a result, creditor acquired no security interest in LLC member's interest. No discussion of § 9-408.

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**Perfection Issues****– Choice of Law**

63. *In re Symons Frozen Foods Inc.*,  
[432 B.R. 290](#) (Bankr. W.D. Wash. 2010)  
Washington law governs the rights of an Oregon corn supplier who perfected a first-priority Oregon statutory lien against its Washington processor by filing in Oregon, but who did not perfect a similar Washington statutory lien by filing in Washington, because the intended permanent location of the goods was Washington.
64. *In re Qualia Clinical Service, Inc. v. Lange*,  
[2010 WL 1441495](#) (Bankr. D. Neb. 2010)  
Accounts financier that initially filed a financing statement in Nebraska, where the debtor had its principal place of business, did not have a perfected security interest until it filed in Nevada, the jurisdiction in which the debtor was incorporated. Because this latter filing was made during the 90-day period before the debtor's bankruptcy petition was filed, the security interest was avoidable as a preference.

**– Method of Perfection**

65. *SEC v. Private Equity Management Group, LLC*,  
[2010 WL 114468](#) (C.D. Cal. 2010)  
Security interest in certificated securities can be perfected by possession.
66. *444 W. Ocean, LLC v. Simmax Energy (CA), LLC*,  
[2010 WL 310775](#) (Cal. Ct. App. 2010)  
Security interest in debtor's deposit account was perfected by a filed financing statement without evidence that the deposit account contained proceeds of collateralized accounts. Even if evidence of tracing were required, the secured party provided that through the testimony of the debtor's office manager that the recent deposits were proceeds of accounts receivable.
67. *In re Cedar Funding, Inc.*,  
[2010 WL 1346365](#) (Bankr. N.D. Cal. 2010)  
[2010 WL 1346402](#) (Bankr. N.D. Cal. 2010)  
Transfer of fractional interests in originator's mortgage loans occurred for preference purposes when transfers were perfected, which because the transfers involved an interest in California real estate, required recording of the assignment in the real estate records.

68. *In re Beaudoin*,  
[427 B.R. 30](#) (Bankr. D. Conn. 2010)  
Even if security interest in “any and all contracts and subcontracts relating to the Property” granted to mortgagee extended to breach of contract claim against contractor, that security interest was not perfected by mortgagee’s fixture filing. Perfection required filing a financing statement with the Connecticut Secretary of State.
69. *In re SGV LLC*,  
[2010 WL 2104241](#) (Bankr. M.D. Ala. 2010)  
Mobile home operator that sold both mobile homes and contracts with purchasers to buyer but retained title to the assets sold until the buyer paid had at most an unperfected security interest because even though the seller was listed as the lienholder on the certificates of title, the mobile homes were inventory of the buyer and the seller had not filed a financing statement.
70. *In re Swerwinski*,  
[2010 WL 3074389](#) (Bankr. N.D. Ohio 2010)  
Summary judgment denied on whether cottage on leased land was a chattel, a fixture, or part of the real estate, and therefore whether perfecting a lien on the cottage required filing a financing statement or recording a mortgage.

**– Adequacy of Financing Statement**

71. *In re EDM Corp.*,  
[431 B.R. 459](#) (8th Cir. BAP 2010)  
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. A trade name may be added as an additional name, but not as part of the debtor’s name.
72. *In re Wing Foods, Inc.*,  
[2010 WL 148637](#) (Bankr. D. Idaho 2010)  
Financing statement identifying the debtor as “Wing Fine Food” instead of its registered name, “Wing Foods, Inc.,” was ineffective because a search under the registered name by each of the parties did not reveal the filing.
73. *In re Larsen*,  
[2010 WL 909138](#) (Bankr. N.D. Iowa 2010)  
Financing statement identifying the debtor as “Mike D. Larsen” was ineffective to perfect because the debtor’s legal name is “Michael D. Larsen” and a search under the legal name does not yield the filing.

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74. *In re Lohrey Enterprises, Inc.*,  
[2010 WL 147916](#) (Bankr. N.D. Cal. 2010)  
Financing statement identifying the debtor as “Lohrey Investments LLC “ was ineffective to perfect a security interest in collateral acquired by “Lohrey Enterprises, Inc.,” a company owned by the same individual and to which the loaned funds were transferred and used to buy the collateral. As a result, subsequent lender who perfected properly had priority in the collateral.
75. *In re Lifestyle Home Furnishings, LLC*  
[2010 WL 148644](#) (Bankr. D. Idaho 2010)  
Financing statement that properly identified the debtor’s original name as “Factory Direct, LLC” was not effective to perfect an interest in collateral acquired by the debtor more than four months after the debtor changed its name to “Lifestyle Home Furnishings, LLC,” because the name change rendered the filed financing statement seriously misleading.
76. *In re American Consolidated Transportation Cos.*,  
[433 B.R. 242](#) (Bankr. N.D. Ill. 2010)  
Financing statement that identified the secured party by its trade name was effective.
77. *In re QuVIS, Inc.*,  
[2010 WL 2228246](#) (Bankr. D. Kan. 2010)  
After financing statement filed on behalf of noteholders lapsed, individual filings by some noteholders re-perfected their own security interests but was inadequate to perfect the security interests of the other noteholders. Although Article 9 does not require a secured party’s representative capacity be disclosed on the financing statement, the alleged representative must be able to demonstrate some source of its authority, and here there was no agreement authorizing one creditor to act as an agent or representative of all of the noteholders, despite language in the loan agreement providing that “Borrower authorizes each Lender to perform every act which such Lender considers necessary to protect and preserve the Collateral and Lenders’ interest therein.” Moreover, while each noteholder had the debtor’s authorization to file a financing statement, none had authorization to file for the others. Despite language in loan agreement calling for pro rata distributions, priority was now governed by the first-to-file-or-perfect rule.
78. *In re U.S. Insurance Group, LLC*,  
[429 B.R. 903](#) (E.D. Tenn 2010)  
Financing statement that described the collateral as accounts and “all records of any kind relating to” the accounts was sufficient to perfect a security interest in the debtor records, also known as its book of business, which were general intangibles.
79. *In re Burvial*,  
[2010 WL 4115493](#) (Bankr. D. Neb. 2010)  
Financing statement that described the collateral as “a farm lease” on certain described tracts of land was inadequate to cover crops grown on those tracts.



80. *Yablonsky v. Shields*,

[2010 WL 3219529](#) (Bankr. D.N.J. 2010)

Creditor who received assignment of security interest remained perfected when financing statement filed by assignor lapsed because the creditor had by then filed his own financing statement.

**– Authorization of Termination Statement**

81. *Roswell Capital Partners LLC v. Alternative Construction Technologies*,

[2010 WL 3452378](#) (S.D.N.Y. 2010)

Termination statement filed by the debtor with respect to the lender's financing statement was effective even if not authorized by the lender.

**– Control**

82. *National Consumer Co-op. Bank v. Morgan Stanley & Co.*,

[2010 WL 3975847](#) (M.D. Pa. 2010)

Letter agreement signed by brokerage that provided that brokerage would comply "with all written instructions originated by Lender concerning the Collateral without further consent by the Owner" was a valid control agreement even though it did not expressly refer to an "entitlement order." The control agreement was supported by consideration because Lender agreed to allow the collateral to remain at brokerage and thus the brokerage was able to keep the collateral in an account it maintained. Exculpatory clause providing that brokerage "shall not be responsible for any decline in market value of the accounts or any actions [the debtor] takes which reduces the value of the accounts below" \$1 million did not insulate brokerage from contract liability from allowing the debtor to withdraw assets from the account in violation of the letter agreement.

83. *In re Alexander*,

[429 B.R. 876](#) (Bankr. W.D. Ky. 2010)

Bank that loaned money to depositor did not have a perfected security interest in electronic certificates of deposit issued in "reciprocal transaction" because the CDs were issued by other banks and the lending bank did not have a control agreement with any of them.

84. *Brown v. National City Bank*,

[2010 WL 4683706](#) (Ohio Ct. App. 2010)

Bank with a security interest in two uncertificated CDs was perfected in one by control because the debtor had signed a document assigning to Bank all the "right, title and interest" of all deposits, making Bank a customer of the issuer. Factual dispute prevented summary judgment on whether Bank's interest in the other CD was perfected.

85. *In re Perez*,  
[2010 WL 4942033](#) (Bankr. D.N.J. 2010)  
Certificate of deposit issued by credit union and conspicuously labeled “non-negotiable – non-transferable” was a deposit account, not an instrument, and therefore the issuer’s security interest in the CD was perfected by control. The issuer also has a statutory lien on the CD pursuant to the Federal Credit Union Act.
86. *Wiley v. Hicks*,  
[2010 WL 3829417](#) (W.D. Ark. 2010)  
[2010 WL 4115146](#) (W.D. Ark. 2010)  
Secured creditor that entered into undated control agreement with the debtor, which the bank acknowledged and agreed to in a separate writing, had acquired control over the deposit account and thus its security interest was perfected, even though the bank had entered into another control agreement. Accordingly, secured creditor had priority over later lien creditor.

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

87. *In re Moye*,  
[2010 WL 3259386](#) (S.D. Tex. 2010)  
Creditor’s alleged purchase-money security interest in motor vehicles held inventory was not perfected by possession of unmarked certificates of title. Perfection required filing a financing statement. Moreover, even if perfection could be obtained by complying with the Certificate of title Act, that Act requires that the security interest be recorded on the certificate and possession of unmarked certificates would not suffice.
88. *In re Johnson*,  
[422 B.R. 183](#) (Bankr. E.D. Ark. 2010)  
Security interest in mobile home was perfected even though the security agreement described the vehicle as a “2004 R-Vision Condor 1351” and the certificate of title described it as a “2003 Ford F-5” because the vehicle identification numbers matched (actually, they were off by one digit but no issue about that discrepancy had been properly raised) and the vehicle was actually a Vision Condor mounted by the home manufacturer onto a 2003 Ford Chassis, and thus the security agreement accurately described the upper portion of the vehicle while the certificate of title accurately reflects the type of chassis used.
89. *In re Walling*,  
[2010 WL 5421148](#) (Bankr. E.D. Ky. 2010)  
Security interest noted on certificate of title was not perfected because the certificate was not issued by the county clerk in the county of the debtor’s residence, as required by statute.

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90. *Johnson v. Branch Banking and Trust Co.*,  
[313 S.W.3d 557](#) (Ky. 2010)  
Perfection of a security interest in a motor vehicle occurs only if and when the lien is noted on the certificate of title; perfection is not accomplished as and when the required paperwork and fee are submitted to the county clerk.
91. *In re Shepard*,  
[2010 WL 1257672](#) (Bankr. D.S.D. 2010)  
Security interest in motor vehicles was perfected under South Dakota law when the certificates were issued with the lien notation, not when the application for the certificates was filed.
92. *In re Clark Contracting Services, Inc.*,  
[438 B.R. 913](#) (W.D. Tex. 2008)  
Security interest noted on certificate of title for collateralized vehicle remained perfected after security interest was assigned because certificate of title statute made notation of assignment permissive, not mandatory.
93. *In re Scott*,  
[427 B.R. 123](#) (Bankr. S.D. Ind. 2010)  
Security interest noted on certificate of title for collateralized vehicle remained perfected after security interest was assigned to a securitization trust because § 9-311 comment 4 so provides and nothing in the Indiana certificate of title act expressly indicates that notion of the assignment on the certificate of title is necessary.
94. *In re Dickson*,  
[427 B.R. 399](#) (6th Cir. BAP 2010)  
Security interest in titled manufactured home that was affixed to realty but for which no affidavit of conversion to real property was filed was not perfected by recorded mortgages or by lis pendens, but instead by state court order, obtained during the preference period, that deemed the manufactured home converted to realty. As a result, the security interest was avoidable.
95. *Citizens National Bank of Jessamine County v. Washington Mutual Bank*,  
[309 S.W.3d 792](#) (Ky. Ct. App. 2010)  
Security interest in titled mobile home that was not affixed to realty was not perfected by recorded mortgages or by lis pendens, and therefore secured creditor who got its lien noted on the certificate of title had priority over an earlier secured party who had filed a lis pendens in connection with its action to determine priority.

96. *In re Passa,*[436 B.R. 120](#) (Bankr. D.N.D. 2010)

Secured creditor that upon refinancing inadvertently signed the lien release on the certificate of title for the collateral and returned the title certificate to the debtors was no longer perfected even though the debtors never presented the certificate to the department of transportation and even though the secured creditor subsequently obtained a duplicate copy of the certificate showing its security interest.

– Other

97. *In re HSF Holding, Inc.,*[421 B.R. 716](#) (Bankr. D. Del. 2010)

Secured creditor's preferred ship mortgage in documented vessel extended to spare engine delivered with the vessel because the engine qualifies as an "appurtenance" of the vessel even though it was never used on the vessel and could have been used on a different vessel. Moreover, the creditor's interest was perfected by the secured creditor's financing statement covering the shipbuilding contract, because the spare engine was proceeds of that contract.

98. *In re Rose,*[2010 WL 1740635](#) (Bankr. D. Neb. 2010)

Bank that had all the keys to safe deposit boxes containing pledged coins had possession of the coins and thus a perfected security interest in the coins.

99. *Rothrock v. Turner,*[2010 WL 2267226](#) (D. Me. 2010)[435 B.R. 70](#) (D. Me. 2010) (on request for rehearing)

Although creditor had perfected security interest in shares of stock by possession of the stock certificate, the creditor's interest became unperfected when he delivered the certificate to the debtor's representative for presentation in connection with a merger redemption. No discussion of § 9-312(g).

On request for rehearing, court refused to consider the impact of § 9-312(g) because its was not argued originally and its application contradicted arguments the creditor had made previously. Even if it were to consider § 9312(g), the 20-day perfection period it provides would help the creditor only if the representative to whom the certificate had been delivered was originally the agent of the creditor and later become the agent of the debtor, a formulation that would "enable parties to obfuscate the time of transfer, allowing the exception to swallow the rule."

100. *In re Reid,*[435 B.R. 810](#) (Bankr. D. Mass. 2010)

Security interest perfected by a filed financing statement did not become unperfected four months after an intrastate transfer of the collateral despite the secured creditor's failure to list the transferee's name on the financing statement.

101. *Abercrombie & Fitch Stores, Inc. v. American Commercial Construction, Inc.*,  
[2010 WL 1055265](#) (S.D. Ohio 2010)

Creditor with judgment against individual, who was alter ego of corporate entity, did not acquire a judgment lien on the property of the corporate entity by filing a Notice of Judgment with the California Secretary of State because the creditor listed the corporate entity in the box labeled “name of first debtor on related judgment lien” instead of the box labeled “additional judgment debtor[s],” and this error was seriously misleading.

102. *In re Krummel*,  
[427 B.R. 711](#) (Bankr. W.D. Ark. 2010)

Federal tax lien that was perfected as to the taxpayers’ personal property by filing a notice in the Arkansas county where the taxpayers resided remained perfected even though the taxpayers subsequently moved to a different county, at least as to the personal property that the debtor’s owned prior to the move.

### ***PMSI Status***

103. *In re Howard*,  
[597 F.3d 852](#) (7th Cir. 2010)

Negative equity in trade-in vehicle financed as part of the purchase of a new car is part of the purchase-money obligation and is therefore secured by a purchase-money security interest.

104. *In re Westfall*,  
[599 F.3d 498](#) (6th Cir. 2010)

Negative equity in trade-in truck financed in connection with the purchase of a new truck is both part of the price of the new truck and value given to enable the debtor to purchase the new truck, and is therefore covered by a PMSI.

105. *In re Riley*,  
[428 B.R. 757](#) (Bankr. N.D. Ohio 2010)

Negative equity in trade-in vehicle is part of the purchase-money obligation owed on the new vehicle.

106. *In re Penrod*,  
[611 F.3d 1158](#) (9th Cir. 2010)

Negative equity in trade-in vehicle that was included in amount financed in connection with purchase of new vehicle was not part of the purchase-money obligation because it is antecedent debt.

107. *In re Allen*,  
[2010 WL 1439691](#) (Bankr. M.D. Tenn. 2010)

Renewal and combination of prior PMSI consumer loans, destroyed the loans’ PMSI character.

108. *In re Naumann*,  
[2010 WL 2293477](#) (Bankr. S.D. Ill. 2010)  
Renewal of PMSI consumer loan by increasing the interest rate, extending the maturity, and, most important, adding a new co-debtor constituted a novation and destroyed the purchase-money nature of the transaction.
109. *In re Boston*,  
[2010 WL 5128960](#) (Bankr. D.S.C. 2010)  
Modification of PMSI consumer loan by altering the interest rate, payment amount, payment date, and number of payments, but not loaning additional funds and not executing a new note or security agreement, did not destroy the purchase-money nature of the transaction.

### ***Priority Issues***

#### **– Tax Liens**

110. *Huntington National Bank v. United Sates*,  
[2010 WL 1416971](#) (N.D. Ohio 2010)  
Secured creditor who entered into control agreement with predecessor of securities intermediary had control of securities account and was therefore perfected. The fact that the account number changed from what was listed in a filed financing statement was therefore immaterial. Because the secured creditor perfected prior to when the IRS filed its notice of tax lien, the secured creditor had priority in the entire securities account, including security entitlements acquired after the notice of tax lien was filed.
111. *The Trane Company v. CGI Mechanical, Inc.*,  
[2010 WL 2998516](#) (D.S.C. 2010)  
Notice of federal tax lien listing the debtor by its former name, “Clontz-Garrison Mechanical Contractors, Inc.,” instead of its current name, “CGI Mechanical, Inc.,” was sufficient to give IRS tax lien priority over a subsequent judgment lien, in part because the judgment creditor occasionally still used the debtor’s former name and a reasonably diligent search by the judgment creditor would have revealed the tax lien notice.
112. *In re Green Pastures Christian Ministries, Inc.*,  
[437 B.R. 465](#) (N.D. Ga. 2010)  
Notices of federal tax lien that misspelled the debtor’s name as “Green Pastures Christain Ministries, Inc.” were effective in part because a computerized search in the filing office could be conducted under the name “Green Pastures” and such a search would reveal the notices.

113. *In re Louis Jones Enterprises, Inc.*,  
[2010 WL 4259977](#) (Bankr. N.D. Ill. 2010)  
Federal tax lien for which notice was properly filed had priority over perfected security interest in accounts, even those accounts acquired within 45 days of when the notice of tax lien was filed, because the secured party's loan was not a renewal of an earlier demand loan that predated the notice of tax lien, it was a new loan. Demand loan had no fixed maturity date to be extended and the loan documentation did not reference it was a renewal.
114. *Bloomfield State Bank v. United States*,  
[2010 WL 5772876](#) (S.D. Ind. 2010)  
IRS tax lien had priority over earlier mortgage lien on rents that became due more than 45 days after notice of the tax was filed because rents are not choate until they become payable.

**– Buyers of Goods**

115. *Capital Solutions, LLC v. Konica Minolta Business Solutions U.S.A., Inc.*,  
[2010 WL 446936](#) (D. Kan. 2010)  
Secured party, which perfected its security interest in the debtor's leased equipment by filing where the debtor is located, not where the equipment is located, had priority over the equipment lessee who purchased the equipment at the end of the lease term, even though the purchase was pursuant to the leases entered into before the security interest attached.
116. *Deere & Co. v. New Holland Rochester, Inc.*,  
[935 N.E.2d 267](#) (Ind. Ct. App. 2010)  
Creditor with a perfected security interest in farm equipment was entitled to pre-judgment writ of replevin against dealer who acquired the equipment in trade even though the dealer had been informed by the debtor and a third party bank that the creditor's lien had been paid. Even if a bona fide purchaser takes free of a perfected security interest, Dealer could not qualify as a bona fide purchaser because it knew of the creditor's filing and failed to contact the creditor.
117. *NXCESS Motor Cars, Inc. v. JPMorgan Chase Bank*  
[317 S.W.3d 462](#) (Tex. Ct. App.), *superceding* [2010 WL 547391](#) (2010)  
Car dealer and its customer whose chain of title was traced to buyer who purchased the car from the original owner and then forged a release of lien took the car subject to that lien even though the car dealer and its customer acted in good faith and obtained a clean certificate of title. A forged title certificate passes no title.

118. *In re Hatfield 7 Dairy, Inc.*,

[425 B.R. 444](#) (Bankr. N.D. Ohio 2010)

Pre-paying buyer of farm products from seller engaged in farming operations could not, pursuant to the Food Security Act, take free of a security interest created by the seller because the buyer never received possession, the Act implicitly applies only when the sale is completed, and unless otherwise agreed, title passes upon delivery.

119. *In re Sunbelt Grain WKS, LLC*,

[427 B.R. 896](#) (D. Kan. 2010)

Prepaying buyer of corn from grain elevator was not a buyer in ordinary business and did not have priority over elevator's secured party in the grain or its proceeds because it did not take constructive possession of the corn since the corn was not identified to the contract. The interest of the secured party, who had swept the elevator's deposit accounts shortly after the buyer paid, was not equitably subordinated because the secured party's conduct was not tantamount to fraud, misrepresentation, overreaching or spoliation, or moral turpitude.

#### **– Competing Security Interests**

120. *In re Sports Pub., Inc.*,

[2010 WL 750008](#) (C.D. Ill. 2010)

PMSI inventory lender did not obtain priority over prior lender with perfected security interest because it did not provide authenticated notification of its plan to provide PMSI financing merely by sending the prior lender a copy of the security agreement which contained a single sentence in the middle, without any heading, referencing a PMSI.

121. *In re Leading Edge Pork, LLC*,

[2010 WL 2926155](#) (Bankr. C.D. Ill. 2010)

PMSI livestock lender did not obtain PMSI priority over bank by sending e-mail message that identified a representative of the debtor but not the debtor itself and which failed to state that the PMSI livestock lender has acquired or expects to acquire a PMSI. A subsequent letter informing bank of planned PMSI transactions in livestock was sufficient even though it erroneously mentioned subsection (b) of § 9-324 instead of subsection (d). However, a factual issue remained about whether the bank received the notification before the debtor received the livestock.



122. *Bank of Lincoln County v. GE Commercial Distribution Finance Corp.*,  
[2010 WL 4392913](#) (E.D. Tenn. 2010)

PMSI inventory lender did not obtain priority over prior lender with perfected security interest because the PMSI lender did not send notification of its plan to provide PMSI financing. The prior lender had a security in all inventory, not merely the items it financed, because its financing statement covered all inventory, there was no course of dealing to the contrary established by the unilateral act of the debtor in failing to remit the proceeds of non-financed inventory to the prior lender, and the prior lender did not waive its security interest by not repossessing the disputed items of collateral when it repossessed the items it had financed.

123. *City Bank v. Compass Bank*,  
[717 F. Supp. 2d 599](#) (W.D. Tex. 2010)

Senior secured party had no claim for conversion against bank with a junior security interest for accepting a deposit in payment of a collateralized account before the senior secured party revoked its consent to the debtor's collection and use of accounts. Section 9-341 also protects the bank with respect to acceptance of the deposit, but perhaps not with respect to application of the deposited funds to the obligation owed to the bank.

124. *LOL Finance Co. v. Paul Johnson & Sons Cattle Co.*,  
[2010 WL 5422621](#) (D. Neb. 2010)

Lender with perfected security interest in cattle placed by debtor at feedlot lost priority in cash proceeds of cattle that feedlot deposited into bank that had a security interest in the deposit account to secure the feedlot's debt. However, bank might be liable for aiding and abetting feedlot's conversion of collateral.

125. *Merrill Lynch Business Financial Services, Inc. v. Kupperman*,  
[2010 WL 2179181](#) (D.N.J. 2010)

Secured creditor of predecessor business had priority over secured creditor of successor with respect not merely to collateral transferred but also as to collateral acquired after the successor began operations because the security interest granted by the predecessor expressly covered after-acquired collateral. Secured creditor of successor could not be holder in due course of account collections because it was aware of the other security interest.

126. *Barcosh, Ltd. v. Dumas*,  
[2010 WL 3172984](#) (M.D. La. 2010)

Bank was not the first to file or perfect because it could not rely on the filing made by its predecessor. While perfection continues when a perfected security interest is assigned, in this case there was no outstanding loan between the debtor and the predecessor when the predecessor and bank merged.

127. *American Bank of St. Paul v. Coating Specialties, Inc.*,  
[787 N.W.2d 202](#) (Minn. Ct. App. 2010)

Credit union that had contractually agreed to subordinate its security interest to bank's security interest securing two \$25,000 notes and "all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions" thereof, remained subordinate in the proceeds of the collateral to the extent of \$50,000 even though bank rolled the two notes into a \$100,000 line of credit.

128. *Angulo-Mestas v. Editorial Televisa International, S.A.*,  
[2010 WL 2835550](#) (D.P.R. 2010)

[2010 WL 3363102](#) (D.P.R. 2010) (on request for reconsideration)

Assignee of account had priority over prior lender with an unperfected security interest in the assignor's accounts. No discussion of whether the assignee was perfected.

Secured party that filed to perfect security interest in accounts after assignee purchased the accounts was not entitled to the portion of the accounts accruing after it filed. Still no discussion of whether assignee was perfected.

129. *In re Snyder*,  
[436 B.R. 81](#) (Bankr. C.D. Ill. 2010)

Secured creditor with third priority that knew of claim owed to second priority secured creditor when it bought the debt owed to first priority secured creditor took the debt subject to the third priority creditor's marshaling rights. The transfer of the debt did not affect existing marshaling rights.

#### – Other

130. *In re Roser*,  
[613 F.3d 1240](#) (10th Cir. 2010)

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 week after the debtor's bankruptcy petition was perfected and had priority over the bankruptcy trustee pursuant to § 9-317(e). The state's certificate of title statute preempts Article 9's filing rules with respect to the method of perfection but not Article 9's rules regarding priority over a lien creditor.

131. *Nickey Gregory Co., LLC v. AgriCap, LLC*,  
[597 F.3d 591](#) (4th Cir. 2010)

Factor who acquired interest in produce distributor's accounts did not take free of PACA claims of produce suppliers because the factor did not buy the accounts, thereby removing them from the PACA trust, the factor merely loaned money secured by the accounts, and because the factor had notice of PACA claims. The factor had to disgorge not merely the profits it received, but all amounts received after the debtor stopped paying its suppliers, up to the amount necessary to satisfy the PACA claimants.

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132. *Onions Etc, Inc. v. Z & S Fresh, Inc.*,  
[2010 WL 2598392](#) (E.D. Cal. 2010)  
Produce buyer's broker that arranged resale was not a PACA trust beneficiary. PACA protects produce sellers, suppliers, and their agents, not the buyer's sell-side broker, and expanding PACA to protect such creditors would undermine PACA by dissipating the assets available for its intended beneficiaries.
133. *In re Cumberland Molded Products, LLC*,  
[431 B.R. 718](#) (6th Cir. BAP 2010)  
Because the bankruptcy trustee is not a "transferee" of estate assets, the trustee did not take 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 the trustee. Bank's action may have waived its setoff rights but did not waive its security interest.
134. *In re Seizure Of \$143,265.78*,  
[384 Fed. Appx. 471](#) (6th Cir. 2010)  
Bank that received notice of forfeiture of funds in which it claimed a security interest lost the right to contest forfeiture by its failure to timely file a claim despite having sent an e-mail message and letter to an Assistant U.S. Attorney alleging it had a security interest and requesting notification of future proceedings.
135. *United States v. Watson*,  
[2010 WL 2573478](#) (W.D. Mich. 2010)  
Bank with security interest in customer's deposit account to secure multi-million dollar line of credit was not entitled to defense from criminal forfeiture as a bona fide purchaser for value because even though it was a purchaser for value under the UCC, its rights were governed by Article 9, which does not protect good faith purchasers for value.
136. *Fulcrum Financial Inquiry, LLP v. NXTV, Inc.*,  
[2010 WL 3025802](#) (Cal. Ct. App. 2010)  
Secured creditor who purchased collateral, including debtor's deposit account, and later deposited the proceeds of some collateral into the deposit account, was the owner of the account despite its failure to acquire control under § 9-104. Consequently, judgment creditor of the debtor could not levy on the deposit account.
137. *Movsovit & Sons of Florida, Inc. v. Doral Bank*,  
[2010 WL 1978958](#) (D.P.R. 2010)  
Summary judgment denied on whether bank with security interest in certificate of deposit it had issued to produce buyer had to disgorge to the buyer's produce suppliers the funds received from liquidating the CD because the bank had not proven that the CD was acquired with non-PACA trust assets. However, funds remaining in the produce buyer's deposit account were proceeds remaining from the bank's loan to the produce buyer and were therefore not subject to the PACA trust.

138. *Great Western Bank v. Willmar Poultry Co.*,  
[780 N.W.2d 437](#) (N.D. 2010)

Poults sold to debtor engaged in raising turkeys were “supplies” under state agricultural lien statute and therefore seller had a statutory lien on the proceeds received from the debtor’s sale of the turkeys and this lien was superior to bank’s previously perfected security interest in the debtor’s poultry and accounts.

139. *In re Crooked Creek Corp.*,  
[427 B.R. 500](#) (Bankr. N.D. Iowa 2010)

Feed supplier’s agricultural lien in pigs that ate feed did not have priority over bank’s earlier perfected security interest because the supplier did not make a certified request to the bank for financial information about the debtor, as required by the Iowa agricultural lien statute.

140. *In re Coastal Plains Pork, LLC*,  
[438 B.R. 845](#) (Bankr. E.D.N.C. 2010)

Feed suppliers’ agricultural lien in pigs that ate feed did not have priority over bank’s earlier perfected security interest because the suppliers did not make a certified request to the bank for a financial memorandum about the debtor, or provide the bank with a confidentiality waiver from the debtor, as required by the Iowa agricultural lien statute.

141. *Premier Community Bank v. Schuh*,  
[789 N.W.2d 388](#) (Wis. Ct. App. 2010)

Creditor that pastured livestock for related entity had a possessory lien for the unpaid pasturing charges and, even without the filing of a financing statement, this lien had priority under § 9-333 over the perfected security interest granted by the related entity to its bank. The lien was a possessory lien even though the statute creating it provides that the person pasturing livestock “shall” have a lien on the livestock and “may” retain possession of it.

142. *Rent-N-Roll v. Highway 64 Car And Truck Sales*,  
[2010 WL 4629604](#) (Tenn. Ct. App. 2010)

Lessor of large-size custom wheels and tires that were installed on car in which seller had a perfected security interest had priority over the seller under § 2A-310(2) because the lease was entered into before, although only shortly before, the wheels and tires were installed. However, the lessor had to compensate the seller for injury to the car done during both installation and removal, and this included restoring the car to its original wheel base.

143. *In re Union City Contractors, Inc.*,  
[2010 WL 1226882](#) (Bankr. N.D.N.Y. 2010)

Progress payments paid to general contractor and deposited into deposit account maintained at creditor bank were not held in trust for surety that later paid laborers and materialmen, but were instead subject to first-priority security interest of the depositary bank and a second-priority security interest of lender with a security interest the deposit account as proceeds of accounts.

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144. *Trevdan Building. Supply v. Toll Brothers, Inc.*,  
[996 A.2d 520](#) (Pa. Super. Ct. 2010)  
Unpaid supplier to subcontractor had equitable rights to subcontractor's payment from general contractor that were superior to factor that had purchased subcontractor's accounts because the subcontract authorized the contractor to directly pay the unpaid suppliers. No discussion of Article 9.
145. *In re Bill Heard Enterprises, Inc.*,  
[423 B.R. 771](#) (Bankr. N.D. Ga. 2010)  
Secured party that settled priority dispute with another lender by allowing the other lender to retain 15% of the escrowed proceeds of the collateral was not entitled to be subrogated to the other lender's security interest in different collateral because the secured party did not advance money in agreeing to the settlement and because it acted as a volunteer.
146. *U.S. ex rel. Solera Construction, Inc. v. J.A. Jones Construction Group, LLC*,  
[2010 WL 1269938](#) (E.D.N.Y. 2010)  
Although judgment creditor could have acquired priority in account owed to debtor if it had properly levied during the period when the bank's financing statement had lapsed and the bank's security interest was therefore unperfected, the judgment creditor failed to levy on that account pursuant to New York law.
147. *High Valley Concrete, L.L.C. v. Sargent*,  
[234 P.3d 747](#) (Idaho 2010)  
Judgment creditor lacked standing to claim the security interest of judgment debtor's attorneys was void as a violation of the Rules of Professional Conduct.
148. *KeyBank v. Mazer Corp.*,  
[935 N.E.2d 428](#) (Ohio Ct. App. 2010)  
Printer's customer who paid vendor for paper that the vendor delivered to the printer for printing was a bailor of the paper and was entitled to have the paper returned despite claims to the paper by the printer's secured creditor and receiver.
149. *Southwest Bank of St. Louis v. Pouloukefalos*,  
[931 N.E.2d 285](#) (Ill. Ct. App. 2010)  
Security interest in fixtures held by bank that had filed in Missouri, where the debtor was located, but not in Illinois, where the fixtures were located, was subordinate under the common law to the landlord's lien because the bank's security interest was unperfected and the landlord's lien was first in time.

150. *In re Wilson*,  
[2010 WL 5341917](#) (Bankr. D. Neb. 2010)  
Creditor with a perfected security interest in debtor's action against home builder for negligent construction had priority over earlier mortgagee in the proceeds of a settlement of that claim to the extent the claim was for personal injury but mortgagee had priority to the extent that the claim was for property damage and represents a reduction in value of the mortgagee's collateral.
151. *SEC v. Wealth Management, LLC*,  
[2010 WL 3701784](#) (E.D. Wis. 2010)  
Pursuant to Wisconsin statute, claim for unpaid wages by employees of debtor had priority over bank's perfected security interest in the debtor's assets.
152. *North Valley Bank v. McGloin, Davenport, Severson and Snow, P.C.*,  
[2010 WL 5013755](#) (Colo. Ct. App. 2010)  
Attorney's statutory lien on a judgment has priority over a previously perfected security interest in account that gave rise to the judgment because Colorado's attorney's lien statute states that an attorney's lien is a "first lien" and the Colorado Commercial Code does not govern the priority dispute.
153. *Richards v. Louisiana Citizens Property Insurance Corp.*,  
[623 F.3d 241](#) (5th Cir. 2010)  
Under Louisiana law, attorney's right pursuant to contingent fee agreement to percentage of recovery in action against property insurer had priority over the rights of the property mortgagee that was an additional loss-payee on the insurance policy.

### ***Enforcement Issues***

#### **– Default**

154. *In re Jones*,  
[591 F.3d 308](#) (4th Cir. 2010)  
Clause in security agreement that made filing a bankruptcy petition a default is enforceable under West Virginia law and state statute requiring creditor to give notice of the right to cure before repossessing collateral was inapplicable because the default – filing for bankruptcy protection – could not be cured.

155. *Grohman v. Kahlig*,

[318 S.W.3d 882](#) (Tex. 2010)

Despite term in security agreement by which debtor promised not to “sell, transfer, lease, or otherwise dispose of the Collateral,” the debtor did not breach security agreement by converting two corporations, whose stock was pledged as collateral, into limited partnerships because the security agreement defined the collateral to include “all replacements, additions and substitutions” for the stock. These two clauses must be harmonized and, while the collateral changed form, it was not destroyed.

156. *In re Bolin & Co., LLC v. Ogden*,

[437 B.R. 731](#) (D. Conn. 2010)

Although promissory note defined default as only the failure to pay within five days of demand, security agreement defined default to include the creation of any encumbrance on the collateral and because the debtor had created such encumbrances by pawning collateral, the debtor was in default under the security agreement despite the absence of a demand for payment. The secured party was therefore permitted to repossess the collateral.

157. *Cornerworld Corp. v. Timmer*,

[2010 WL 3942804](#) (W.D. Mich. 2010)

[2010 WL 3942850](#) (W.D. Mich. 2010) (Special Master report)

Debtor’s movement of collateralized equipment from Michigan to Texas may make repossession more inconvenient but was not a default because the transaction documents said nothing about where the collateral was to be maintained and, because the relocation made certain cost savings possible, it was not a “materially adverse event” under the debenture.

158. *Allason v. Gailey*,

[2010 WL 3970374](#) (Ohio Ct. App. 2010)

Despite clauses in security agreement calling for secured party and debtor to be joint loss-payees on insurance contract, debtor was entitled to use insurance proceeds of the collateral to require replacement property because the security agreement lacked an acceleration clause and the secured party had not shown how this would impair her interest.

#### – Waiver, Estoppel & Other Defenses

159. *Scott v. Houston*,

[2010 WL 680984](#) (Tenn. Ct. App. 2010)

Despite clause in security agreement providing that any waiver of default by seller does not impair the seller’s right to declare a later default, seller modified contract by expressly agreeing to accept and by accepting late payments without imposing late payment charge. Subsequent repossession after debtor had paid the principal debt in full therefore constituted conversion and, because it was done in retaliation for the debtor’s cooperation with authorities conducting an unrelated criminal investigation of the seller, punitive damages were available.



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160. *Minor v. Chase*,  
[2010 WL 2006401](#) (Ark. 2010)  
Clauses in security agreement prohibiting unwritten modifications and providing that no waiver occurs by accepting late payment were effective. Secured creditor could therefore repossess the collateral without giving prior notification of its intent to require strict compliance.
161. *Platt v. Wachovia Dealer Services, Inc.*,  
[932 N.E.2d 255](#) (Ind. Ct. App. 2010)  
Debtors had no right to have court modify the terms of the loan and security agreement to reduce the monthly payment so that the it fell within their budget.
162. *In re Lehman Brothers Holdings, Inc.*,  
[439 B.R. 811](#) (Bankr. S.D.N.Y. 2010)  
Bank was not permitted to exercise setoff against \$500 million deposit account that customer had opened and funded solely to provide security for intra-day credit in order to satisfy customer's unrelated obligations arising from derivatives transactions. The language of the security agreement made it clear that the security interest secured only intra-credit, of which there was none, and the restricted nature of the deposit account made it a special deposit against which the bank did not have common-law setoff rights.
163. *Fifth Third Bank v. Peoples National Bank*,  
[929 N.E.2d 210](#) (Ind. Ct. App. 2010)  
Depository bank with a perfected security interest in customer's deposit account did not waive that security interest by claiming that it held no deposit account when it answered interrogatories in connection with a writ of garnishment. Nor did depository waive its security interest by failing to properly effect setoff upon service of the writ because the depository's security interest had priority over the garnishment lien and the secured debt exceeded the balance in the deposit account. However, sanctions were appropriate for the depository's untruthful and misleading answers to interrogatories.
164. *Burke v. United American Acquisitions and Management, Inc.*,  
[2010 WL 3062222](#) (Mich. Ct. App. 2010)  
Creditor with perfected security interest did not, by entering into a contract with company to manage and eventually purchase the debtor's assets, waive its rights to the subsequently generated receivables. Therefore judgment lien creditor could not garnish the proceeds of those accounts.
165. *AEP Energy Services Gas Holding Co. v. Bank of America*,  
[2010 WL 4261227](#) (2d Cir. 2010)  
Bank with a security interest in stored natural gas did not waive or subordinate its interest by agreeing to allow lessee of storage facility to use during the gas during the term of the lease, provided no default by the debtor had occurred. Because the debtor had defaulted, the bank could foreclose on the gas.



166. *Wachovia Bank v. Metro Automation, Inc.*,  
[2010 WL 2836176](#) (N.D. Tex. 2010)

Secured creditor's refusal to allow the debtor to sell the collateral for the creditor's benefit and refusal to accept the collateral in partial satisfaction of the debt did not constitute a failure to mitigate damages or a waiver of the right to collect the full amount of the debt because the security agreement expressly provided that the debtor waived any requirement that the secured creditor dispose of the collateral before seeking payment of the debt.

### – Replevin & Repossession

167. *Merrill Lynch Com. Fin. Corp. v. American Standard Testing and Consulting Labs., Inc.*  
[2010 WL 114280](#) (E.D.N.Y. 2010)

Secured creditor is entitled to a pre-judgment order of seizure of the collateral even though it was unable to set forth the value of the collateral. Secured creditor need not post a bond to get that order because the requirement of a bond was waived in the security agreement.

168. *GMAC v. Everett Chevrolet, Inc.*,  
[2010 WL 4010113](#) (Wash. Ct. App. 2010)

Secured creditor was entitled to prejudgment writ of replevin upon posting bond; trial court erred in deciding, at replevin hearing, the merits of the underlying contractual dispute by concluding that secured creditor had breached the contract by violating its duties of good faith and fair dealing.

169. *TFS Capital Solutions v. KO & Associates LLC*,  
[2010 WL 5151615](#) (E.D. La. 2010)

Member of LLC debtor who had been served with order of sequestration directed at LLC was in contempt for failing to comply with order by either delivering the collateralized equipment to the marshal or informing the marshal where the equipment is located.

170. *Pharmacy Advantage, Inc. v. A & C Health Care Services, Inc.*,  
[2010 WL 3404826](#) (Cal. Ct. App. 2010)

Trial court did not abuse its discretion in its pre-judgment order appointing a receiver to manage the debtor's nursing facility and take control of enough funds to satisfy the plaintiff's claim because the debtor's accounts, in which plaintiff held a security interest, was a dwindling pool of assets. However, trial court erred in allowing receiver to take control over accounts due from Medi-Cal, which by state law are exempt from legal process and are not assignable.

171. *GE Commercial Distribution Finance Corp. v. Carter Bros. Mfg. Co.*,  
[2010 WL 3118276](#) (M.D. Ala. 2010)

Secured creditor was not entitled to order temporarily restraining debtors from selling the collateral because all of the threatened harms are readily compensable by monetary damages and therefore the secured creditor had not shown irreparable injury. For the same reasons, secured creditor was not entitled to writ of seizure without notice and a hearing because even though it feared that the debtors would dispose of the collateral.

172. *States Resources Corp. v. Yohe*,  
[2010 WL 2773335](#) (W.D. Mo. 2010)

Secured creditor was entitled to judgment on notes and guaranty due to debtors' default but was not entitled to replevy the collateral because, even though the creditor had a right to possession, there was no evidence that the debtors have actually deprived the creditor of any right over the collateral or that the debtors were exercising unauthorized control over the collateral.

173. *Becker v. Longinaker*,  
[784 N.W.2d 202](#) (Iowa Ct. App. 2010)

Secured party that had waived right to a deficiency when foreclosing mortgage committed conversion when it later repossessed horses that the debtor had also used to collateralize the debt.

174. *General Electric Capital Corp. v. Delaware Machinery & Tool Co.*,  
[2010 WL 1687910](#) (S.D. Ind. 2010)

Lessor – whose interest may or may not be a security interest – that, before receivership action commenced, obtained replevin order requiring debtor to deliver equipment in 30 days, was entitled to possession over the receiver. Court stayed order to determine relative priority of lessor and secured party.

175. *Williams v. Republic Recovery Services, Inc.*,  
[2010 WL 2195519](#) (N.D. Ill. 2010)

Because a secured party may repossess collateral without judicial process only if it does so without breaching the peace, a breach of the peace negates the secured party's right to take possession. That in turn makes the action a violation of the Fair Debt Collection Practices Act, which prohibits "[t]aking or threatening to take any nonjudicial action to effect dispossession . . . if . . . there is no present right to possession of the property claimed."

176. *Siwka v. Smart Recovery Service, LLC*,  
[2010 WL 3719902](#) (E.D. Mich. 2010)  
[2010 WL 4791370](#) (E.D. Mich. 2010)

Secured party could not be liable for conversion due to its repossession of car because the debtor was in default and thus the secured party had a right to possession. However, material facts were in dispute about whether the creditor would be liable for breach of the peace due to the repossession agent's use of a police officer to conduct the repossession. Police officers could be liable, but the city could not be because there was no evidence that the police acted pursuant to official policy.

177. *Siwka v. Smart Recovery Service, LLC*,  
[2010 WL 3719897](#) (E.D. Mich. 2010)

Repossession agent did not, for the purposes of a § 1983 claim, act under color of state law when conducting repossession given that the debtor did not learn that the agent was a police officer until later in court following the repossession events.

178. *Ford Motor Credit Co. v. Ryan*,  
[2010 WL 3783156](#) (Ohio Ct. App. 2010)

Because repossession is authorized only if it can be effected without a breach of the peace, a breach of the peace negates the creditor's right to possession and can give rise to damages for conversion. Repossession agent did not breach the peace in repossessing three cars even though they were located in the debtors' parking lot, driveway, and carport because the secured party has a limited privilege to trespass on the debtor's property to repossess collateral and this privilege extends to the secured party's agents. A breach of the peace may have occurred in a fourth repossession, during which the debtor went out to the carport and confronted the repossession agent hooking the car to a tow truck. The debtor told the agent to stop, unhook the car and to leave the premises. The debtor then reached down to unhook the car, and the agent grabbed his hands, pushed him, and began screaming. The secured creditor was also liable for conversion of personal property located in the cars when they were repossessed and which was not returned.

179. *Brown v. City of Philadelphia*,  
[2010 WL 4484630](#) (E.D. Pa. 2010)

Debtor's negligence and conversion actions against secured party arising out of conduct during repossession were covered by the parties' arbitration agreement, which applied to "any claim, dispute or controversy between you and us that in any way arises from or relates to the Loan Agreement."

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– Notification of Disposition

180. *Colonial Pacific Leasing Corp. v. Elite S-W Mo., Inc.*,  
[2010 WL 3119448](#) (W.D. Mo. 2010)

Notification of disposition that erroneously stated that collateralized vehicles would be sold at a public auction on September 10, 2009, when in fact the vehicles were sold at private dealer-only auctions on September 17, 2009, and October 15, 2009, was nevertheless sufficient in part because the debtor had bought and sold vehicles through the auction company, and was aware that it conducts private, dealer-only auctions. The sale was commercially reasonable because the auction company was the largest in the country, regularly frequented by hundreds of dealers, the debtor had itself delivered the vehicles to the auction company for sale before the secured party took control, and the five-month delay before the sale was caused by the debtor's own obstructions.

181. *Cabrera v. Nationwide Southeast, LLC*,  
[700 S.E.2d 626](#) (Ga. Ct. App. 2010)

Summary judgment on secured party's deficiency claim was improper because a factual issue remained about whether secured party had complied with non-uniform statutory requirement that secured party notify the debtor of its intent to pursue a deficiency claim, the debtor's rights of redemption, and the debtor's right to demand a public sale of the motor vehicle.

182. *Textron Financial Corp. v. Metro Lincoln-Mercury, Inc.*,  
[2010 WL 4736262](#) (E.D. Tenn. 2010)

Notification of disposition sent by certified mail, return receipt requested, and returned "unclaimed" was effective because it was sent.

– Conducting a Commercially Reasonable Disposition

183. *Regions Bank v. Trailer Source*,  
[2010 WL 2074590](#) (Tenn. Ct. App. 2010)

Senior secured creditor's control over and approval of debtor's sale of collateralized trailers after default was sufficient to trigger the requirement, with respect to junior secured creditor, that the sale be conducted in a commercially reasonable manner. Control was evidenced by the senior secured creditor's possession and later release of the certificates of title for the trailers. Sale to a single buyer of 241 trailers scattered around the country sight unseen and "as is" for less than the amount of the debt owing to the senior secured party was commercially reasonable. Bank did not act in a commercially unreasonable manner in failing to appraise the trailers because it did not know where they were located and obtaining appraisals would have been costly.

184. *Grayson v. Union Federal Sav. & Loan Ass'n of Crawfordsville*,  
[928 N.E.2d 652](#) (Ind. Ct. App. 2010)

Although a secured creditor who fails to comply with Article 9 when disposing of collateral can be liable to a junior secured party under § 9-625, a junior secured party is not someone who can put the secured creditor's compliance at issue under § 9-626 (so as to put the burden of proof on the secured creditor). Because the deficiency owed to the disposing creditor exceeded the value of the collateral, the junior secured party had no damages for any failure to conduct a commercially reasonable disposition.

185. *Commercial Credit Group, Inc. v. Falcon Equipment, LLC of Jax*,  
[2010 WL 144101](#) (W.D.N.C. 2010)

Secured creditor's failure to provide evidence of the value of the collateral it purchased at the sale did not create a presumption that the sale was commercially unreasonable. Neither creation of note nor creation of guaranty somehow discharged previously perfected security interest in the collateral.

186. *Versey v. Citizens Trust Bank*,  
[2010 WL 4009662](#) (Ga. Ct. App. 2010)

Although in its request for summary judgment the secured creditor submitted two appraisals of the car disposed of, neither of those appraisals contained sworn opinion testimony of a witness who stated the basis for the opinion or who opined that the appraised value of the car is its "fair and reasonable" value in that particular market at the time of either the repossession or of the sale. Because, based on pre-revision case law, the secured party must prove the value of the collateral at the time of repossession to show entitlement to a deficiency, summary judgment for the creditor was improper.

187. *Textron Financial Corp. v. Metro Lincoln-Mercury, Inc.*,  
[2010 WL 4736262](#) (E.D. Tenn. 2010)

Secured party was not entitled to summary judgment on its claim for a deficiency because the debtors had put commercial reasonableness at issue but the secured party provided no specific information about the collateral sold, the date or place of the sales, the process by which the sales were conducted, the number or dollar amount of bids received, or whether the sales were made in conformity with reasonable commercial practices among dealers in such property.

188. *Aviation Finance Group, LLC v. Duc Housing Partners, Inc.*,  
[2010 WL 1576841](#) (D. Idaho 2010)

Material question of fact existed as to whether secured party disposed of aircraft in a commercially reasonable manner. Although the only expert testimony admitted supported the secured party, there was information in the record suggesting that the secured party agreed to accept a purchase price more than \$500,000 below the appraised value of the aircraft, from a buyer it described as a "true bottom fisher," shortly after beginning marketing efforts and due largely to pressure regarding its own financial position.

189. *Wells Fargo Business Credit v. Environamics Corp.*,  
[934 N.E.2d 283](#) (Mass. Ct. App. 2010)

Material question of fact existed as to whether secured party disposed of business assets in a commercially reasonable manner. The creditor's only evidence was the affidavit of its vice president who conducted the sale, but which was silent as to the background of the affiant. The guarantors presented expert evidence suggesting that there were numerous other avenues consistent with industry practice that could have yielded a higher price and submitted an affidavit from an employee of the debtor describing how the assets could be sold separately for more money.

190. *Financial Federal Credit Inc. v. Hartmann*,  
[2010 WL 4918980](#) (S.D. Tex. 2010)

Affidavit of secured party's vice president, who had 23 years of experience in equipment financing, which stated that, in his opinion, the public sales of the equipment were conducted in accordance with industry standards and were commercially reasonable in all respects, including method, manner, time, place and terms, was sufficient to support summary judgment on action for a deficiency given the debtor's failure to present competent evidence demonstrating the procedural irregularities occurred during the course of the sales.

191. *USA Financial Services, LLC v. Young's Funeral Home, Inc.*,  
[2010 WL 3002063](#) (Del. Ct. Comm. Pleas 2010)

Secured creditor's sale of hearse approximately one year after repossession occurred was not commercially reasonable, particularly since vehicles are depreciating assets and the factors contributing to the delay were within the creditor's control. Moreover, the notice of public sale provided by the creditor was deficient because it failed to provide the time or full address of the public sale, failed to inform the debtors that they were entitled to an accounting of the unpaid indebtedness, and did not accurately state the intended disposition because the vehicle was not immediately taken to auction, but first was placed for private sale at a used car lot for nearly a year. Because the creditor offered no proof as what a commercially reasonable disposition would have yielded, the court presumed that a proper sale would have yielded the amount of the secured obligation.

192. *In re Walter B. Scott & Sons, Inc.*,  
[436 B.R. 582](#) (Bankr. D. Idaho 2010)

Term in security agreement providing that disposition would be commercially reasonable if notice was provided to the debtor ten days in advance and notice was published in a newspaper of general circulation at least ten days before a public sale was manifestly unreasonable and therefore unenforceable because it dealt only with notification and advertisement, not with the other aspects of the sale. Summary judgment denied on the commercial reasonableness of the disposition because the debtor raised with expert testimony a factual dispute about the commercial reasonableness of how the auction was publicized, the condition of the equipment when it was auctioned, and the manner in which the auction itself was conducted.

193. *Regal Finance Company, Ltd. v. Tex Star Motors, Inc.*,  
[2010 WL 3277132](#) (Tex. 2010)

Although § 9-627(b)(3) provides that a disposition of collateral is commercially reasonable if it conforms to reasonable commercial practices among dealers in the type of property, this is a safe harbor, not a requirement of commercial reasonableness. A secured party need not produce evidence of dealer practices to prove that a disposition was commercially reasonable. Testimony of the creditor's sales agent provided sufficient evidence to uphold the jury determination that the creditor acted in a commercially reasonable manner in selling 906 motor vehicles through private sales to wholesalers.

194. *Arizona Business Bank v. Leveton*,  
[2010 WL 1998149](#) (Ariz. Ct. App. 2010)

Commercial reasonableness of disposition is not part of creditor's prima facie case for a deficiency judgment and was not put at issue because guarantor failed to raise it in his pleadings. Moreover, allegations that the value of the collateral was higher than the sales price and that the creditor delayed before conducting the sale were insufficient to overcome evidence that the creditor sold the collateral to the highest bidder at a public sale conducted by an established auctioneer.

195. *SFG Commercial Aircraft Leasing, Inc. v. N59CC, LLC*,  
[2010 WL 883764](#) (N.D. Ind. 2010)

Secured creditor was entitled to judgment for the entire secured obligation even though it had repossessed and not yet sold the collateral, an aircraft. Whether the secured creditor acted in a commercially reasonable manner in rejecting an offer to buy the aircraft for an amount the debtor conceded was less than what the aircraft was worth and before the secured creditor had the log book for the plane, an item necessary to entertain other bids or assess the reasonableness of the offer, was a factual issue not ripe for adjudication and that did not prevent judgment on the debt.

196. *General Electric Capital Corp. v. John Carlo, Inc.*,  
[2010 WL 3937313](#) (E.D. Mich. 2010)

Secured party was entitled to judgment on the debt even though it had not yet disposed of the collateral.

197. *In re King*,  
[2010 WL 4290527](#) (Bankr. S.D.N.Y. 2010)

Secured party had no duty to repossess and dispose of the collateral, and therefore had a valid claim for the full amount of the debt despite its decision, consciously or not, to go after the collateral.



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– Collecting on Collateral

198. *Allied Capital Partners, LP v. Proceed Technical Resources, Inc.*,  
[313 S.W.3d 460](#) (Tex. Ct. App. 2010)  
Even if factor materially breached agreement with debtor by refusing to purchase accounts, debtor was not entitled to an order enjoining the factor from contacting the account debtors or collecting on accounts that the factor had previously purchased. A material breach discharges further performance but does not relieve the other party of obligations that arose before the breach, and thus factor did not forfeit its security interest in the purchased accounts and the debtor was not relieved of its warranty obligations on those accounts.
199. *Ta Chong Bank Ltd. v. Hitachi High Technologies America, Inc.*,  
[610 F.3d 1063](#) (9th Cir. 2010)  
After creditor's unperfected security interest in accounts was avoided, creditor could not maintain an action against account debtor that paid the debtor before the petition was filed but after receiving instructions to pay the creditor directly.
200. *Platinum Funding Services, LLC v. Magellan Midstream Partners, LP*,  
[2010 WL 2383786](#) (Conn. Super. Ct. 2010)  
Account debtor that paid debtor after receiving instruction by certified mail to pay the debtor's factor had not discharged the account and still had to pay the factor. Account debtor was not entitled to any setoff or mitigation for checks it sent and which the debtor had endorsed over to the factor, and which allegedly therefore provided the factor with notice that the account debtor was still paying the debtor.
201. *Wells Fargo Bank v. Kal-Rich, Inc.*,  
[2010 WL 1740603](#) (Mass. Ct. App. 2010)  
Secured party had standing to collect accounts owed to entity that had purchased from junior lienor substantially all the assets of the original debtor.
202. *MG Herring Group Inc. v. John Vratsinas Commercial Builders, Inc.*,  
[2010 WL 1979393](#) (N.D. Tex. 2010)  
Bank claiming a security interest in contractor's accounts could not intervene in action between the contractor and its customers because the parties had already reached a settlement and the bank's delay in seeking to intervene would prejudice the customers.
203. *Sweet Ones, Inc. v. Mercantile Bank of Michigan*,  
[2010 WL 1658205](#) (W.D. Mich. 2010)  
Debtor lacks standing to raise the PACA rights of its suppliers in effort to prevent its secured lender from exercising setoff against the debtor's bank account or collecting from account debtors.



204. *Summit Financial Resources, L.P. v. Kathy's General Store, Inc.*,  
[2010 WL 1816685](#) (D. Kan. 2010)

Account financier had no cause of action against customer of debtor who continued to prepay the debtor for goods after the customer received notification to pay the account financier directly. Because the transactions involved prepayment, and thus the customer never owed a monetary obligation, no accounts were created.

205. *The Sportsman's Guide Inc. v. Havana National Bank*,  
[2010 WL 2663098](#) (C.D. Ill. 2010)

Account debtor that brought interpleader action to determine whom it should pay was entitled to reimbursement of its costs and reasonable attorney's fees.

#### – Retaining Collateral

206. *In re CBGB Holdings, LLC*,  
[439 B.R. 551](#) (Bankr. S.D.N.Y. 2010)

Secured party conducted effective strict foreclosure by entering into agreement with debtor, after default, providing that if debtor did not pay the secured obligation within the next three months, the secured creditor could without further notice, “possess and retain” the collateral pursuant to § 9-620. The debtor's further consent after the end of the three-month period was not necessary.

207. *Corsair Special Situations Fund, L.P. v. Engineered Framing Systems, Inc.*,  
[694 F. Supp. 2d 449](#) (D. Md. 2010)

Because patent security agreement provided that the creditor's interest would “become an absolute assignment” after debtor defaulted, and debtor had defaulted, the security interest had become an absolute assignment of the patent. *See also* [2010 WL 236739](#) (subsequent decision in the same case).

208. *Blakely v. Tri-County Financial Group, Inc.*,  
[2010 WL 1286856](#) (N.D. Ill. 2010)

Although secured party may have obtained a windfall by accepting the debtor's interest in a 20-year revenue stream in satisfaction of a deficiency judgment, the debtor and debtor's counsel expressly declined to object to the proposal, and therefore the acceptance was effective.

209. *R.S. Silver Enterprises Co. v. Pascarella*,  
[2010 WL 3259869](#) (Conn. Super. Ct. 2010)

Secured creditor had not taken ownership of “participation interest” through a strict foreclosure because the creditor had not sent a proper proposal to do so. The communication sent was not unconditional because it referred to consequences *if* payment were not made. It identified the debtor, a corporation, simply as “Bob.” It identified the collateral simply as “the Riversedge project.” It made no mention of cancelling or satisfying the \$200,000 Note. And, it was not authenticated.

– **Standing Issues**

210. *Wyatt v. Capital One Auto Financing*,  
[2010 WL 323124](#) (Tex. Ct. App. 2010)

Even though installment loan contract provided that any change in the agreement has to be in a writing signed by both parties and incorrectly identified the seller’s assignee, the seller validly assigned the right to payment to a finance company. The finance company provided reasonable proof of the assignment even though the contract assignment form was not completely filled out because it was authenticated by the seller and identified the debtor’s purchase contract. Although the seller later provided a slightly different assignment form to the debtor, both forms identified the debtor’s purchase contract and the assignee. Moreover, the seller repeatedly advised the debtor of the assignment and returned checks the debtor had sent to the seller. Accordingly, the debtor was in default by not paying the assignee.

– **Statute of Limitations**

211. *Holman Street Baptist Church v. Jefferson*,  
[317 S.W.3d 540](#) (Tex. Ct. App. 2010)

Expiration of the statute of limitations on an action to collect personally from the debtor does not bar the lender from foreclosing on collateral, in this case shares of stock, to satisfy the debt.

212. *Montgomery v. Ford Motor Credit Co.*,  
[2010 WL 2431894](#) (Tex. Ct. App. 2010)

Debtor’s causes of action against secured party for deceptive trade practices and conversion accrued when the secured party repossessed the collateral, not when it later disposed of the collateral, and thus were barred by the applicable statute of limitations.

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– Other

213. *Textron Financial Corp. v. Ship and Sail, Inc.*,  
[2010 WL 1912653](#) (D.R.I. 2010)

Clauses in commercial security agreement and guaranties selecting Rhode Island, the creditor's location, as a permissible place to litigate and consenting to jurisdiction and venue were presumptively valid. Although all none of the activity took place in Rhode Island and all of the witnesses are located in Texas, the consent to jurisdiction was not unreasonable given that sophisticated parties willingly signed the agreements. Venue was also proper in Rhode Island.

214. *LI Equity Network, LLC v. Village in the Woods Owners Corp.*,  
[910 N.Y.S.2d 97](#) (N.Y. App. Div. 2010)

Buyer of coop shares at Article 9 disposition who, at the auction, agreed that the sale was subject to the cooperative corporation's governing documents, was required to obtain approval from the cooperative corporation's board of directors prior to obtaining the shares and a proprietary lease of the unit.

215. *In re Lake County Grapevine Nursery Operations*,  
[2010 WL 4928488](#) (Bankr. N.D. Cal. 2010)

Despite language in pledge agreement to the contrary, under California law neither the pledging of membership rights in an LLC nor the declaration of a breach by the secured party is sufficient to divest the pledging member of the right to vote.

216. *Bank of North Carolina v. RCR Marketing, LLC*,  
[2010 WL 5020502](#) (M.D.N.C. 2010)

Bank with security interest in trademarks was not entitled to preliminary injunction against alleged infringer that thought it had purchased the trademarks from the debtor's subsidiary because the debtor had never used the trademarks, only licensed them to the subsidiary, the alleged infringer was the only entity currently using the trademarks in commerce, and an outright prohibition on use would not protect either the ownership interest claimed in the trademarks or the goodwill of the trademarks in the eyes of the consuming public. The alleged infringer would be required to deposit 4% of its gross sales into escrow while the matter is litigated and the bank and the debtor would be permitted to monitor use of trademarks.

217. *Textron Financial Corp. v. Freeman*,  
[2010 WL 5778756](#) (D.R.I. 2010)

Inventory lender that, seventeen months after bringing suit against debtor- tractor dealer, requested an injunction ordering the debtor to: (i) pay proceeds of previously sold collateral in escrow; and (ii) not to sell collateral unless putting the proceeds in escrow, was entitled to only the latter. The first relief requested was akin to a prejudgment attachment, which is not appropriate given that the lender's failure to bring claim for replevin and delay in requesting the injunction. The injunction as to future sales would issue. Virtually identical decisions in *Textron Financial Corp. v. Meranda*, [2010 WL 5778772](#) (D.R.I. 2010); *Textron Financial Corp. v. Two Rivers, Inc.*, [2010 WL 5778771](#) (D.R.I. 2010); and *Textron Financial Corp. v. Oakboro Tractor & Equipment, Inc.*, [2010 WL 5779358](#) (D.R.I. 2010).

### ***Liability Issues***

#### **– of the Secured Party**

218. *In re Bolin & Co., LLC v. Ogden*,  
[437 B.R. 731](#) (D. Conn. 2010)

Although the secured party was authorized to repossess the collateralized jewelry, the secured party had no right to inform the debtor's suppliers that the debtor had improperly pawned consigned jewelry or to return some jewelry to the consignors, and thus was liable for tortious interference with business relations.

219. *Kingsburg Apple Packers, Inc. v. Ballantine Produce Co.*,  
[2010 WL 2719828](#) (E.D. Cal. 2010)

Secured creditor who obtains the collateral through foreclosure, is generally not subject to a restitution claim for the amount of the value of the collateral furnished to the debtor by an unsecured creditor. Absent unusual circumstances, the equitable remedy of restitution must defer to the rights given a secured creditor by the California Uniform Commercial Code.

220. *General Motors, L.L.C. v. Comerica Bank*,  
[2010 WL 5174515](#) (Mich. Ct. App. 2010)

Bank with a security interest in deposit account it maintained for the debtor was liable to third party for unjust enrichment resulting from third party's mistaken wire transfer of two overpayments to the debtor's deposit account. Neither old nor revised Article 9 displaces the claim for restitution because the debtor acquired no rights to the overpayments and therefore the bank had no security interest in them.

221. *Green Tree Servicing, LLC v. 1997 Circle N Ranch Ltd.*,  
[325 S.W.3d 869](#) (Ct. App. Tex. 2010)

Owner of land on which mobile homes were situated had, pursuant to statute, a possessory lien on the mobile homes but secured party that repossessed and sold the mobile homes in place had no personal liability for the unpaid rent.

222. *Terra Partners v. Rabo Agrifinance, Inc.*,  
[2010 WL 3270225](#) (N.D. Tex. 2010)

Secured party was not liable for conversion allegedly committed during repossession to entity that claimed to own some of the collateral repossessed because the secured party acknowledged the claimant's potential ownership rights, made a reasonable request that the claimant identify its property so that it could be returned, but the claimant refused to do so.

223. *Mitec Partners, LLC v. U.S. Bank*,  
[605 F.3d 617](#) (8th Cir. 2010)

Individual stockholders who purchased secured loan to their corporation from a bank had no cause of action against bank for failing to disclose its subordination agreement with the SBA. The stockholders failed to identify any specific misrepresentation made by the bank and could not have justifiably relied on any misrepresentation because the stockholders initiated the transaction, were sophisticated in business and financial matters, had access to the corporation's financial records which contained information about the subordination agreement, and the sale documents expressly disclaimed any representations by the bank and indicated that the stockholders had relied on their own investigation.

224. *Taylor v. Knoxville Trucks, Inc.*,  
[2010 WL 3951505](#) (D.S.C. 2010)

Secured creditor was not liable in either tort or contract to the debtor for loaning more than the value of the collateral or for failing to make sure that the collateral was insured for the full amount of the debt because lender had no legal or contractual duty to the debtor with respect to either of these matters.

225. *Velocity Press, Inc. v. Key Bank*,  
[2010 WL 5300903](#) (D. Utah 2010)

Debtor stated a cause of action for breach by repudiation against lender for lender's actions in demanding and obtaining additional collateral.

226. *Clark v. Morinda Properties Escala Lodges, LC*,  
[2010 WL 2025583](#) (D. Utah 2010)

Condominium purchaser whose deposit had become non-refundable and was then seized by developer's secured creditor after developer's default had no cause of action against the secured creditor. The condominium purchaser's only cause of action was against the developer.

227. *Denny Hecker's Cadillac-Pontiac-GMC, Inc. v. GMAC Inc.*,  
[2010 WL 3399163](#) (D. Minn. 2010)

Car dealership's inventory lender who refused to allow the title documentation to be transferred at the time a vehicle was sold unless it received all proceeds from the sale, including amounts for taxes, licensing fees and lien payoffs on trade in vehicles may have acted wrongfully, but dealership had no standing to bring an action for the harm, which was suffered by the state or third parties.

228. *State Farm Bank, F.S.B. v. Manheim Automotive Financial Services, Inc.*,  
[2010 WL 3156008](#) (N.D. Tex. 2010)

Secured creditor of used car buyers owed no duty to car dealer's inventory lender to demand that the dealer produce titles at the time of sale or otherwise help ensure that the inventory lender is paid off. Secured creditor was not unjustly enriched by paying the dealer rather than the warehouse lender because the secured creditor received no undue benefit by paying the purchase price of the cars.

229. *Hyduke's Valley Motors v. Lobel Financial Corp.*,  
[2010 WL 3769199](#) (Cal. Ct. App. 2010)

Buyers of conditional sales contracts from car dealer were liable to supplier of 19 vehicles whom the dealer had not paid because the buyers could have ensured that the dealer had title to the vehicles and they were in the better position to avoid the loss.

230. *Hopkins v. Kansas Teachers Community Credit Union*,  
[265 F.R.D. 483](#) (W.D. Mo. 2010)

Class of 140 members, all of whose car loans were included in a securitization, would be certified for an action against the secured party for its servicer's alleged failure to provide adequate notification of a sale of repossessed cars. The class would not be certified for the members' conversion claims because the members reside in different states where different statutes of limitations apply.

231. *In re A.T. Reynolds & Sons, Inc.*,  
[424 B.R. 76](#) (Bankr. S.D.N.Y. 2010)

Secured party was liable for the costs of mediation because it failed to comply with the mediation order in good faith when it sent a representative who lacked settlement authority and its counsel refused to participate in the discussion or risk analysis of its legal position.

232. *First Bank v. Unique Marble and Granite Corp.*,  
[2010 WL 4874872](#) (Ill. Ct. App. 2010)

Even though assignee for the benefit of creditors is defined to be a lien creditor, and a lien creditor's rights are subject to the rights of a prior perfected security interest, the assignee has a right to payment for the services provided and that right is not subject to UCC priority rules. Therefore, the assignee is entitled to receive reasonable compensation for services and reimbursement of expenses before the satisfaction of the secured party's claims, but such compensation should be based at least in part on the benefits the secured party received.

233. *Paloian v. Grupo Serla S.A. de C.V.*,  
[433 B.R. 19](#) (N.D. Ill. 2010)

Although debtor's agreement with bank allowed bank to sell the collateralized note following prior written notice if the sale did not increase the debtor's obligations, bank nevertheless violated § 9-207 by: (i) providing notice to the debtor only after the sale agreement was signed and no notice at all to the debtor's bankruptcy counsel, the creditors' committee, or the bankruptcy court; and (ii) in practical respects, impairing the debtor's rights.

234. *State ex rel. Cordray v. Estate of Roberts*,  
[935 N.E.2d 450](#) (Ohio Ct. App. 2010)

Material facts were in dispute, barring summary judgment, on whether secured party breached the terms of the security agreement by failing to dispose of the collateralized inventory of chemicals in a timely fashion after taking possession, thereby allowing the chemicals to turn into hazardous waste and making it responsible in part for the debtor's environmental cleanup liability.

235. *First United Bank & Trust Co. v. Penny*,  
[242 P.3d 593](#) (Okla. Ct. App. 2010)

Secured party in control of collateralized stock has a duty to preserve the stock, but not its value, and hence was not liable in negligence for failing to monitor the price of the stock after the debtor's default or in ignoring the stock's decline in value, particularly since the debtor did not request that the stock be sold and indeed did request that the secured party not sell the stock while the debtor tried to become current on his obligation.

236. *Macquarie Bank Ltd. v. Knickel*,  
[723 F. Supp. 2d 1161](#) (D.N.D. 2010)

Summary judgment denied because of factual dispute about whether bank tortiously disclosed confidential and propriety information about the debtor. Although the bank had a security interest in all of the debtor's confidential data, and thus could have transferred the data as part of a disposition, the sheriff's sale did not include general intangibles and thus the bank did not foreclose on them.

237. *Interpharm, Inc. v. Wells Fargo Bank*,  
[2010 WL 1257300](#) (S.D.N.Y. 2010)

Debtor that had executed several settlement agreements with its secured lender in which the debtor agreed to "waive, release and discharge any and all claims or causes of action, if any, of every kind and nature whatsoever" it may have against the secured lender was bound by those releases despite the debtor's claims of economic duress. There was no duress because the secured lender had made no wrongful threat that deprived the debtor of its free will. The secured lender may have insisted on onerous terms after the debtor defaulted under the loan agreement, but such insistence is not wrongful given that the secured lender did not cause the debtor's default. However, none of the settlement agreements purported to release future claims, and thus the debtor's two claims for breach that arose after the last settlement agreement remained.



238. *Citizens Bank of Pennsylvania v. Executive Car Buying Services, Inc.*,  
[2010 WL 4687922](#) (D.N.J. 2010)

Debtors and guarantors that had executed forbearance agreement with secured lender in which they agreed to “fully and unconditionally release[] . . . any and all claims, liabilities, demands, obligations, damages, losses, actions and causes of action whatsoever which the Obligor may now have or claim to have against the Lender” was bound by that release. Debtors and guarantors failed to plausibly allege economic duress given that they each signed the forbearance agreement and its amendments – all of which contained the release – on four separate occasions over eight months during which they were free to consult with legal counsel and failed to contest its validity of the release until the credit sought to collect.

239. *Brown Bark II, L.P. v. Dixie Mills, LLC*,  
[2010 WL 3119769](#) (N.D. Ga. 2010)

Seller that retained security interest in trademarks and associated goodwill, and that later obtained against the buyer/debtor a judgment that gave the seller “full rights” to one of the trademarks, was not liable to subsequent secured party that purported to purchase the trademarks at a public sale after default. The debtor’s business had ceased prior to the public sale and there was no goodwill – of which trademarks are a part – left for the secured party to acquire at the public sale.

240. *Ulbrich v. Groth*,  
[2010 WL 4722267](#) (Conn. Super. Ct. 2010)  
[2010 WL 5030804](#) (Conn. Super. Ct. 2010) (subsequent ruling in case)

Secured party could be liable in negligence to buyer at foreclosure sale for failing to determine and disclose that some of the personal property purportedly sold did not in fact belong to the debtor. Neither the economic loss doctrine nor the warranties provided at sale displaced the common-law cause of action for breach of the to exercise reasonable care to properly identify the property being sold and not to misidentify property as being part of the sale when it is not.

#### – of Others

241. *Perceptron, Inc. v. Silicon Video, Inc.*,  
[2010 WL 3463098](#) (N.D.N.Y. 2010)

Compliance with the processes for foreclosing on collateral does not necessarily insulate the buyer from successor liability.

242. *Boss Hoss Cycles of Houston, L.L.C. v. Wells Fargo Bank*,  
[2010 WL 307955](#) (Tex. Ct. App. 2010)

Motorcycle dealer breached agreement with lender by failing to repurchase motorcycle loan after it became clear that the security interest in the motorcycle was unperfected.



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243. *In re Greene*,  
[2010 WL 3724782](#) (Bankr. D. Ariz. 2010)  
Car dealership that undertook to process the title application necessary to perfect unrelated individual's security interest in car purchased was liable to individual for its failure to do so in a timely manner if that failure resulted in avoidance of the security interest in the car buyer's bankruptcy.
244. *State ex rel. Wagner v. Amwest Surety Insurance Co.*,  
[790 N.W.2d 866](#) (Neb. 2010)  
Surety of bonds secured by income from equipment leases had a duty to perfect the security interest within a reasonable time and that time passed shortly after the closing and long before the surety was replaced, about eighteen months after the closing. Creditor's signed waiver of surety's future performance did not waive breach that had already occurred by failing to perfect security interests.
245. *Bank of the West, Inc. v. Organic Grain & Milling, Inc.*,  
[2010 WL 995459](#) (D. Ariz. 2010)  
Secured party had a valid cause of action in contract against account debtor who had contracted to purchase the debtor's crop output because the secured party and account debtor had reached agreement for the account debtor to pay after setting aside a specified sum for the seed supplier and harvester. The account debtor was not entitled to setoff its alleged damages resulting from the debtor's failure to properly irrigate because the secured party had no duty to provide the funds needed for irrigation and it was not "assignee" under the debtor's output contract.
246. *Moretran Financial Services, LLC v. State*,  
[905 N.Y.S.2d 707](#) (N.Y. App. Div. 2010)  
State was not liable for damages resulting from its issuance of clean certificate of title for collateralized vehicle even though certificate from other state was submitted showing the creditor's lien because no notice of lien was submitted with the application, as required by state regulations. The creditor mistakenly relied on the debtor to submit the notice of lien.
247. *Mid-Century Ins. Co. v. Vinci Inv. Co.*,  
[2010 WL 673267](#) (Cal. Ct. App. 2010)  
Insurance policy that indemnified auto dealer from any negligent act, error or omission in failing to comply with truth in lending laws is not limited to any damages awarded under such laws or to claims brought by consumers, and thus extends to the dealer's liability to a finance company for failing to repurchase chattel paper created in transactions in which the dealer failed to comply with truth in lending laws.

248. *PHL Variable Ins. Co. v. Sidney Nachowitz 2007 Irrevocable Trust*,  
[2010 WL 3893623](#) (D. Minn. 2010)

Because an insurer need not return to the policyholder unearned premiums for life insurance procured through fraud, creditor with a security interest in the unearned premiums was not entitled to summary judgment that it was entitled to the unearned premiums, pending discovery about what role the parties played in the fraud.

249. *Bean v. Greater Minnesota Credit Union*,  
[2010 WL 1029581](#) (Minn. Ct. App. 2010)

Although discharged credit union employee who spot checked auto dealer's financed inventory instead of checking the VIN of every financed car may have acted negligently, the employee did so pursuant to the advice of a supervisor, as a reasonable employee would have, and thus is entitled to unemployment compensation.

250. *PNC Bank v. Pence*,  
[2010 WL 3947516](#) (S.D. Ind. 2010)

Officer of debtor, who could be personally liable for debtor's fraud that he authorized or directed, may have liability for reporting accounts receivable as "bona fide," a fact that increased the debtor's borrowing base. Jury will have to determine whether "bona fide" means a higher collection rate than the disputed accounts or merely in existence.

251. *Bear Mountain Orchards, Inc. v. Mich-Kim, Inc.*,  
[623 F.3d 163](#) (3d Cir. 2010)

Individual who held one officer title and was a 50% shareholder of wholesale produce dealer whose assets were in a PACA trust was not personally liable for dissipation of trust assets because she worked only a few hours per week performing basic clerk-level operations, not managerial tasks. Personal liability attaches only to individuals who actively controlled or managed the PACA assets held in trust.

252. *Raicevic v. Lopez*,  
[2010 WL 3248335](#) (Cal. Ct. App. 2010)

Attorneys who, at debtors' request, drafted security agreement to replace existing mortgage owed no duty to creditors and therefore could not be liable to creditors for professional negligence for failing to describe the collateral properly. However, the attorneys could be liable to the creditors for misrepresentation.

253. *Alexander v. Blackhawk Recovery and Investigation, L.L.C.*,  
[2010 WL 3257355](#) (E.D. Mich. 2010)

Repossession agency that is not itself the creditor is a "debt collector" under the Fair Debt Collection Practices Act to the extent that it repossesses or threatens to repossess the collateral when there is no present right to possession. Because there is no right to take possession through a breach of the peace, held repossession agency can be liable under the FDCPA for engaging in repossession activities that breach the peace.

254. *United States v. Bowling*,  
[619 F.3d 1175](#) (10th Cir. 2010)  
Debtor was guilty of defrauding bank by selling collateralized cattle under relatives' names and not remitting the sale proceeds to the bank, even though bank had never enforced terms in security agreement requiring bank consent to sale of collateral and requiring sale proceeds to be made jointly payable to the debtor and bank. Bank's security interest cannot be waived by actions of bank officers.
255. *United States v. Kalfas*,  
[2010 WL 5441686](#) (N.D. Fla. 2010)  
Even if collateralized equipment had sufficient value to fully secure loans from two different banks, borrower was guilty of bank fraud for pledging the equipment as security for the second loan without telling the second bank of the pledge to the first bank two weeks earlier.
256. *Greenbank v. Thompson*,  
[2010 WL 5549231](#) (Tenn. Ct. App. 2011)  
Debtor committed conversion by withdrawing funds from collateralized certificate of deposit even though bank released the funds.
257. *Torrington Municipal & Teachers Federal Credit Union v. Whitford*,  
[2010 WL 5610900](#) (Conn. Super. Ct. 2010)  
Secured party may bring cause of action against alleged tortfeasor for damage to or destruction of the collateral and secured party's settlement with the debtor does not constitute an election of remedies or otherwise bar the action.

## **BANKRUPTCY**

### ***Eligibility***

258. *In re Las Vegas Monorail Co.*,  
[429 B.R. 770](#) (Bankr. D. Nev. 2010)  
Non-profit corporation organized to provide monorail service to metropolitan area was neither a municipality nor instrumentality of a state, such that it would be eligible for relief only under Chapter 9, because it did not have any traditional government powers such as taxation, eminent domain, or sovereign immunity, and it did not rely on the public fisc to support its operations.

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***Property of the Estate***

259. *In re First Protection, Inc.*,  
2010 WL 5059589 (9th Cir. BAP 2010)  
All of debtors' rights and interest in single-member LLC – including their management rights – became property of the estate under § 541(a)(1) because § 541(c) overrides the restrictions in both the operating agreement and the Arizona LLC Act on the assignment of debtors' interest. The debtors' interest will not be treated as an executory contract under § 365 because that section is designed to protect third parties, and there is no third party in a single-member LLC.
260. *In re AGA Management, LLC*,  
2010 WL 5315940 (Bankr. D. Ariz. 2010)  
Agreement between city and debtor for management and operation of golf course implied that the business was the debtor's, not the city's, and thus revenues from operating the golf course were property of the estate.
261. *In re 1518 West Chicago Ave., LLC*,  
427 B.R. 439 (Bankr. N.D. Ill. 2010)  
Prepetition rents collected by court-appointed receiver for the debtor's property remained property of the debtor, subject to the mortgagee's perfected interest. Factual question remained about whether mortgagee assigned its interest in those collected rents when it sold the loan.
262. *In re Bryant Manor, LLC*,  
422 B.R. 278 (Bankr. D. Kan. 2010)  
Post-petition rents from mortgaged apartment building were property of the estate even though a court-appointed receiver took control of the property prepetition. However, turnover would not be required merely to allow the debtor's management company to resume operation of the property, particularly since the debtor has no equity in the property.
263. *In re Music City RV, LLC*,  
304 S.W.3d 806 (Tenn. 2010)  
All true consignments have been removed from Article 2, with the result that if a consignment-like transaction is excluded from Article 9, such as a consignment of property held as consumer goods by the consignor prior to consignment, then the UCC does not apply and the goods are not available to the creditors of the consignee.
264. *In re AE Liquidation, Inc.*,  
426 B.R. 511 (Bankr. D. Del. 2010)  
Debtors' customers alleged sufficient facts that their deposits toward the purchase of aircraft should be deemed to be held in constructive trust for them despite the absence of language of trust in the agreements and despite the fact that each deposit of \$100,000 provided the customer with a credit of \$125,000.

265. *In re M.W. Sewall & Co.*,

[431 B.R. 526](#) (Bankr. D. Me. 2010)

Proceeds of instant lottery tickets were not held in trust for the state and therefore were property of the estate. The fact that the state had the right to and did regularly sweep the debtor's deposit account to collect the amounts owed from sales of lottery tickets amounted only to bargained-for collection rights, it did not transform the deposit account, or any part of it, into a trust res.

266. *In re Anderson*,

[2010 WL 3941638](#) (Bankr. N.D. Ga. 2010)

Secured party did not violate the stay by repossessing collateral owned by corporation after guarantor filed for bankruptcy protection because debtor's guaranty was insufficient to establish a legal interest in the collateral that would make the collateral property of the estate.

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

267. *In re Delta Air Lines, Inc.*,

[608 F.3d 139](#) (2d Cir. 2010)

Owner-participants in aircraft leases had a valid claim against debtor-lessee pursuant to their tax indemnity agreements for tax loss resulting when owner-participants sold their interest even though the agreements limited the right to payment if the debtor paid the Stipulated Loss Value to the indenture trustee. The limitations were designed merely to prevent a double recovery and were not triggered either by discharge of the obligation to pay the Stipulated Loss Value or by the accrual of liability for the Stipulated Loss Value, only by actual payment of the Stipulated Loss Value.

268. *HSBC Bank USA v. Calpine Corp.*,

[2010 WL 3835200](#) (S.D.N.Y. 2010)

Because the debtor's bankruptcy filing rendered the no-call provision in the notes unenforceable, the noteholders had no claim for repaying the notes. While the notes could have provided for payment of a premium in the event of payment pursuant to acceleration, some of the notes at issue had no such clause and the remainder of the notes had a repayment premium clause that did not apply.

269. *In re Commissary Operations, Inc.*

[421 B.R. 873](#) (Bankr. M.D. Tenn. 2010)

Claim for goods sold prepetition can qualify for administrative expense treatment under § 503(b)(9) while also counting as new value for the § 547(c)(4) preference defense.

270. *In re TI Acquisition, LLC*,

[429 B.R. 377](#) (Bankr. N.D. Ga. 2010)

Section 503(b)(9) claims that are fully paid post-petition cannot constitute new value for the purposes of § 547(c)(4).

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271. *In re Circuit City Stores, Inc.*,  
2010 WL 4956022 (Bankr. E.D. Va. 2010)  
Because the payment of a creditor's § 503(b)(9) administrative claim is an "otherwise unavoidable transfer," the claimant is not entitled to utilize the value of those same goods as the basis for a new value defense under § 547(c)(4).
272. *In re Erving Industries, Inc.*,  
432 B.R. 354 (Bankr. D. Mass. 2010)  
Sale of electricity by competitive seller who was not responsible for ultimately delivery to the buyer was a sale of goods within the meaning of Article 2 of the UCC and, therefore, under § 503(b)(9). Predominant purpose test for evaluating hybrid transactions involving goods and services is not applicable to § 503(b)(9).
273. *GFI Wisconsin, Inc. v. Reedsburg Utility Commission*,  
2010 WL 4595508 (D. Wis. 2010),  
affirming *In re Grede Foundries, Inc.*, 435 B.R. 593 (Bankr. D. Wis. 2010)  
Electricity that debtor received from utilities within 20 days before the petition date was a "good" for which utilities were entitled to assert administrative expense claim, even though movement was so fast as to be simultaneous with its consumption; goods do not have to be reclaimable for the seller to assert administrative expense claim for its value.
274. *In re Circuit City Stores, Inc.*,  
432 B.R. 225 (Bankr. E.D. Va. 2010)  
Suppliers who delivered consigned goods to the debtor more than 20 days before the petition did not have a § 503(b)(9) priority claim for the goods the debtor sold within the 20-day period because the goods were "received" within the meaning of the Code when the debtor acquired physical possession.
275. *In re Circuit City Stores, Inc.*,  
2010 WL 843394 (Bankr. E.D. Va. 2010)  
Sellers' reclamation claims were extinguished by secured creditors' floating lien on the debtor's inventory and subsequent sale to buyers in ordinary course of business. Even though secured creditors were paid in full, sellers had no reclamation claim to remaining proceeds of their goods because reclamation is an *in rem* right that under § 546(c) does not extend to proceeds.
276. *Paramount Home Entertainment Inc. v. Circuit City Stores, Inc.*,  
2010 WL 3522089 (E.D. Va. 2010)  
Seller's reclamation claims were forfeited when seller failed to diligently pursue them. After seller filed reclamation demand, seller did nothing even though it knew of the debtor's use the goods to secure DIP financing and the debtor's liquidation of its inventory.

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

[428 B.R. 590](#) (D. Del. 2010)

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.

278. *In re Alma Energy, Inc.*,

[439 B.R. 92](#) (6th Cir. BAP 2010)

Post-petition lender to Chapter 11 debtor was estopped from claiming administrative expense priority due to statements its representatives repeatedly made, even though the lender's statements related only to administrative expense priority in the reorganization case and the case had been converted to Chapter 7.

279. *In re Siller*,

[427 B.R. 872](#) (Bankr. E.D. Cal. 2010)

Claim for prepetition attorney's fees resulting from contingent fee agreement were subject to standard in § 502(b)(4), and therefore limited to the reasonable value of the services provided, even though an arbitrator had resolved a fee dispute and a court had confirmed the arbitration award prepetition.

280. *In re Gluth Bros. Construction, Inc.*,

[426 B.R. 771](#) (Bankr. N.D. Ill. 2010)

Bank whose claim was paid in full by guarantor and then disallowed without objection could not later assert a claim for attorney's fees incurred in defending an avoidance action even though the bank was contractually entitled to reimbursement of such expenses under the loan and security agreement. The bank lost its lien when its claim was disallowed and, because the bank was aware of the potential avoidance action against it when it failed to object to disallowance of its claim, it would not be equitable to now reconsider the disallowance order.

281. *In re Rodriguez*,

[2010 WL 1838286](#) (M.D. Fla. 2010)

Bankruptcy Court did not abuse its discretion in refusing to permit vehicle lessor to amend its proof of claim in Chapter 13 case after the bar date to double the amount claimed following a sale of the vehicle.

282. *Grede v. Bank of New York Mellon*,

[2010 WL 4539448](#) (N.D. Ill. 2010)

Bank's claim against financial intermediary that had pledged securities was not subject to equitable subordination even though bank may have had reason to know that the intermediary was improperly collateralizing client assets. Equitable subordination requires more than negligence – a failure to act in an objectively reasonable manner – it requires willful engagement in inequitable conduct.



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*Automatic Stay & Injunctions*

283. *In re 201 Forest Street, LLC*,  
[422 B.R. 888](#) (1st Cir. 2010)

Even if automatic stay did not enjoin mortgagee from recording affidavit to extend duration of mortgage, mortgagee's time period for recording such an affidavit was tolled by § 108(c). The issue is not whether the mortgagee was prevented from taking action to extend the relevant enforcement period, but whether the mortgagee was prohibited from taking action to enforce its rights.

284. *In re Mathson Industries, Inc.*,  
[423 B.R. 643](#) (E.D. Mich. 2010)

Manufacturer that sold goods to debtor prepetition but failed to perfect its security interest violated the stay by telling potential buyers of the goods that the manufacturer would not service the goods in an effort to suppress bidding so that it could recover the goods cheaply (court suggested that merely refusing to service the goods for this reason, without communicating that to potential bidders, would also violate the stay). Bankruptcy Court properly issued an injunction requiring the manufacturer to service the goods.

285. *In re Reid*,  
[423 B.R. 726](#) (Bankr. E.D. Pa. 2010)

Under Article 9 of the Delaware UCC, automobile that secured creditor repossessed prepetition remained the property of the debtor until sold, and thus secured creditor violated the stay by refusing to return it to the debtor after she filed a bankruptcy petition.

286. *In re Ballard*,  
[2010 WL 4501891](#) (Bankr. M.D. Ga. 2010)

Lender that took possession of car to secure the loan was not protected by the state pawnbroker act because the loan agreement provided no grace period for payment, and thus the lender had a security interest in the car, not complete title, when the debtor filed his bankruptcy petition. Lender's refusal to release the car to the debtor violated the automatic stay.

287. *In re Brittain*,  
[435 B.R. 318](#) (Bankr. D.S.C. 2010)

Automatic stay did not prevent secured creditor from repossessing collateral owned by non-debtor LLC that was, in turn, owned by the individual debtors. Even though the individual debtors had guaranteed the secured obligation, and therefore may later have a right to redeem the collateral, the debtors had not listed such a right in their schedules, indicated an intent to redeem on their Statement of Affairs, or provided for redemption in their plan, and the secured creditor had not yet repossessed the collateral.



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288. *In re Pollilo*,  
[2010 WL 235125](#) (Bankr. E.D. Pa. 2010)  
Secured party did not violate discharge injunction by failing to return to the debtor the certificate of title covering the collateral promptly after the secured obligation was paid in full pursuant to the plan. The court lacked jurisdiction over whether the secured party's inaction breached a contractual stipulation or state law.
289. *In re Noble International, Ltd.*,  
[424 B.R. 760](#) (E.D. Mich. 2010)  
Creditor had right to determine whether cash collateral was applied to an obligation of the debtor secured by other collateral or a different obligation of the debtor for which there was no other collateral. Because the cash collateral was applied toward the latter obligation, the debtor failed to provide adequate protection.
290. *In re Blixseth*,  
[2010 WL 3222537](#) (Bankr. D. Mont. 2010)  
Secured creditor did not violate stay by foreclosing on personal property of individual debtor who did not timely file a statement of intention with respect to the property because the stay had expired with respect to such property under § 362(h) even though the debtor did not list the collateral on her schedule of assets.
291. *In re Mwangi*,  
[432 B.R. 812](#) (9th Cir. BAP. 2010)  
Prior to expiration of the 30-day period for objecting to exemptions, bank violated automatic stay by refusing to release funds on deposit to Chapter 7 debtor who claimed them as exempt. Debtor had standing to pursue a claim for damages.
292. *In re Bucchino*,  
[439 B.R. 761](#) (Bankr. D.N.M. 2010)  
Debtor had no standing, prior to expiration of time to object to claimed exemption, to object to freeze on debtor's bank account.
293. *In re Young*,  
[439 B.R. 211](#) (Bankr. M.D. Fla. 2010)  
Bank did not act to obtain possession of or exercise control over property of the estate by placing administrative freeze on deposit account that debtor claimed as exempt because a deposit account is merely the bank's promise to pay the depositor. The Chapter 7 debtor had no standing, prior to expiration of time to object to claimed exemption, to maintain action for violation of the stay.
294. *In re Phillips*,  
[2010 WL 3943730](#) (Bankr. M.D.N.C. 2010)  
Bank did not violate stay by freezing deposit account which debtor claimed as partially exempt and seeking instructions from the trustee.

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***Adequate Protection***

295. *In re Big3D, Inc.*,  
[438 B.R. 214](#) (9th Cir. BAP 2010)

Bankruptcy court did not err in denying adequate protection to a secured creditor for post-petition diminution in the value of collateral case prior to the filing of a request for such relief even though the secured creditor had obtained prepetition an order for possession of collateral. The issue remains one in which the bankruptcy court has discretion to order adequate protection retroactively to when the secured creditor would have obtained its state law remedies had bankruptcy not intervened.

***Sales of Assets***

296. *In re Philadelphia Newspapers, LLC*,  
[599 F.3d 298](#) (3d Cir. 2010)

Debtor may auction assets under § 1129 without allowing secured claimants to credit bid if the secured claimants are to receive under the plan the indubitable equivalent of their claims.

297. *In re Moore*,  
[608 F.3d 253](#) (5th Cir. 2010)

Trustee's state-law fraudulent transfer claim was property of the estate even though the cause of action belonged to the debtor's creditors prior to the bankruptcy. Accordingly, the trustee's proposed compromise of the claim was a proposed sale of estate property and the bankruptcy court abused its discretion in approving the compromise after a creditor offered to buy the cause of action for more than the settlement amount.

298. *In re Carmichael*,  
[2010 WL 3767850](#) (Bankr. D. Kan. 2010)

Trustee who avoided portion of an unperfected lien on debtor's homestead could not sell the homestead under § 363. Instead, the trustee's options were to: (1) sell the estate's lien interest to a third party; (2) agree with the debtor to release of the lien upon payment of an agreed-upon sum; or (3) await foreclosure of the lien by the lender.

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***Discharge & Dischargeability***299. *In re Powell,*[423 B.R. 201](#) (Bankr. N.D. Tex. 2010)

Loan debt to bank of cattle rancher who provided substantially inflated handwritten inventory reports to the bank was not nondischargeable under § 523(a)(2) because the bank was not reasonable in substantially relying on the inventory reports of an elderly man, given that the loan agreement did not require such reports, the bank did not avail itself of its contractual right to perform physical inspections of the pastured cattle, and the tax returns provided to the bank should have alerted the bank to the debtor's substantial losses, which in turn meant that the debtor lacked the cash flow to continually purchase a consistent level of inventory.

300. *In re Asbury,*[2010 WL 3733871](#) (Bankr. W.D. Mo. 2010)

Debt of debtor-husband to bank was nondischargeable because bank reasonably relied on borrowing base certificate indicating that couple owned 4,667 head of cattle when, in fact, they owned no more than 2,000 head of cattle. There were no red flags that would have alerted an ordinarily prudent lender to the possibility of a problem with the certificate.

301. *In re Rowles,*[2010 WL 743175](#) (Bankr. W.D. Mo. 2010)

Debt of debtors who misrepresented on application to renew and extend credit that they owned certain farm equipment offered as collateral was nondischargeable. The lender reasonably relied on the misrepresentation because the lender had no indication of another ownership interest in the equipment at the time the loans were made or renewed and therefore no duty to conduct an independent investigation. Moreover, the equipment was not covered by a certificate of title.

302. *In re Ortiz,*[2010 WL 3491178](#) (Bankr. W.D. Tex. 2010)

Debtor's representation that restaurant assets were unencumbered was a statement relating to the debtor's financial affairs, and thus cannot be a basis for denying a discharge under § 523(a)(2)(A).

303. *In re Cline,*[431 B.R. 307](#) (10th Cir. BAP 2010)

Obligation of president and majority owner of car dealership, who had guaranteed dealership's debt to floor plan financier and who had orchestrated sale of 130 vehicles out of trust shortly before dealership filed for bankruptcy, was nondischargeable embezzlement under § 523(a)(4).

304. *In re Franceschini*,[2010 WL 3952870](#) (Bankr. S.D. Tex. 2010)

Obligation of individual who was director, officer, and partial owner of a car dealership was not nondischargeable under § 523(a)(4) due to the dealership's sale of cars out of trust and failure to remit proceeds because the language of trust in the security agreement – which did not include a requirement to segregate the proceeds and hold them for secured creditor's benefit, merely to remit the proceeds to the secured creditor – did not change the character of the debtor-creditor relationship into a fiduciary one.

305. *In re Munson*,[2010 WL 3768017](#) (Bankr. N.D. Ill. 2010)

Debtor's failure to assist secured creditor in getting its interest noted on the certificate of title to the car, even to the point of failing to comply with a pre-petition court order, did not make the debt nondischargeable under § 523(a)(2) because, considering that the debtor paid over 80% of the secured loan, there was no evidence that the debtor's promise to assist in the security agreement was fraudulent when made. The debt was not nondischargeable under § 523(a)(6) because no facts suggested that the debtor's breach of contract was a willful and malicious effort to harm the secured creditor.

306. *In re McDermott*,[434 B.R. 271](#) (Bankr. N.D.N.Y. 2010)

Even if the directors of an insolvent corporation owe a fiduciary duty to the corporation's creditors, a breach of that duty is insufficient to make an obligation nondischargeable under § 523(a)(4). Moreover, the use of the proceeds of a collateralized account to pay an unsecured creditor whose debt the director had guaranteed would not qualify as fraud or defalcation even if a fiduciary duty existed.

307. *In re Richmond*,[430 B.R. 846](#) (Bankr. E.D. Ark. 2010)

Debtor's sale of collateral caused willful and malicious injury to secured creditors even though the security interests were unperfected.

***Leases & Executory Contracts***308. *In re Exide Technologies, Inc.*,[607 F.3d 957](#) (3d Cir. 2010)

Exclusive trademark license that debtor granted in connection with sale of its business was not an executory contract which the debtor in possession could reject because the buyer had substantially performed its obligations such that any future breach would not be material. The buyer had fully paid the purchase price; the use restriction was a condition subsequent, not a material obligation; the buyer's indemnity obligation expired three years after the purchase; and the buyer's further assurances obligation was not material because the debtor had identified no remaining required cooperation.

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***Avoidance Powers*****– Preferences**309. *In re Taylor*,[599 F.3d 880](#) (9th Cir. 2010)

A creditor whose security interest is avoidable as a preference can be liable for either the actual transferred property (the security interest) or the value of the transferred property, and the bankruptcy court did not err in awarding the value of the security interest given that the value of the security had diminished by depreciation of the collateral and postpetition payments. However, the court did err in forcing the creditor to pay the full amount of the initial loan. At most the creditor was liable for the value of its security interest, but because there was no evidence of the value of the collateral at the time of transfer, the bankruptcy court should have simply avoided the security interest.

310. *In re Trout*,[609 F.3d 1106](#) (10th Cir. 2010)

Because an 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 the lien has been paid off – in most cases lien avoidance and a money judgment are mutually exclusive remedies.

311. *In re NetBank, Inc.*,[424 B.R. 568](#) (Bankr. M.D. Fla. 2010)

Former CEO of debtor was not an insider for the purposes of the longer preference period. Although the former CEO still held his position when he entered into the agreement providing for a \$2.9 million payment on the effective date of his resignation, the actual transfer was after he resigned.

312. *Wells Fargo Home Mortgage, Inc. v. Lindquist*,[592 F.3d 838](#) (8th Cir. 2010)

Trustee had a valid preference claim against initial transferee of unrecorded mortgage, even though the original mortgagee had later transferred the mortgage and related loan to another entity, and the original mortgagee was liable for the value of the mortgage.

313. *In re Commissary Operations, Inc.*,[421 B.R. 873](#) (Bankr. M.D. Tenn. 2010)

Supplier was entitled to new value defense for value of goods provided after receiving preferential payment even though supplier was also entitled to have the claim for those goods treated as an administrative priority under § 503(b)(9).

314. *In re McCaskill*,[434 B.R. 875](#) (Bankr. W.D. Mo. 2010)

30-day rule in § 547(e)(2) does not put a limit on whether a transfer is substantially contemporaneous. A security interest in an automobile that attached when the creditor contemporaneously released its lien on a different motor vehicle and which was perfected 34 days later was nevertheless substantially contemporaneous, in part because the creditor believed its lien release was valid when filed rather than when executed.

**– Strong-Arm Powers**315. *In re Deuel*,[594 F.3d 1073](#) (9th Cir. 2010)

Trustee may avoid unrecorded deed of trust. Creditor under unrecorded deed of trust cannot be subrogated to rights of previous lender whose deed of trust was paid off because: (i) the previous lender no longer has a lien; (ii) equitable subrogation is not permitted when it would prejudice other parties and the trustee has the status of a bona fide purchaser for value; and (iii) state law gives priority to bona fide purchasers over an equitable subrogation claimant.

316. *In re Motta*,[423 B.R. 393](#) (Bankr. D. Mass. 2010)

Trustee could not avoid unrecorded second mortgage given to first mortgagee in connection with new note that altered the payment terms because the first mortgage was never released and there was no evidence that the parties intended the second note and mortgage to discharge the first mortgage or the debtors' obligation to pay the amounts remaining unpaid on the first note.

**– Fraudulent Transfers**317. *In re Lockwood Auto Group, Inc.*,[428 B.R. 629](#) (Bankr. W.D. Pa. 2010)

The only apparent purpose of a transaction in which bank loaned \$200,000 to corporation's principal shareholder, who contributed the funds to the corporation, which then purchased CD from and pledged the CD to the lender, was to create the fraudulent illusion that the corporation had additional capital. Bank was not entitled to summary judgment on basis that it acted in good faith in the transaction because, even though it may have lacked actual knowledge that the corporation was perpetrating a fraud on its creditors, under a reasonable person standard, the bank should have known of the suspicious nature of the transaction yet did not conduct a diligent investigation.

318. *In re Old Carco LLC*,[435 B.R. 169](#) (Bankr. S.D.N.Y. 2010)

All components of financial restructuring of entities comprising automobile manufacturer must be considered as part of one integrated transaction. Specifically, equity investment that provided funds to insolvent manufacturer could not be separated from spin-off of finance subsidiary, that itself may not have provided reasonably equivalent value, because the express purpose of the spin-off was to facilitate the equity investment, even though the spin-off was consummated the day before the contracts for the equity investment were signed.

319. *Paloian v. LaSalle Bank*,[619 F.3d 688](#) (7th Cir. 2010)

Trustee of securitized note, not the beneficial owners of the trust, was the initial transferee of allegedly fraudulent payments on the note.

Sale of accounts to related entity does not appear to have been a true sale given that putative buyer operated as if it were a department of the seller: it did not have an office, phone number, checking account, or stationery; all of its letters were written on the seller's stationery; it did not prepare financial statements or file tax returns; and it did not pay for the receivables but instead took a small cut of collections to cover its costs of operation.

Lower court erred in determining that the debtor was insolvent by: (i) subtracting debtor's contingent obligations based on the amount later paid rather than their projected amount at the time as of which insolvency was to be determined; (ii) failing to add back in the debtor's contingent right of reimbursement or contribution from others; and (iii) by reducing the value based on discounted cash flow to reflect the lower price a taxpaying entity would pay for the tax-exempt debtor – the price someone would pay for the debtor has no relationship to the value of the asset side of the debtor's balance sheet.

320. *In re CNB International, Inc.*,[2010 WL 3749079](#) (W.D.N.Y. 2010)

Secured lender, not seller in asset sale transaction, was initial transferee of \$26 million paid by buyer because the prearranged plan called for these funds to be distributed to the secured lender and the seller was therefore a mere conduit that never exercised dominion and control over the funds.

### – Post-Petition Transfers

321. *In re Delco Oil, Inc.*,[599 F.3d 1255](#) (11th Cir. 2010)

Debtor's unauthorized use of \$1.9 million in cash collateral to pay vendor for goods sold post-petition was avoidable. Although the vendor may have taken free of the secured party's security interest under § 9-332, the fact remains that the funds were cash collateral prior to payment and payment was unauthorized. The vendor has no defense for the value of the goods it provided.

322. *In re Ellis*,  
[2010 WL 3719923](#) (Bankr. D. Idaho 2010)  
New mortgage created in connection with unauthorized post-petition refinancing in which original mortgages were released was avoidable. Creditor, whose main office was notified of the bankruptcy filing, has no defense and court would not use its equitable powers to reinstate prepetition mortgages.
323. *In re Diversified Traffic Services, Inc.*,  
[2010 WL 2179620](#) (Bankr. N.D. Ga. 2010)  
Because the debtor's road service contracts were signed prepetition, even though the notices to proceed were provided postpetition, the accounts arising from those contract arose prepetition and a lender's security interest in those accounts was not cut off by § 552(a).
324. *In re Veblen West Dairy LLP*,  
[2010 WL 2736641](#) (Bankr. D.S.D. 2010)  
Milk produced postpetition by debtor's collateralized cows was a product of the cows and thus the security interest in the milk was not cut off by § 552(a).
325. *In re Wyatt*,  
[2010 WL 4781334](#) (Bankr. D. Colo. 2010)  
Chapter 7 debtor's postpetition payments to secured creditor whose lien was later avoided as preferential could be recovered as proceeds of the lien, and hence estate property, or as part of an effort to recover the value of property subject to the avoidable transfer.

#### **– Protection for Settlement Payments**

326. *In re Mervyn's Holdings, LLC*,  
[426 B.R. 488](#) (Bankr. D. Del. 2010)  
Seller of target in leveraged buyout was not protected by § 546(e) because that rule does not apply to "collapsed transactions" and in this case there were multiple transactions associated with the buyout (not involving the seller directly), some of which were not settlement payments.

#### ***Reorganization Plans***

327. *Good v. RMR Investments, Inc.*,  
[428 B.R. 249](#) (E.D. Tex. 2010)  
Interest rate to be paid on secured claim by a solvent debtor in a crammed down Chapter 11 plan is presumptively the contract rate, including the default rate provided for in the contract.



328. *In re Potts*

[421 B.R. 518](#) (8th Cir. BAP 2010)

Chapter 13 plan may modify secured creditor's default rights by specifying the sequence in which the collateral may be foreclosed upon if the debtor defaults on the plan obligations and the stay is lifted.

329. *In re Herrera,*

[422 B.R. 698](#) (9th Cir. BAP 2010)

Chapter 13 plan may impose various notification requirements on mortgage lenders without modifying the lender's rights in violation of § 1322(b)(2) because the imposition of a duty does not impair a right.

***Other Bankruptcy Matters***330. *In re Garden Ridge Corp.,*

[386 Fed. Appx. 41](#) (3d Cir. 2010)

Substantive consolidation order, pursuant to which the debtors retain all retained legal and equitable defenses that they had immediately prior to the petition date, did not create mutuality required for ex-employee to set off one debtor's obligation for severance pay and relocation expenses against his own obligations on promissory note.

331. *In re England Motor Co.,*

[426 B.R. 178](#) (Bankr. D. Mass. 2010)

Substantive consolidation of bankruptcy cases of three related entities did not allow bank to set off its obligations on a deposit account of two subsidiaries against loan debt of parent because even if substantive consolidation rendered the debts mutual, it did so postpetition. However, fact that one subsidiary guaranteed the debt of the parent did render the bank's debt on that subsidiary's deposit account mutual and thus gave the bank setoff rights.

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

[431 B.R. 404](#) (Bankr. W.D. Mich. 2010)

Secured party lacked standing to seek substantive consolidation in order to reduce its exposure to avoidance claims.

333. *In re Lehman Brothers Holdings, Inc.,*

[433 B.R. 101](#) (Bankr. S.D.N.Y. 2010)

Despite a contract with debtor that gave a swap participant the right to setoff deposited funds against the debtor's obligations, swap participant was not permitted to setoff the debtor's post-petition deposits against the debtor's pre-petition obligations because of a lack of mutuality, and nothing in § 560 or § 561 altered this limitation. Accordingly, swap participant's administrative freeze violated the automatic stay.

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334. *In re Erickson Retirement Communities, LLC*,  
[425 B.R. 309](#) (Bankr. N.D. Tex. 2010)  
Creditor who had expressly agreed in subordination agreement not to “exercise any rights or remedies or take any action or proceeding to collect or enforce any of the Subordination Obligations [without] the prior written consent of the Agent” had no standing to request appointment of examiner.
335. *In re Boston Generating, LLC*,  
[2010 WL 4922578](#) (Bankr. S.D.N.Y. 2010)  
Second lien creditors have standing to object to proposed disposition of collateral because even though the intercreditor agreement expressly gave the first lien creditors the “exclusive right to enforce rights . . . and make determinations regarding . . . dispositions,” it also indicated that the second lien lenders retained the right to file objections that unsecured creditors could file, and thus did not clearly waive the second lien creditors’ right to object.
336. *In re Philadelphia Newspapers, LLC*,  
[422 B.R. 553](#) (E.D. Pa. 2010)  
Self-appointed group of creditors with joint representation and a controlling interest in the debtor’s prepetition credit facility is not a “committee” that must comply with the disclosure requirements of Rule 2019 because it was not appointed by anyone and does not represent any non-member.
337. *In re Premier International Holdings, Inc.*,  
[423 B.R. 58](#) (Bankr. D. Del. 2010)  
Ad hoc group of noteholders is not a “committee” that must comply with the disclosure requirements of Rule 2019 because it was not appointed by anyone and does not represent any non-member.
338. *Bank Midwest v. Hypo Real Estate Capital Corp.*,  
[2010 WL 4449366](#) (S.D.N.Y. 2010)  
Minority lender in pre-petition credit facility could maintain breach of contract action against other lender that acted as administrative agent for providing, without minority lender’s consent, court-approved DIP financing that primed the credit facility.
339. *In re Bigler LP*,  
[2010 WL 1993807](#) (Bankr. S.D. Tex. 2010)  
Language in DIP financing order restricting challenges to lien perfection or priority was expressly limited to actions “on behalf of Debtor’s estate” and therefore did not restrict other secured creditor’s claim to priority.
340. *In re Talsma*,  
[436 B.R. 908](#) (Bankr. N.D. Tex. 2010)  
Debtor in possession could employ accounting firm that held prepetition claim.

341. *In re International Banking Corp. B.S.C.*,  
[439 B.R. 614](#) (Bankr. S.D.N.Y. 2010)

Deposited funds on which creditors had a judicial lien under New York law would not be released to administrator in Bahrain insolvency proceeding prior to determination of whether lien was an avoidable preference under Bahraini law. The parties were ordered to consent to the jurisdiction of the Bahraini court to decide the issue and if the Bahraini court declines to exercise jurisdiction, this court will decide the dispute.

#### GUARANTIES & RELATED MATTERS

342. *Citizens State Bank-Midwest v. Symington*,  
[2010 WL 2026678](#) (N.D. 2010)

Even though father's guaranty unambiguously indicated that it covered "all obligations" of son's corporation, the parol evidence rule does not bar evidence of fraud or mistake and thus the father could admit evidence that he signed the guaranty after the lender's representative assured him that all he was doing was guarantying one \$20,000 purchase loan.

343. *Terracino v. Gordon and Hiller*,  
[1 A.3d 97](#) (Conn. Ct. App. 2010)

Co-guarantors had no malpractice claim against their attorneys for failing to discover that third co-guarantor at one time held the note because that fact would not have limited their liability in the action eventually bought by an unrelated party. Although the enforcing note holder was not a holder in due course, the guaranty agreements expressly provided that each guarantor was liable for the full debt and the co-guarantors' right of contribution from the intermediate note holder would not have limited the rights of the entity that enforced the guaranties.

344. *Lestorti v. Deleo*,  
[4 A.3d 269](#) (Conn. 2010)

Guarantor's right to contribution from co-guarantor was not affected by creditor's failure to serve co-guarantor. The right of contribution is based on the theory that the co-guarantors have entered into an implied contract with each other, a contract to which the creditor is not a party. However, a guarantor has a right to contribution only if the guarantor pays more than its allocable share of the debt, and if the guarantor settles with the creditor by paying less than his share, the guarantor is entitled to no contribution from co-guarantors.

345. *VCS Properties, L.L.C. v. Viking Steel, L.L.C.*,  
[2010 WL 4927731](#) (Ohio Ct. App. 2010)

Surety that paid creditor in full had no breach of contract claim against co-surety because liability on the principal obligation had been discharged and the surety failed to plead a claim for contribution.

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346. *JP Morgan Chase v. Bethel*,  
[2010 WL 2595171](#) (Ohio Ct. App. 2010)  
Summary judgment denied on whether guarantors, whose liability was limited to \$73,500, were discharged by payment when the lender swept the funds in the deposit accounts they had established to serve as collateral for the “Indebtedness” because that defined term covered the debt evidenced by both the note and the guarantees, and thus it was ambiguous whether the funds taken had satisfied the guarantees.
347. *Bank Mutual v. S.J. Boyer Construction, Inc.*,  
[785 N.W.2d 462](#) (Wis. 2010)  
State anti-deficiency statute that insulates from liability for a deficiency on a mortgage loan “every party who is personally liable for the debt secured by the mortgage” does not insulate guarantors because a guarantor’s liability arises not from the debt itself, but from a separate contract.
348. *Beeler v. Martin*,  
[306 S.W.3d 108](#) (Mo. Ct. App. 2010)  
Couple who provided collateral for loan to corporation formed by their son had no claim for indemnity against son and another shareholder after the creditor foreclosed on the collateral, even though the son and the other shareholder had guaranteed the debt. The couple did, however, have a claim for unjust enrichment to the extent the son and other shareholder received assets in excess of liabilities when the corporation was dissolved.
349. *JPMorgan Chase Bank, N.A. v. KB Home*,  
[2010 WL 1994787](#) (D. Nev. 2010)  
Credit facility agent that brought action against the debtors and guarantors on behalf of the lenders had to comply with discovery request seeking documents from all lenders in the facility, even those who acquired their interest in the secondary market after the loan documents were executed.
350. *Jetstream of Houston, Inc. v. Aqua Pro Inc.*,  
[2010 WL 669458](#) (N.D. Ill. 2010)  
Forum selection clause in promissory notes did not bind guarantors because (i) the guaranty agreement promised “full and prompt payment of the Liabilities,” not performance of all contractual obligations of the debtor and (ii) by including the same choice of law as the notes but omitting the venue and jurisdiction provisions, the parties distinguished the enforcement procedure under the notes from the enforcement procedure under the guaranty. Nevertheless, by guarantying the notes in which it was agreed that the notes were made in Illinois, would be interpreted under Illinois law, and would be litigated in Illinois, the guarantors subjected themselves to jurisdiction and venue in Illinois.

351. *Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*,  
[230 P.3d 625](#) (Wash. Ct. App. 2010)

Choice-of-law clause in notes was not relevant to action on subjoined guaranties, which lacked such a clause. Instead, the governing law should be determined pursuant to Restatement (Second) of Conflicts of Law § 188 and § 194. Although there was no attorneys' fee clause in the guaranties, there was such a clause in the guaranteed promissory notes and therefore the guarantors are liable for fees incurred in attempting to collect from the guarantors, not merely fees incurred in attempting to collect from the borrowers.

352. *Regions Bank v. Weber*,  
[2010 WL 5121074](#) (La. Ct. App. 2010)

Even though guaranty agreement contained no arbitration clause, creditor had to arbitrate action against guarantor because the guaranteed promissory note contained an arbitration clause.

353. *Trustee Services, Inc. v. R.C. Koonts and Sons Masonry, Inc.*,  
[688 S.E.2d 737](#) (N.C. Ct. App. 2010)

Future advances clause in promissory note secured by deed of trust did not encompass obligation later incurred by maker under guaranty because the clause covered "future advances to Grantor," not advances made to others or all obligations of the Grantor.

354. *Ringneck, Inc. v. Buck*,  
[2010 WL 3927863](#) (M.D. Fla. 2010)

Secured loan supported by guaranties was sold to entity controlled by two guarantors, not paid off in a refinancing, with the result that the third guarantor's obligation survived.

#### LENDING, CONTRACTING & COMMERCIAL LITIGATION

355. *Highland Crusader Offshore Partners, L.P. v. Lifecare Holdings, Inc.*,  
[377 Fed. Appx. 422](#) (5th Cir. 2010)

Lender did not have actionable claim against debtor who, during effort to obtain consent to amendment to credit facility: (i) offered a 75 basis-point fee to most consenting lenders but secretly offering a 125 basis-point fee to two minor lenders; and (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 the warranties in the credit agreement covered facts as of the date it was signed. The debtor did not violate the duty of good faith because the lender was not deprived of anything for which it had bargained. There was no cognizable claim for fraud or misrepresentation because the lender was aware that the debtor may have made higher offers when the debtor refused to confirm or deny that fact.

356. *Highland Capital Management LP v. Schneider*,  
[607 F.3d 322](#) (2d Cir. 2010)

Note owners' broker had neither actual nor apparent authority to enter into contract to sell the notes because even though the prospective buyer was instructed to communicate only with the broker, the buyer signed a negotiation agreement acknowledging that the consummation of any sale was within the discretion of the note owners and the broker repeatedly indicated that the note owners had to agree to any offer.

357. *Pitman Place Development, LLC v. Howard Investments, LLC*,  
[2010 WL 4773404](#) (Mo. Ct. App. 2010)

Manager of LLC that provided fraudulently altered copy of LLC agreement to potential lender had apparent authority to execute notes and mortgage even though the other members did nothing to create this appearance other than to appoint the manager. Lender, as payee of note, was a holder in due course and lender's rights sheltered the rights of subsequent holder of the note.

358. *Export-Import Bank of U.S. v. Asia Pulp & Paper Co., Ltd.*  
[609 F.3d 111](#) (2d Cir. 2010)

Electronic funds transfers being processed by an intermediary bank are not property subject to garnishment under the Federal Debt Collection Procedures Act for debts owed to either the originator or the beneficiary because neither party has a "substantial interest" in the fund transfer.

359. *Traders Bank v. Dils*,  
[2010 WL 4709029](#) (W. Va. 2010)

Maker of a promissory note may assert fraud in the inducement defense against payee alleging maker's detrimental reliance on the payee's oral promise, made with no intention to fulfill, to revive line of credit, even though a third party was the beneficiary of the promise.

360. *Cardinale v. Miller*,  
[2010 WL 1952423](#) (Cal. Ct. App. 2010)

Judgment creditor stated cause of action against brokers for conspiracy to effect fraudulent transfers, even though the brokers were not transferees and lacked dominion and control over the parties to the fraudulent transfers.

361. *Moffatt & Nichol, Inc. v. B.E.A. International Corp., Inc.*,  
[2010 WL 4103149](#) (Fla. Ct. App. 2010)

Judgment creditor lacked standing to bring fraudulent transfer claim against transferee who purchased judgment debtor's assets from the assignee in an Assignment for the Benefit of Creditors because the assignee has the exclusive authority to pursue fraudulent transfers and other choses in action for the benefit of all creditors.

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362. *First Choice Bank v. Riverview Muir Doran, LLC*,  
[2010 WL 2161778](#) (Minn. Ct. App. 2010)  
Intercreditor agreement which provides that, after default on the senior loan, the junior lender “will not accept any payments under or pursuant to the Subordinate Loan Documents . . . without Senior Lender’s prior written consent” covered payments from guarantors and payments from an entity related to the debtor.
363. *In re USA Commercial Mortgage Co.*,  
[2010 WL 4318537](#) (D. Nev. 2010)  
Individual holders of less than all of a debt obligation always have a right to settle their interests for less than full payment and a loan servicer that fails to prorate according to each lender’s wishes could be liable for damages. Nevada statute authorizing owners of 51% of debt obligation to settle for less than full payment likely violates the Due Process rights of the other holders.
364. *Brookfield Asset Management, Inc. v. AIG Financial Products Corp.*,  
[2010 WL 3910590](#) (S.D.N.Y. 2010)  
Clause in interest rate swap agreements that provided for automatic termination on either parties’ insolvency was not unconscionable.
365. *Grice Engineering, Inc. v. Innovations Engineering, Inc.*,  
[2010 WL 3768107](#) (Wis. Ct. App. 2010)  
Stock pledge agreement that guarantors signed in connection with corporation’s purchase of the assets of a target company was covered by standstill clause in subordination agreement between bank and target company and thus enforcement of the stock pledge agreement was barred. The subordination agreement was not unconscionable even though the standstill clause prevented action until the revolving debt to the bank was paid in full, an event that might never happen.
366. *American Sterling Bank v. Johnny Management LV, Inc.*,  
[2010 WL 4246894](#) (Nev. 2010)  
A lender whose loan proceeds are used to pay off a prior secured debt can be equitably subrogated to the former lender’s lien position, so long as no intervening lienholder is materially prejudiced. For this purpose, the increase in the interest rate does not create material prejudice because subrogation is limited to the amount that would be owing on the paid off note, calculated with its interest rate. However, because the new note’s much accelerated maturity date – six months instead of 12½ years – did create material prejudice to the junior lienor.
367. *In re Fontainebleau Las Vegas Contract Litigation*,  
[716 F. Supp. 2d 1237](#) (S.D. Fla. 2010)  
Lenders who funded their portion of borrower’s draw request under credit facility had no standing to sue other lenders who refused to fund because the funding lenders were not intended beneficiaries of the contractual promise to lend.



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368. *Igbene v. Jackson Federal Bank*,  
[2010 WL 2031276](#) (Cal. Ct. App. 2010)  
Bank did not breach option contract, created by its commitment letter, to provide home mortgage loan merely because the loan documents the borrower executed provided that: (1) the borrower would be in default if he further encumbered the property; (2) the bank would have a security interest in the borrowers personal property attached to the property; and (3) upon default, the interest rate would increase above the ceiling rate provided in the commitment letter. The commitment letter was conditioned on the borrower's execution of "documentation deemed necessary" by the bank, and this language encompassed all of the disputed provisions.
369. *Ex parte Carter*,  
[2010 WL 5396581](#) (Ala. 2010)  
Jury waiver in loan agreement was binding on the parties to the agreement but did not apply to claims by borrowers against individual bank employees, particularly given that separate indemnification clause did expressly list officers, directors, and attorneys.
370. *Fensterstock v. Education Finance Partners*,  
[611 F.3d 124](#) (2d Cir. 2010)  
Arbitration clause in student loan note that contained waiver of class action was unconscionable under California law.
371. *Sawyers v. Herrin-Gear Chevrolet Co.*,  
[26 So. 3d 1026](#) (Miss. 2010)  
Arbitration clause in consumer contract that contained exception for seller to replevy the collateral was enforceable.
372. *Broom v. Morgan Stanley DW Inc.*,  
[236 P.3d 182](#) (Wash. 2010)  
A facial legal error is a basis for vacating an arbitral award because it indicates that the arbitrators exceeded their powers. Because state statutes of limitations do not apply to arbitration absent the parties' agreement, the arbitrators were not authorized to use the expiration of the limitations period as a basis for denying a party's claims.
373. *U.S. ex rel. Gillette Air Conditioning Co. v. Satterfield and Pontikes Construction, Inc.*,  
[2010 WL 5067683](#) (W.D. Tex. 2010)  
Arbitration clause that required subcontractor to arbitrate disputes, if contractor so elected, was enforceable because mutuality of obligation to arbitrate is not required and one-sided clause is not unconscionable.
374. *Gordon v. Dadante*,  
[2010 WL 148131](#) (N.D. Ohio 2010)  
Receiver for failed Ponzi scheme should distribute available assets to investor/claimants pro rata, without factoring in any "profits" previously distributed to some investor/claimants.



375. *Moody National RI Atlanta H, LLC v. RLJ III Finance Atlanta, LLC*,  
[2010 WL 163296](#) (N.D. Ga. 2010)

Mortgagee did not agree to loan modification merely because it accepted some late payments or because the loan servicer failed to bill for the proper amount of default interest. Moreover, a discussion letter signed by the parties expressly indicated that the loan documents remained in full force unless and until amended by a written agreement executed by the parties, which the parties never did. As a result, mortgagee could use the mortgagor's failure to pay default interest as a basis for foreclosing.

376. *Orix Capital Markets, LLC v. La Villita Motor Inns, J.V.*,  
[2010 WL 3331702](#) (Tex. Ct. App. 2010)

Even if loan servicer breached the loan agreement by failing to provide a payoff amount, that breach could be remedied by monetary damages and trial court erred by enjoining foreclosure action for 18 months.

377. *PurCo Fleet Services, Inc. v. Koenig*,  
[240 P.3d 435](#) (Colo. Ct. App. 2010)

Car rental contract that required lessee to pay for "loss of use (regardless of fleet utilization)" resulting from damage to car obviated the need for the rental company to prove that it would have rented the specific car that was damaged, but the rental company still had to prove that it was open for business and had at least one customer interested in renting a car for each day that it seeks damages.

378. *In re Fedders North America, Inc.*,  
[422 B.R. 5](#) (Bankr. D. Del. 2010)

Even if the insider directors of the borrower were grossly negligent in failing to obtain a credible financial assessment of the borrower's ability to comply with the terms of a new loan, no cause of action was stated against the lenders for aiding and abetting the directors' breach of fiduciary duty because the loan was an asset-based transaction for which the borrowers continued solvency was not the principal factor and the loan documents required various certifications and representations that collectively indicate that the lenders had no reason to know the directors failed to conduct the required due diligence.

379. *Midwest Title Loans, Inc. v. Mills*,  
[593 F.3d 660](#) (7th Cir. 2010), *cert. denied*, [131 S. Ct. 83](#) (U.S. 2010)

Amendment to Indiana Uniform Consumer Credit Code aimed at "car title pawns" that made Indiana law applicable to any loan to an Indiana resident if the creditor has advertised or solicited business in Indiana by any means violated the Commerce Clause.

380. *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,  
[597 F.3d 84](#) (2d Cir. 2010)

Customer of investment company whose account was debited for allegedly unauthorized transfers could not maintain common-law actions for breach of fiduciary duty, conversion, and fraud against the investment company after the one-year limitations period provided in § 4A-505 because such claims are inconsistent with the protections Article 4A has established to deal with unauthorized transfers.

381. *Ferrington v. McAfee, Inc.*,  
[2010 WL 3910169](#) (N.D. Cal. 2010)

On-line purchasers of software could maintain cause of action against seller for deceptive practices in connection with advertisement that appeared in pop-up window after the sale was completed that urged customers to “try it now” and that, without disclosure, signed customers up for subscription service offered by another company, and that automatically billed the customers’ credit card.

382. *Bluff Springs Apartments, Ltd. v. Peoples Bank of South*,  
[2010 WL 2106210](#) (Tenn. Ct. App. 2010)

Bank that had lost substantial sums in check kiting scheme by apartment owner had no right to setoff funds in deposit accounts owned by entities related to the apartment owner, even though used in the check kiting scheme, or in a deposit account containing tenants’ security deposits. The bank could, however, exercise setoff against deposit accounts labeled as “reserve replacement” account and “taxes and insurance” account because the apartment owner had used those accounts as he saw fit; the labels on the deposit accounts did not make them special deposits immune from setoff.

383. *First Dakota National Bank v. First National Bank of Plainview*,  
[2010 WL 2557562](#) (D.S.D. 2010)

Bank may be liable for conversion or unjust enrichment for setting off proceeds of checks deposited into customer’s checking account to cover negative balance because it may have known enough about the customer’s business of raising sheep for third parties that the checks were equitably owned by those third parties.

384. *Sanford v. Waugh & Co.*,  
[2010 WL 5139496](#) (Tenn. 2010)

Creditor of insolvent corporation may not assert a direct cause of action against corporate directors for breach of fiduciary duty, only a derivative claim.

385. *CML V, LLC v. Bax*,  
[6 A.3d 238](#) (Del. Ch. Ct. 2010)

While creditors of an insolvent corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties, the language of the LLC Act bars creditors of an insolvent limited liability company from bringing derivative actions.

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386. *Olmstead v. F.T.C.*,  
    [44 So. 3d 76](#) (Fla. 2010)  
Judgment creditor seeking debtor's interest in single-member LLC was not limited to a charging order, but could instead obtain order compelling debtor to sign over interest in LLC.
387. *Western Security Bank v. Eide Bailly LLP*,  
    [2010 WL 5479168](#) (Mont. 2010)  
Accounting firm that issued materially false report about borrower in warehouse lending arrangement owed no duty of care to third parties who allegedly relied on the report before conducting merger transaction with the warehouse lender, and therefore was not liable for negligent misrepresentation.
388. *MMU of New York, Inc. v. Grieser*,  
    [999 A.2d 1204](#) (N.J. Super. Ct. 2010)  
Courts have inherent power, even in the absence of statutory authorization, to award a judgment debtor credit for the fair market value of property purchased by the judgment creditor at a sheriff's sale for a nominal amount, to prevent double recovery.
389. *Sunflower Bank v. FDIC*,  
    [2010 WL 3913597](#) (D. Kan. 2010)  
Participation agreement that provided for pro rata allocation of all collections, including the proceeds of any setoff, required that setoff be allocated among the participants pro rata. Because the seller/servicer that effected setoff was insolvent, the participant buyer merely had a claim against it for its allocable portion of the setoff amount.
390. *Lewitin v. Manhattan Mini Storage*,  
    [2010 WL 5591871](#) (N.Y. Sup. Ct. 2010)  
Statute authorizing warehouseman to sell stored goods after sending notice of the sale "by registered or certified mail, return receipt requested," did not authorize the use of certified mail "electronic return receipt requested," because even though the Post Office maintains a record of delivery, the receipt lacks the signature of the addressee or the addressee's agent.