Commercial Law Developments

2011

Prepared by
Professor Stephen L. Sepinuck

SECURED TRANSACTIONS

Scope Issues

1. *In re Palmdale Hills Property, LLC*,
457 B.R. 29 (9th Cir. BAP 2011)
Repurchase agreements relating to mortgage loans were true sales, not secured transactions, even though the putative buyer had an obligation to resell identical loans and the loans were unique because the transaction documents unambiguously indicated the parties' intent was that the transaction be a true sale.

2. *Aniebue v. Jaguar Credit Corp.*,
708 S.E.2d 4 (Ga. Ct. App. 2011)
Four-year lease of a new Jaguar with an option to purchase at the end for $19,684 was a true lease. Therefore Article 9's requirement of notification before disposition did not apply. Lessees who defaulted were thus, pursuant to the terms of the lease, required to pay the difference between the Adjusted Capitalized Cost and the resale proceeds, plus costs. Summary judgment was not appropriate on what other costs were recoverable because the lessor had not adequately explained them.

3. *In re Warne*,
2011 WL 1303425 (Bankr. D. Kan. 2011)
61-month lease of semi-tractor that was non-cancellable and which contained an option to purchase at the end for $31,100 was a true lease even though the lessee had provided a security deposit equal to the purchase option price. The purchase option price was a reasonable estimate of the tractor's value at the end of the lease term.

4. *VFS Leasing Co. v. J & L Trucking, Inc.*,
2011 WL 3439525 (N.D. Ohio 2011)
Six-year Finance lease of four trucks that gave lessee the option to purchase at the end of the lease term for 8.84% of the purchase price the lessor paid was a true lease because the option price was not nominal.

5. *In re HB Logistics, LLC*,
460 B.R. 291 (Bankr. N.D. Ala. 2011)
TRAC leases of trucks were true leases due to Alabama and Texas statutes providing that "a transaction does not create a sale or security interest merely because the transaction provides that the rental price is permitted or required to be adjusted . . . by reference to the amount realized upon sale or other disposition of the motor vehicle." TRAC leases governed by Minnesota law are also true leases due to a substantially similar Minnesota statute. TRAC leases governed by Mississippi law, which lacks such a statute, were also true leases based on the economic realities and the fact that the lessor was guaranteed to receive 25% of the sale price when the vehicles are sold.

6. *In re Turner*,
2011 WL 2490600 (W.D. Mo. 2011)
Putative lease of automobile was a true lease because the lessee could terminate at any time without charge. Relief from the stay to repossess the automobile will be denied if the debtor proposes a plan calling for payments of $120/month even though the lease calls for payments of $49/week.

7. *Gibraltar Financial Corp. v. Prestige Equipment Corp.*,
949 N.E.2d 314 (Ind. 2011)
Summary judgment was improperly granted on whether six-year lease of punch press recently purchased by lessee was a true lease. Although the lessee's options to buy in year five and at the end of the lease term did not pass the bright-line test, further evidence was needed about evidence of the expectations of the parties at the time they entered into the transaction, including to such factors as the expected value of the punch press on the option dates and whether the only economically sensible course for the lessee would have been to exercise the option.

8. *In re Kentuckiana Medical Center LLC*,
455 B.R. 694 (Bankr. S.D. Ind. 2011)
Non-cancellable equipment leases that gave lessee three options at the end – (i) to purchase the equipment for $238,000; (ii) lease the equipment for one month for $238,000 and become the owner thereafter; or (iii) return the equipment to the lessor, paying the costs of shipping and guarantying that the lessor will realize upon sale at least 10% of its acquisition cost – was a sale with a retained security interests because the first two options, which resulted in the lessee becoming the owner, were less than the reasonably predictable cost of the third.

9. *In re Del-Maur Farms, Inc.*,
2011 WL 2847709 (Bankr. D. Neb. 2011)
Non-cancellable lease of equipment with option to purchase at the end for 10% of the initial purchase price and, if the lessee does not exercise the option, an obligation to renew the lease for one year for a rent that exceeds option price was a sale with a retained security interest.

10. *C and J Vantage Leasing Co. v. Wolfe*,
795 N.W.2d 65 (Iowa 2011)
Non-cancellable equipment lease that contained $1 purchase option was a sale with a retained security interest. Nevertheless, "hell or high water," clause was enforceable and therefore the debtor/lessee claims and defenses against the supplier were generally unavailable against the secured party/lessor, except those that relate to contract formation, such as fraud in the inducement.

11. *In re Ky USA Energy, Inc.*,
449 B.R. 745 (Bankr. W.D. Ky. 2011)
Lease of three motor vehicles that was not subject to cancellation and that included an option to purchase at the end of the lease term for $1 was a security interest even though state law provides that there can be no transfer of ownership of the vehicle without a proper assignment of the certificate of title.

12. *Filer, Inc. v. Staples, Inc.*,
766 F. Supp. 2d 314 (D. Mass. 2011)
Because assignment of rights under single contract was for the purpose of collection and in satisfaction of a pre-existing indebtedness, Article 9 did not apply and, therefore, the anti-assignment rule of § 9-406(d) did not invalidate the contractual restriction on assignment without the account debtor's consent. Consequently, the assignee was not a proper party to maintain an action on the contract. No discussion of whether assignee was an agent of assignor.

13. *In re Ocean Place Development, LLC*,
447 B.R. 726 (Bankr. D.N.J. 2011)
Despite language in assignment agreement, hotel's room revenues were accounts or payment intangibles, not rents, and thus an assignment of them was governed by Article 9. Because the assignment was for security purposes, the hotel had sufficient rights in the revenues for them to be property of the estate.

14. *In re Harbour East Development, Ltd.*,
2011 WL 3035287 (Bankr. S.D. Fla. 2011)
Consensual lien on debtor's interest as seller in forfeited deposits made in connection with contracts to sell real estate was governed by real estate law, not by Article 9. Even if Article 9 applied, the mortgagee was perfected because the escrow agent had possession of the funds on behalf of the mortgagee and money, when deposited into a bank account, is still money.

15. *In re QA3 Financial Corp.*,
2011 WL 1297840 (Bankr. D. Neb. 2011)
Security interest in unearned insurance premiums was not governed by Article 9. Accordingly, lender that financed the debtor's insurance policy and obtained an irrevocable power of attorney to cancel the policy and to collect all unearned premiums in the event of default was entitled to relief from the stay to do so even though the lender had not filed a financing statement.

16. *Modtech Holdings, Inc. v. Monteleone & McCrory LLP*,
2011 WL 1429631 (C.D. Cal. 2011)
Law firm had valid attorney's lien on amounts recovered in contract litigation – for which no financing statement was required to perfect – pursuant to agreement with the client and the lien covered fees generated in matters unrelated to the action giving rise to the recovery.

17. *Textron Financial Corp. v. Weeres Industries Corp.*,
2011 WL 2682901 (D. Minn. 2011)
Inventory lender's claim against manufacturer for breach of agreement to repurchase repossessed inventory of its dealers was not governed by Article 9, and therefore lender had no duty to manufacturer to sell the inventory in a commercially reasonable manner. The lender's general duty to mitigate damages was waived in the repurchase agreement and, in any event, did not require the lender to refinance the inventory with another dealer or permit the manufacturer to make interest payments to cure the defaulting dealers' defaults.

18. *In re Salander O'Reilly Galleries*,
453 B.R. 106 (Bankr. S.D.N.Y. 2011)
Law of New York – where the debtor was located – governed the effect of the debtor's consignment agreement, not the foreign law chosen in the parties' agreement. As a result, clause calling for arbitration under the law of the Channel Islands would not be enforced.

Attachment Issues

– Existence of Security Agreement

19. *United States v. 1997 International 9000 Semi Truck VIN: 1HSRUAER8VH409632*
412 Fed. Appx. 118 (10th Cir. 2011)
Despite the existence of an authenticated security agreement, brother of convicted drug trafficker failed to prove that he had a valid security interest in the trafficker's truck sufficient to prevent forfeiture because the note had several irregularities, the trafficker never made any payments over the eighteen months between the alleged issuance of the note and the trafficker's arrest, and the brother never testified that he was unaware of the trafficker's illegal conduct.

20. *Roswell Capital Partners LLC v. Beshara*,
436 Fed. Appx. 34 (2d Cir. 2011)
Lender's security interest in debtor's assets was extinguished when the lender converted the debtor's notes to equity, and nothing in the documents restored the lender's priority when equity was re-converted to debt. Unclear if court was saying, as the lower court did, that the security interest did nor re-attach at all or merely that the re-attached security interest did not have priority.

21. *Monlezun v. Lyon Interests, Inc.*,
76 So. 3d 628 (La. Ct. App. 2011)
Because a resolution of a corporations board of directors authorized the president to pledge corporate equipment as collateral for loan to himself and his wife, and the resolution expressly indicated that it would remain in force until the lender received notification of its revocation, the president was authorized to pledge the collateral for a second loan after he had paid off the first.

22. *Zaremba Group, LLC v. FDIC*,
2011 WL 721308 (E.D. Mich. 2011)
Husband of managing member of LLC had no apparent authority to grant bank a security interest in LLC's certificates of deposit because apparent authority must arise from acts of the principal, not the agent, and the LLC did nothing other than make the initial deposit shortly after the husband said it would occur. The LLC did not ratify the purported grant by signing a bank resolution ratifying all transactions purportedly done on the LLC's behalf because the LLC had no knowledge of the husband's actions at the time and the loan purportedly secured by the CDs was not for the LLC's benefit. The LLC had a valid contract claim against the bank for failure to honor the CDs, but not a claim for conversion, unjust enrichment, or wrongful detainer.

23. *In re Jojo's 10 Restaurant, LLC*,
455 B.R. 321 (Bankr. D. Mass. 2011)
No authenticated security agreement existed even though the asset purchase agreement provided that the buyer's obligation "shall be secured by a standard form UCC Security Agreement," and the filed financing statement described the collateral. The asset purchase agreement lacks granting language and the financing statement was not signed by the debtor. Although the debtor did purport to pledge a liquor license, Massachusetts law gives limited property rights in such a license only if the pledge is approved by the licensing authority. because no approval was granted, the debtor had no property rights in the license and no security interest attached to it.

24. *Lopes v. Fafama Auto Sales*,
2011 WL 6258818 (Mass. Ct. App. 2011)
Combination of two documents signed by the car buyer – a bill of sale stating that the car dealer had a right to repossess the car for nonpayment and a certificate of title application listing the dealer as sole the lienor – constituted an authenticated security agreement.

25. *First Premier Capital LLC v. Brandt*,
2011 WL 6337791 (N.D. Ill. 2011)
Security agreement that mistakenly purported to grant a security interest in the assets of the creditor, rather than the debtor, could potentially be reformed. As a result, the bankruptcy court's approval of a settlement between the creditor and the trustee that acknowledged the validity of the creditor's lien but created a carve-out for the trustee was not an abuse of discretion.

26. *Quality Ford Auto. Sales, Inc. v. Ford Motor Credit Co., LLC*,
2011 WL 2935161 (Ky. Ct. App. 2011)
Corporate car dealership that granted signed security agreement with financier remained bound by the agreement after ownership of the corporation changed.

27. *In re Global Aircraft Solutions, Inc.*,
2011 WL 3300241 (9th Cir. BAP 2011)
Garageman's possession of aircraft navigation unit pursuant to oral security agreement was sufficient for security interest to attach and be perfected.

28. *Hadassah v. Schwartz*,
2011 WL 4862757 (Ohio Ct. App. 2011)
Judgment creditor could garnish funds law firm held in client trust fund for judgment debtor because there was no written agreement granting the law firm a security interest.

29. *In re Debaeke*,
2011 WL 5563543 (Bankr. E.D. Mich. 2011)
Because, in the court's judgment, the defendant's $1,000 payment to the plaintiff was a gift not a loan, the defendant could not have a security interest in the plaintiff's go-cart that the defendant was storing.

30. *Laborers Pension Trust Fund-Detroit and Vicinity v. Interior Exterior Specialists Co.*,
2011 WL 5211481 (E.D. Mich. 2011)
Written agreement pursuant to which a judgment defendant transferred funds during appeal to a special account held by the judgment creditor, and which provided a source for payment of the judgment if the appeal was overruled, was a security agreement even though it did not expressly use the words "security interest." Because the judgment creditor's interest was perfected by possession, it was senior to the rights of a judicial lien creditor that had attempted to garnish the funds.

– Description of the Collateral

31. *Monticello Banking Co. v. Flener*,
(6th Cir. 2011)
Summarily affirming lower court ruling that 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."

32. *U.S. Bank v. Hanson*,
2011 WL 2847414 (D. Idaho 2011)
Brick machine that turns sawdust into wood bricks and which was integrated with existing equipment of wood pellet manufacturer by connection to a conveyor system is an "accessory" to listed collateral within the meaning of the manufacturer's security agreement.

33. *Pearson v. Wachovia Bank*,
2011 WL 9505 (S.D. Fla. 2011)
Security agreement that described the collateral as "[a]ll of the investment property . . . held in or credited to" three designated securities accounts was sufficient even though the secured party later issued one monthly statement for all three accounts using a different, single account number because the three pledged accounts were not in fact consolidated into a new account. Even if the bank had consolidated the three accounts, the new account would still be covered by the security agreement, which expressly extended to "additions, replacements, and substitutions" of the listed collateral.

34. *In re O & G Leasing, LLC*,
456 B.R. 652 (Bankr. S.D. Miss. 2011)
Description of collateral as "Performance Drilling Rig # 3" and four other numbered rigs was sufficient even if the exhibit providing a more complete description was not attached when the debtor signed the security agreement because the description was sufficient "to raise a red flag to a third party, so as to indicate that more investigation may be necessary to determine whether an item is subject to a security interest." In addition, the exhibit is part of the security agreement even though attached after the debtor signed it.

35. *Regions Bank v. Bric Constructors, LLC*,
2011 WL 6288033 (Tenn. Ct. App. 2011)
Description of collateral in security agreement as "Hydraulic Excavator w/ Tramac V1600 Hammer Eq. # C0442 and a 36" HD Hensley Bucket Stock # A6775" was sufficient and created no confusion about which hydraulic excavator was covered.

36. *In re Inofin, Inc.*,
455 B.R. 19 (Bankr. D. Mass. 2011)
Original security agreement and financing statement that described the collateral to be "motor vehicle installments sales contracts purchased by Debtor with the proceeds of loans from Secured Party and assigned and delivered to Secured Party" did not include chattel paper not financed by the secured party. Subsequent loan agreement providing that "[a]s security . . . , Borrower shall assign and deliver to Lender, . . . Installment Contracts" removed the requirement that the secured party provide the financing for collateralized chattel paper but the secured party gave no value for that additional collateral.

37. *In re HT Pueblo Properties, LLC*,
2011 WL 5041767 (Bankr. D. Colo. 2011)
Security agreement that described the collateral to include "[a]ll accounts, general intangibles. . . [and] rents . . .arising out of a sale, lease, consignment or other disposition of any of the . . . Collateral" did not cover room rents of hotel because there was no disposition of the property, merely operation of the property. Deed of trust that purported to grant a UCC security interest in "all present and future rents revenues, income, . . . and other benefits derived from the [subject] Property" does not clearly grant a security interest in the fees, charges, accounts, or other payments for the use or occupancy of rooms and in any event such an interest is in personalty and is governed by Article 9, and therefore must be created in the security agreement, not in ancillary documents.

38. *Beane v. Beane*,
2011 WL 223167 (D.N.H. 2011)
Claims of corporation against former employee/owner were commercial tort claims and therefore generic references in the security agreement to "accounts and other rights to payment" and "payment intangibles" were insufficient to create a valid security interest in those claims. Accordingly, a sheriff's sale of the collateral to the former employee/owner did not transfer the commercial tort claims and the former employee/owner did not have the right to have the claims dismissed.

39. *Algonquin Power Income Fund v. Christine Falls of New York, Inc.*,
2011 WL 6178802 (N.D.N.Y. 2011)
Claim for engineering malpractice could not be assigned under Connecticut law (prior to enactment of revised Article 9) and, even if it could be, security agreement describing the collateral as "any interest in any kind of property or asset, whether real, personal or mixed, and whether tangible or intangible," while sufficient to cover a chose in action, was not sufficiently specific to cover the existing malpractice claim. Subsequent agreement covering "actions and rights in action . . . arising from or relating to any of the property described" also did not cover the malpractice claim because the claim did not involve damage to property. Moreover, no security interest attached when the malpractice action transformed to a judgment, bond, and contract claim because if a security agreement does not grant a security interest in a tort claim or its proceeds, no subsequent transformation will "magically" result in an automatic attachment of those proceeds.

40. *In re Taylor*,
2011 WL 841511 (Bankr. E.D. Ky. 2011)
Security agreement that described the collateral as "155 head of mixed breed cows and calves" without specifying which particular cattle would be deemed, in the absence of any other reasonable approach, to cover the last 155 cattle sold by the debtor and the proceeds thereof.

41. *In re McKenzie*,
2011 WL 2118689 (Bankr. E.D. Tenn. 2011)
Slight errors in the names of the LLCs in which the debtor had pledged membership interests were immaterial because it was possible to determine the interests pledged by looking at the names of the entities in which the debtor had an interest. However, pledge of membership interest in "Exit 20, LLC" was inadequate because the debtor had a membership interest in two entities whose names began with "Exit LLC" – Exit 20 Properties, LLC and Exit 20 Development, LLC – and it was not objectively possible to ascertain which interest had been pledged.

42. *In re Moore*,
2011 WL 2457343 (Bankr. N.D. Miss. 2011)
Description of collateral as "[a]ll crops, and farm products whether any of the foregoing is owned now or acquired later; whether any of the foregoing is now existing or hereafter raised or grown" was sufficient to cover future year's harvest, as well as the proceeds thereof.

43. *In re Holland*,
2011 WL 5902778 (Bankr. E.D.N.C. 2011)
Debtor's mobile home used as a principal residence was collateral for refinanced loan pursuant to language in security agreement providing that "[p]roperty given as security under this Plan or for any other loan I have with the credit union will secure all amounts I owe the credit union now and in the future." Although the security agreement went on to state that "property securing another debt will not secure advances under the Plan if such property is my principal residence (unless the proper rescission notices are given and any other legal requirements are satisfied)," the mobile home was not excluded by this clause because the mobile home secured not *another* debt but the stated debt because the mobile home was included in the recital of security in the advance receipt under which the debt was refinanced.

44. *In re Southeastern Materials, Inc.*,
452 B.R. 170 (Bankr. M.D. N.C. 2011)
Description of collateral as" all of the Debtor's . . . equipment, wherever located," but which also stated that "the address where the Debtor keeps and maintains the equipment is . . . Columbus County," created a factual issue as to whether the parties intended to encumber equipment located in a different county.

– Rights in the Collateral

45. *In re TerreStar Networks, Inc.*,
457 B.R. 254 (Bankr. S.D.N.Y. 2011)
Although federal law prohibits a security interest from attaching to an FCC license itself, a security interest can attach to the "economic value" of the license; because this lien attached prepetition, § 552 of the Bankruptcy Code does not apply even if, on the petition date, no proceeds of the license existed and there was no agreement to sell the license.

46. *In re Tracey Broadcasting Corp.*,
2011 WL 3861612 (D. Colo. 2011)
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.

47. *U.S. v. Corry Communications*,
2011 WL 4572012 (W.D. Pa. 2011)
Because no lien can attach to an active broadcast license, merely to the proceeds of such a license, the federal tax lien on a broadcaster's assets extended only to the sale proceeds of the license, not to the license itself, and thus the government could not foreclose on the license now owned by the buyer.

48. *Concorde Equity II, LLC v. Bretz*,
2011 WL 5056295 (Cal. Ct. App. 2011)
Although state law prohibits the granting of a security interest in a liquor license, the lender's security interest could and did attach to the proceeds of the a liquor license sold by a court-appointed receiver.

49. *In re Garrison*,
462 B.R. 666 (Bankr. W.D. Ark. 2011)
Restrictions on transfer of corporate stock are governed by the state of incorporation. Statement on reverse of stock certificate for shares in close-held corporation providing that the shares "may not be offered, sold, transferred, pledged or hypothecated in the absence of an effective registration statement for the shares under the [Securities Act of 1933] and under any applicable state securities laws, or an opinion of counsel to the corporation that such registration is not required as to such sale or offer" was ineffective to prevent the shareholders from granting a security interest in the shares because it prevents only a public offering and the shareholder's pledge was an exempted transfer. However shareholder agreement that prohibited shareholders from transferring or encumbering any stock without the express written consent of all the shareholders, even though not noted on the stock certificate, was effective to prevent the creation of a security interest once the lender had knowledge of the restriction. The court did not explain why, given that the debtors authenticated the security agreement before that time, subsequent refinancings triggered the effectiveness of the restriction.

50. *In re Westbay*,
2011 WL 2708469 (Bankr. C.D. Ill. 2011)
Although LLC agreement required the written consent of all members to use of the debtor's membership interest as collateral, that requirement was impliedly waived because all the members knew of and benefitted from the transaction, which was in exchange for a loan of working capital to the LLC. No discussion of § 9-408.

51. *In re McKenzie*,
2011 WL 2118689 (Bankr. E.D. Tenn. 2011)
2011 WL 6140516 (Bankr. E.D. Tenn. 2011) (subsequent decision)
No security interest attached to the debtor's LLC interest because the operating agreement required the prior written consent of the LLC's Board of Governors, and no such consent was obtained. The court asked for more briefing on whether § 9-408 allows a security interest to attach to the proceeds of the LLC interest despite a restriction on assignment in the operating agreement.

Pursuant to subsequent decision, debtor could grant a security interest in wholly owned LLCs regardless of restrictions in membership agreement because consent to the transfer is presumed. As to remaining LLCs, secured party failed to submit evidence that the debtor's interests were freely transferrable. While § 9-408 does override restrictions on the transfer of an interest in general intangibles, such as partnership interests and some LLC interests, by failing to submit the operating agreements, the secured party failed to prove that the LLC interests were general intangibles and not securities.

52. *Meecorp Capital Markets, LLC v. PSC of Two Harbors, LLC*,
2011 WL 1119191 (D. Minn. 2011)
2011 WL 6151487 (D. Minn. 2011) (subsequent decision)
Summary judgment denied on whether lender acquired a security interest in LLC interests because LLC agreements required unanimous consent of all members to the creation of a security interest and it was not clear that all the members had consented.

Pursuant to subsequent decision, guarantor did not grant a security interest in his LLC interest because there was no evidence that written notice was provided to all members, as required by the member control agreement. The guarantor also did not grant a security interest in his general partnership interests because the member control agreements prohibit transfer of governance interests without the unanimous, written consent of all other members and the resolutions of the Boards of Governors consenting to the transfer were insufficient to satisfy this requirement. No discussion of § 9-408.

53. *In re Rabinowitz*,
2011 WL 6749068 (Bankr. D.N.J. 2011)
Although LLC operating agreement purported to make void any grant of a security interest in a member's LLC interest without the consent of a majority of members, state court judgment in action by lender against member and stating that the security agreement remained in full force and effect was binding on the debtor's bankruptcy trustee pursuant to the entire controversy doctrine because the validity of the security agreement could have been litigated in the state action.

54. *Lebedowicz v. Meserole Factory LLC*,
2011 WL 6380290 (N.Y. Sup. Ct. 2011)
Security agreement signed by members of LLC on behalf of the LLC, and not in their personal capacities, did not grant a security interest in the members' LLC interests because the LLC itself did not have rights in those membership interests.

55. *Lonely Maiden Productions, LLC v. Goldentree Asset Management, LP*,
2011 WL 5966335 (Cal. Ct. App. 2011)
Security interest granted by payroll processor attached to funds provided by processor's clients, including a security deposit provided by one client, because the processor's contracts with its clients disclaimed any agency relationship and failed to create a trust because even though the contracts required the processor to pay the clients' employees, the contracts did not require the processor to make the payments out of the funds provided.

56. *In re WL Homes, LLC*,
452 B.R. 138 (Bankr. D. Del. 2011)
Debtor had sufficient rights in deposit account of wholly owned subsidiary to grant a security interest in the deposit account because: (i) the debtor funded the deposit account, had access to it (five of the seven authorized signatories were officers of the debtor and the other two were officers of both the debtor and the subsidiary), and controlled access to the funds by requiring approval of the debtor's controller; and (ii) the subsidiary implicitly consented to the use the deposit account as collateral because the person who signed the security agreement on behalf of the debtor was also the president of the subsidiary. Even if the pledge of the deposit account violated state insurance law, the only consequence of that would be revocation or non-renewal of the subsidiary's license, not invalidation of the security interest.

57. *Zurita v. SVH-1 Partners, Ltd.*,
2011 WL 6118573 (Tex. Ct. App. 2011)
Landlord acquired a security interest in equipment used by individual tenant even though the equipment was purchased by a limited liability company because the tenant wholly owned the LLC and therefore had the power to transfer rights in the equipment. Although security agreement referred to property "owned or hereafter acquired" by the tenant, that language did not limit the scope of the security interest.

58. *Farm Credit of Northwest Florida, ACA v. Easom Peanut Co.*,
718 S.E.2d 590 (Ga. Ct. App. 2011)
2011 WL 4057786 (Ga. Ct. App. 2011)
Although debtor's contracts to purchase peanuts provided that the sellers retained all beneficial interest and title until the peanuts were delivered to the debtor and the warehouse receipts therefor were delivered to the debtor, delivery of the peanuts to a third party processor at the debtor's direction gave the debtor sufficient rights in the peanuts for its lender's security interest to attach. The seller's reservation of title despite delivery to the processor was limited to an unperfected security interest.

59. *JP Morgan Chase Bank v. Lamb Livestock, LLC*,
2011 WL 3360100 (Ariz. Ct. App. 2011)
Secured party had provided sufficient evidence in the form of the corporate debtor's financial statements and insurance lists, as well as a list of equipment that the debtor had provided to the secured party at the time the loan was made, to support trial court's conclusion that the bulk of the equipment was owned by the debtor rather than by related business entities and individuals.

60. *In re Moberg*,
2011 WL 3745889 (Bankr. D.N.M. 2011)
Factual issue remained as to whether corporation or its principals were the owners of the equipment in which the corporation purported to grant a security interest. Secured party no longer had a security interest in vehicles owned by the corporation because, although its interest was previously noted on the certificates of title, new certificates were issued to the principles showing that they owned the vehicles free and clear.

61. *In re A&S Livestock, Inc.*,
449 B.R. 525 (Bankr. W.D. Ky. 2011)
Secured party had no security interest in cattle that borrower vaccinated and fed pursuant to contract with entity that owned the cattle (not clear from facts whether the corporate borrower had even authenticated the security agreement).

62. *In re Grain*,
2011 WL 2462037 (Bankr. E.D. Tex. 2011)
Bank with a security interest in farmer's grain deposited into a silo was entitled only to a pro rata portion of the proceeds of the grain sold after it was discovered that the silo operator had insufficient grain to cover all the claims to the grain.

63. *ATC Healthcare Services, Inc. v. New Century Financial, Inc.*,
2011 WL 2739540 (Tex. Ct. App. 2011)
Factor's perfected security interest in existing and after-acquired accounts covered accounts generated after the debtor became a franchisee and operated under the name of the franchisor.

64. *In re Ward*,
464 B.R. 471 (Bankr. N.D. Ga. 2011)
Credit union with security interest in customer's account could enforce that security interest by setoff even though the account contained social security benefits because setoff is not a judicial or other legal process and thus does not violate 42 U.S.C. § 407(a). Moreover, in this case the customer received an advance on the social security benefits from another creditor and thus treating the funds as exempt would effectively allow the debtor double benefits.

– Other

65. *In re American Cartage, Inc.*,
656 F.3d 82 (1st Cir. 2011)
Security agreement's after-acquired property clause cannot encompass commercial tort claims that did not exist when the security agreement was entered into. While the right to a tort recovery can be proceeds of other collateral, the commercial tort claim itself – and hence standing to pursue a commercial tort claims – cannot be proceeds of other collateral.

66. *In re Young*,
2011 WL 3799245 (Bankr. D.N.M. 2011)
Debtors' member withdrawals from LLC – a form of distribution on account of their equity interests– were not proceeds of their LLC interests and hence Bank's security interest in those membership interests did not attach to the withdrawals. The court treated as dispositive the ruling in *In re Hastie*, 2 F.3d 1042 (10th Cir. 1993), without considering subsequent enactment of § 9-102(a)(64)(B).

67. *In re Chalmers*,
2011 WL 6217373 (Bankr. W.D. Mo. 2011)
Bank with a security interest in all of an insurance agency's assets was entitled to payments from buyer of agency's book of business even though the owner of agency agreed to stay on as an employee of the agency, thereby maintaining the value of the book of business. The payments were by the buyer to the seller agency, not by the agency to the owner, and hence were proceeds of the assets sold, not compensation for post-sale services.

68. *In re EEE Auto Sales, Inc.*,
2011 WL 2078544 (Bankr. E.D. Va. 2011)
Amounts auto dealer collected from buyers for sales taxes and registration fees were not proceeds of the dealer's inventory.

69. *In re Aleris International., Inc.*,
456 B.R. 35 (Bankr. D. Del. 2011)
Although buyers and sellers of goods are generally free to determine by agreement when title passes, the reservation of title in the seller after delivery is limited to a security interest. Because the buyer possessed the equipment before the parties executed the sales agreement, the seller retained only a security interest: the sales agreement functioned as an authenticated security agreement, value was given and the buyer had rights in the collateral.

70. *Barletta Heavy Division, Inc. v. Erie Interstate Contractors, Inc.*,
778 F. Supp. 2d 109 (D. Mass. 2011)
Security Agreement that defined multiple parties as "the Debtor," referred to "all liabilities or obligations of the Debtor to the Lender of every kind and description" and defined the collateral to include "all of Debtor's right, title and interest in . . . goods" made each of the debtor's liable for the debts of any of them.

71. *In re Dumlao*,
2011 WL 4501402 (9th Cir. BAP 2011)
Language in consumer's car loan agreement with credit union providing that the vehicle secured "any other amounts or loans, including any credit card loan, you owe us for any reason now or in the future" was effective under revised § 2-204 to cover credit-card obligation, but case was remanded to determine if clause violated the duty of good faith or was unconscionable given the adhesive nature of the agreement and the small font used.

72. *In re Alaska Fur Gallery, Inc.*,
457 B.R. 764 (Bankr. D. Alaska 2011)
Cross-collateralization clause in bank's commercial security agreement unambiguously covered future loans, even if unrelated, and therefore the borrower's inventory, equipment, accounts, chattel paper, and general intangibles secured subsequent real estate loans. Revised Article 9 rejects any requirement that the loans have a related purpose, which had previously been the law in Alaska, although that rule may still apply in consumer transactions.

73. *In re Zaochney*,
2011 WL 6148727 (Bankr. D. Alaska 2011)
Dragnet clauses in both car loan and line-of-credit agreement between credit union and consumer were enforceable to make car secure the line-of-credit obligation because revised Article 9 rejects the requirement that the loans have a related purpose.

74. *In re Renshaw*,
447 B.R. 453 (Bankr. W.D. Pa. 2011)
Cross-collateralization clause in bank's 1995 line of credit to consumer that purported to make all collateral for line-of-credit debt also secure "all other loans you have with us" was effective to cover debt on previously issued credit card. Revised Article 9 rejects the relatedness rule, which had previously been the law in Pennsylvania, and expressly applies to transactions entered into before it took effect.

75. *In re Hobart*,
452 B.R. 789 (Bankr. D. Id. 2011)
Security agreement governed by Oregon law and providing that "[a]ll collateral securing one loan will secure all your other obligations . . . , including all existing and future loan obligations" was sufficient to make each financed vehicle secure the debt for each of the other vehicles.

76. *In re Brannan*,
2011 WL 2076378 (Bankr. D. Mont. 2011)
Cross-collateralization clause in security agreement covering individual debtor's trailer was effective to make the trailer secure both earlier and later car loans by the same secured party.

77. *In re McGregor*,
449 B.R. 468 (Bankr. D.S.C. 2011)
Debtor's obligations on both the credit card and the truck loan were cross-collateralized by language in security agreement (court assumed, without analysis, that clause was effective).

78. *Educators Credit Union v. Guyton*,
805 N.W.2d 736 (Wis. Ct. App. 2011)
Automobile securing debtor's initial loan from credit union also secured debtor's credit card debt to the credit union because the initial loan agreement expressly provided that the collateral secured all amounts owing now or in the future to the credit union on other loans and the subsequent credit-card agreement provided collateral securing other loans from the credit union also secured the credit-card debt.

79. *21st Mortgage Corp. v. Stovall*,
2011 WL 3307516 Tex. Ct. App. 2011)
Dispute about material facts prevented summary judgment on whether manufactured home attached to leased land was either real estate or a fixture, and therefore whether security interest remained attached to it.

80. *In re Adkins*,
444 B.R. 374 (Bankr. N.D. Ohio 2011)
Because windows are ordinary building materials, creditor's PMSI in windows did not continue after the windows were installed in home.

81. *In re Dalebout*,
454 B.R. 158 (Bankr. D. Kan. 2011)
Replacement windows purchased in credit card transaction did not become fixtures when installed in home, largely because the credit card agreement so provided. As a result, the card issuer retained a security interest in the windows.

82. *Waite v. Cage*,
2011 WL 2118803 (S.D. Tex. 2011)
Putative buyer of chattel paper consisting of retail installment contracts for vehicles did not in fact acquire any interest in the chattel paper because the buyer was not licensed as required by Texas law.

83. *Lopes v. Fafama Auto Sales*,
2011 WL 6258818 (Mass. Ct. App. 2011)
Fact that car dealer was not licensed as a sales finance company did not invalidate dealer's security interest car sold or make dealer's repossession unlawful, it merely subjected the dealer to the specified statutory penalties.

84. *Hanson v. 5K Auto Sales, LLC*,
2011 WL 6755138 (D. Minn. 2011)
Even if car dealer was required to be licensed as an automobile financier, the lack of a license would not invalidate the dealer's security interest.

85. *In re Dunlap*,
458 B.R. 301 (Bankr. E.D. Va. 2011)
Because federal statute prohibits assignment of military pension benefits until they are "due and payable," retired major's purported assignment of future pension benefits did not in fact transfer either a security interest or complete ownership of the future payments.

86. *Massachusetts Mutual Life Insurance Co. v. Sanders*,
787 F. Supp. 2d 628 (S.D. Tex. 2011)
Assignment for security of life insurance policy need not be authenticated by the named beneficiary or the secured party, only by the owner of the policy.

87. *In re Brooks*,
452 B.R. 809 (Bankr. D. Kan. 2011)
Bank had a security interest in debtor's mobile home by getting a mortgage on real estate and the fixtures thereon.

Perfection Issues

– Choice of Law

88. *In re Qualia Clinical Service, Inc.*,
441 B.R. 325 (8th Cir. BAP), *aff'd*, 652 F.3d 933 (8th Cir. 2011)
Factor was not perfected until one month before the debtor's bankruptcy, when factor filed a financing statement in Nevada where the debtor was incorporated; factor's earlier filing in Nebraska, where the debtor's principal place of business was located, was ineffective. As a result, factor's security interest was an avoidable preference and factor could have no valid § 547(c)(5) defense.

89. *In re Supplies & Services, Inc.*,
461 B.R. 699 (1st Cir. BAP 2011)
Although security agreement was by express choice governed by North Carolina law, which makes financing statements effective for five years, perfection was governed by the law of the debtor's location, Puerto Rico, which makes financing statements effective for ten years. Accordingly, secured party's filing had not lapsed seven years after it was filed.

– Method of Perfection

90. *In re K-Ram, Inc.*,
451 B.R. 154 (Bankr. D.N.M. 2011)
Funds paid into court registry in connection with debtor's slander of title claim were proceeds of a commercial tort claim. Bank that previously received an Assignment of Any and All Excess Proceeds held a security interest in the commercial tort claim and, because the bank never filed a financing statement, its interest was unperfected and avoidable in the debtor's bankruptcy.

91. *Epstein v. Coastal Timber Co., Inc.*,
711 S.E.2d 912 (S.C. 2011)
Although both Articles 2 and 9 treat timber to be cut as goods and the latter provides that a security interest in the timber can be perfected by filing a financing statement, a recorded mortgage on the land – even one that does not specifically mention the timber – also encumbers the timber and, if recorded first, has priority.

92. *In re McConnell*,
455 B.R. 824 (Bankr. M.D. Ga. 2011)
Security interest in civil aircraft must be recorded with the FAA to be perfected; filing a financing statement is inadequate to perfect.

– Adequacy of Financing Statement

93. *Hancock Bank of Louisiana v. Advocate Financial, LLC*,
2011 WL 94425 (M.D. La. 2011)
Section 9-509(b)(1)'s authorization to file an "initial financing statement" allows the secured party to file a second financing statement after the first financing statement lapsed. Even if the temporary lapse of perfection did somehow irrevocably prejudice the guarantor's subrogation rights, the guarantor had expressly waived any defense based on such impairment.

94. *In re Harvey Goldman & Co.*,
455 B.R. 621 (Bankr. E.D. Mich. 2011)
Financing statement that identified the corporate debtor by its registered assumed name, "Worldwide Equipment Co.," rather than the name on its articles of incorporation, "Harvey Goldman & Company," was ineffective to perfect. Registration of the assumed name does not make it the proper name to use in the financing statement under or prevent a financing statement using that name from being seriously misleading.

95. *In re PTM Technologies, Inc.*,
452 B.R. 165 (Bankr. M.D.N.C. 2011)
Financing statements that omitted the "h" in the debtor's name and which were not disclosed in a "standard" web search but were disclosed in a "non-standard" web search were ineffective to perfect because the filing office's rules provide for an exact word match (while ignoring certain "noise" words) and the "standard" search is the one that follows these rules.

96. *In re Camtech Precision Manufacturing, Inc.*,
443 B.R. 190 (Bankr. S.D. Fla. 2011)
Filed financing statements listing additional debtors on separate paper exhibits but which did not indicate in the additional debtors box of the financing statement to look beyond the first page or use the official addendum (form UCC1Ad) to indicate additional debtors were inadequate to perfect security interests granted by additional debtors given that the filings were not indexed by or discoverable under the names of the additional debtors. Had the additional debtor information been submitted using an approved standard form or had there been a direction in the additional debtor box on the first page to look at the exhibits for additional debtor information, the result here would be different.

97. *Textron Financial Corp. v. New Horizon Home Sales, Inc.*,
2011 WL 901844 (N.D.W. Va. 2011)
Financing statement that listed president of corporate debtor as the first debtor and the corporation as an additional debtor was effective to perfect even though the filing office failed to index it under the corporation's name; the filer had no duty to run a lien search to check for errors.

98. *In re Twin City Hospital*,
2011 Bankr. LEXIS 1501(Bankr. N.D. Ohio 2011)
Financing statement properly submitted to but improperly indexed by the filing office, and therefore undiscoverable by subsequent searchers, was nevertheless effective to perfect the filer's security interest and give it priority over subsequent filer that searched but did not discover the filing.

99. *In re D & L Equipment Inc.*,
457 B.R. 616 (E.D. Mich. 2011)
Financing statement that described the collateral as "[e]quipment and inventory financed by The CIT Group" was effective to perfect equipment and inventory financed by Wells Fargo Equipment Finance Inc. after it acquired the secured loan and filed an amendment changing the name of the secured party – but not the collateral description – because the filings collectively provided notice of the possibility that Wells Fargo had assumed CIT's role in the financing arrangement.

100. *In re Borges*,
2011 WL 4101096 (Bankr. D.N.M. 2011)
Although the security agreements authenticated by the debtor secured all present and future debts owed by the debtor to both the secured party and the secured party's affiliates, and therefore granted a security interest to the affiliates, because only the secured party was listed on the financing statement, the affiliates' security interests were unperfected.

101. *SEC v. Kaleta*,
2011 WL 6016827 (S.D. Tex. 2011)
Financing statement filed by representative of secured party did not perfect security interest claimed by other creditors absent evidence that the representative had an agency relationship with the other creditors.

102. *In re O & G Leasing, LLC*,
456 B.R. 652 (Bankr. S.D. Miss. 2011)
Financing statement filed more than 30 days after separate secured loans were consolidated did not render the security interest preferential because earlier filed financing statements for each individual loan, each with its different collateral, remain effective to perfect the security interests in the collateral.

– Authorization of Termination Statement

103. *Official Committee of Unsecured Creditors v. City National Bank,*
2011 WL 1832963 (N.D. Cal. 2011)
Secured party that, in connection with the debtor's sale of some collateral, provided the title company serving as escrow agent with UCC-3s releasing specified collateral but not terminating the filings had not authorized the title company to check the termination box. As a result, the termination statements were unauthorized and did not render the security interest in the remaining collateral unperfected.

104. *In re Negus-Sons, Inc.*,
2011 WL 2470478 (Bankr. D. Neb. 2011), *aff'd*,
460 B.R. 754 (8th Cir. BAP 2011)
Secured party that, after receiving prospective lender's letter requesting a payoff amount, seeking confirmation of the secured party's willingness to terminate its security interest, and enclosing a proposed amendment to its UCC filings to effectuate the termination, responded with letter providing payoff figure and stating "[u]pon receipt of payoff all liens will be released," authorized prospective lender to file termination statement. Therefore, secured party's prior loan to the same debtor, even if secured, was not perfected.

105. *AEG Liquidation Trust v. Toobro N.Y. LLC,*
932 N.Y.S.2d 759 (N.Y. Sup. Ct. 2011)
Unauthorized termination statement did not affect the perfection or priority of the secured party's security interest. As a result, the collateral remained subject to the secured party's lien even after a foreclosure sale by a lender with a subordinate security interest.

– Control

106. *Smith v. Powder Mountain, LLC*,
2011 WL 2457906 (S.D. Fla. 2011)
Creditor that received court order awarding it the debtor's securities accounts and that then proceeded to discuss with securities intermediary on how to transfer the entitlements did not have control under § 8-106(d)(2) sufficient to defeat the rights of intervening garnishor. Control requires not mere agreeability but a contractual right. While the intermediary had expressed a willingness to acquiesce in the creditor's orders, the parties had not yet agreed on whose signatures would be needed on those orders when the garnishment order was served.

– Collateral Covered by a Certificate of Title

107. *In re Moye*,
437 Fed. Appx. 338 (5th Cir. 2011)
Creditor's alleged purchase-money security interest in motor vehicles held as inventory was not perfected by possession of unmarked certificates of title. Perfection required filing a financing statement. Subsequent decision at 2011 WL 4808124 (Bankr. S.D. Tex. 2011).

108. *Stanley Bank v. Parish*,
264 P.3d 491 (Kan. Ct. App. 2011)
Pursuant to certificate-of-title statute, purchase-money security interest in truck was perfected by mailing notice of the security interest to the Division of Motor Vehicles even though the Division later issued a paper certificate that failed to indicate the security interest. As a result, secured party had priority over both subsequent lien creditor and buyer at sheriff's sale.

109. *In re Barbee*,
461 B.R. 711 (6th Cir. BAP 2011)
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; the home remained personal property and notation on the certificate of title was required to perfect.

110. *In re Epling*,
2011 WL 4356358 (E.D. Ky. 2011), *affirming*,
2011 WL 1984061 (Bankr. E.D. Ky. 2011)
Security interest in mobile home was not perfected because the secured party failed to file the title lien statement in the county where the debtor resides, as required by Kentucky law, even though, as a result of the filing elsewhere, the security interest was noted on the certificate of title for the mobile home.

111. *In re Pierce*,
2011 WL 4433620 (Bankr. E.D. Ky. 2011)
Security interest in mobile home was not perfected because the secured party failed to file the title lien statement in the county where the debtor resides, as required by Kentucky law, even though, as a result of the filing elsewhere, the security interest was noted on the certificate of title for the mobile home.

112. *In re Rumble*,
2011 WL 1740966 (Bankr. W.D. Mo. 2011)
Security interest in manufactured home was perfected by delivery of a proper application for a certificate of title to the Missouri Department of Revenue even though the Department improperly rejected the application.

113. *In re Moore*,
2011 WL 1100072 (Bankr. D. Kan. 2011)
Lender's security interest in debtor's manufactured home that was permanently affixed to the real estate was not perfect by recorded mortgage because the certificate of title for the home had not been eliminated pursuant to the Kansas Manufactured Housing Act and therefore notation of the security interest on the certificate remained the only way to perfect.

114. *In re Jones*,
2011 WL 5869610 (Bankr. N.D. Ohio 2011)
Father's security interest in daughter's motor vehicle was not perfected because the interest was not noted on the vehicle's certificate of title.

115. *In re Stuewe*,
2011 WL 2173694 (Bankr. D. Kan. 2011)
Lessor listed as owner of vehicle on certificate of title would be perfected even if lease was re-characterized as secured transactions because substantial compliance with the certificate of title law is all that is necessary and a person examining the certificate of title would have notice that the lessor claimed an interest in the vehicle.

116. *In re McMullen*,
441 B.R. 144 (Bankr. D. Kan. 2011)
Assignee of perfected security interest in motor vehicle covered by a certificate of title did not have to have its interest noted on the certificate to remain perfected.

117. *In re Fryseth*,
2011 WL 4344162 (Bankr. W.D. Wis. 2011)
While a creditor who refinances a motor vehicle loan must, under Wisconsin law, get its security interest noted on the certificate of title to perfect, an assignee of a perfected security interest in a motor vehicle need do nothing to remain perfected.

118. *In re Rice*,
462 B.R. 651 (6th Cir. BAP 2011)
Because the assignee of perfected security interest in motor vehicle covered by a certificate of title did not have to get its interest noted on the certificate to have a perfected interest, the assignee had standing to seek relief from the bankruptcy stay.

119. *In re Reality Auto Group Corp.*,
2011 WL 336798 (Bankr. D.P.R. 2011)
Security interest in car dealer's inventory of used cars – for which certificates of title already exist – must be perfected by notation of the lien on the certificates of title, not by filing a financing statement. No discussion of whether Puerto Rico has enacted § 9-311(d).

120. *In re Wagner Trucking, Inc.*,
2011 WL 748700 (Bankr. S.D. Ind. 2011)
Secured party was perfected despite fact that it received an assignment of the security interest from its parent company which had signed the original certificate of title to release the lien and returned that certificate to the debtor, because the assignee then submitted an application claiming original certificate of title had been lost and requesting a duplicate title changing the lien holder's name, which certificate was in fact issued. It did not matter that the original certificate was not in fact lost.

121. *Pollitt v. DRS Towing, LLC*,
2011 WL 1466378 (D.N.J. 2011)
Obligation to file a termination statement with respect to consumer goods after the secured obligation is paid does not apply to property covered by a certificate of title. Instead the secured party must comply with the certificate of title act's rules on releasing the title certificate and removing the lien notation.

– Other

122. *Travel Express Aviation Maintenance, Inc. v. Bridgewiew Bank Group*,
942 N.E.2d 694 (Ill. Ct. App. 2011)
Secured party is not required to file continuation statement with FAA for its security interest in aircraft to remain perfected.

123. *In re Willis*,
2011 WL 1168408 (Bankr. E.D. Tex. 2011)
Bank that did not file a financing statement with respect to its security interest in an annuity to secure an indebtedness was not perfected by letter sent to issuer instructing issuer to pay the bank because the issuer did not acknowledge that it held the annuity for the bank's benefit. There was no evidence or even any of the factual allegations necessary to establish that the assignment was a insignificant portion of the debtor's payment intangibles, and thus automatically perfected under § 9-309(2).

124. *In re Wright Group, Inc.*,
443 B.R. 795 (Bankr. N.D. Ind. 2011)
Transactions in which patrons of miniature golf course pay for use of the course and receive permission to use a golf club, ball, scorecard, and pencil, are licenses to use the facility; they do not generate proceeds of the equipment and, because they are cash transactions, do not generate accounts. Any security interest in money received from patrons prepetition was not perfected due to a lack of possession. Any security interest in post-petition receipts is cut off by § 552.

125. *In re McCoy*,
2011 WL 3501851 (Bankr. E.D.N.Y. 2011)
Cooperative association had, pursuant to its by-laws, a security interest in debtor's shares in the debtor's cooperative apartment and this security interest was automatically perfected under New York's non-uniform version of § 9-308.

126. *In re Winchester*,
2011 WL 3878336 (Bankr. E.D. Ky. 2011)
Because the debtor used his all-terrain vehicle for recreation and transportation, it was a consumer good and the PMSI granted to the secured party's assignor before ATVs became subject to the state's certificate-of-title statute was automatically perfected.

127. *In re Hall*,
2011 WL 4485774 (9th Cir. BAP 2011)
Attorney's charging lien on proceeds of lawsuit was unperfected because attorney failed to comply with Nevada statute requiring service of notice of the claimed lien on both the client and the opposing party.

– Bogus Filings

128. *United States v. Thomas*,
2011 WL 9569 (E.D. Cal. 2011)
Financing statement filed by taxpayer against IRS employee declared null and void and taxpayer enjoined from filing further financing statements.

129. *United States v. Merritt*,
2011 WL 9736 (E.D. Cal. 2011)
Financing statement filed by taxpayer against IRS employee declared null and void and taxpayer enjoined from filing further financing statements.

130. *United States v. Castle*,
2011 WL 1585832 (E.D. Cal. 2011)
Financing statements filed by taxpayers against IRS employees declared null and void and taxpayers enjoined from filing further financing statements.

131. *United States v. Marty*,
2011 WL 4056091 (E.D. Cal. 2011)
Financing statements filed by taxpayer against IRS employees, Justice Department attorney, and federal judge declared null and void and taxpayers enjoined from filing further financing statements.

132. *United States v. Merritt*,
2011 WL 5026074 (E.D. Cal. 2011)
Financing statement filed by relative of taxpayer against IRS employee declared null and void and both the filer and taxpayer enjoined from filing further financing statements.

133. *United States v. Baker*,
2011 WL 1322262 (S.D. Ind. 2011)
Financing statement filed by inmate against sentencing judge declared invalid and inmate enjoined from filing further financing statements.

134. *People v. King*,
2011 WL 1438090 (Mich. Ct. App. 2011)
Inmate was properly convicted and sentenced to 3-10 years for filing a false financing statement against corrections officer.

PMSI Status

135. *In re Penrod*,
636 F.3d 1175 (9th Cir. 2011)
Dissent from refusal to rehear en banc earlier panel decision concluding that negative equity in trade-in vehicle is not part of the purchase-money obligation.

136. *In re Siemers*,
2011 WL 5598349 (Bankr. W.D. Wash. 2011)
Down payment made when debtor purchased a new vehicle and traded in old truck with negative equity was allocable to the negative equity, leaving a purchase-money obligation for the entire amount financed minus the thereby reduced negative equity.

137. *In re Inofin, Inc.*,
455 B.R. 19 (Bankr. D. Mass. 2011)
Chattel paper financier could not have a PMSI in the chattel paper even if the chattel paper itself represented a PMSI in the goods financed.

Priority Issues

– Tax Liens

138. *Nabers v. Morgan*,
2011 WL 359069 (S.D. Miss. 2011)
Perfected security interest in accounts has priority over subsequent state tax lien because the tax lien is a security interest and priority goes to the first in time.

139. *Green Tree-AL LLC v. Dominion Resources, L.L.C.*,
2011 WL 3963010 (Ala. Civ. Ct. App. 2011)
Treatment of manufactured home as realty for purposes of taxation does not convert it to real property; a manufactured home remains personal property unless and until its certificate of title is cancelled. As a result, secured party with perfected security interest in manufactured home that became a fixture had priority over buyer of real property at tax sale.

– Buyers of Goods

140. *In re Black Diamond Mining Co.*,
2011 WL 6202905 (Bankr. E.D. Ky. 2011)
Buyer of coal from coal merchant was a buyer in ordinary course of business that took free of factor's security interest in inventory because even though the termination clause of the master sales agreement permitted the buyer to setoff the purchase price against liquidated damages for the seller's breach, termination had not occurred prior to the sales transactions and thus the buyer did not acquire the goods in satisfaction of a money debt. Although the volume of coal sold was large, the buyer was not a buyer in bulk given the repeal of Article 6 and the fact that the volume was no so large as to provide the buyer with notice that the seller will not continue in the same kind of business. Moreover, the factor had approved the master agreement before providing financing and had approved each individual sale before agreeing to factor the resulting account, the sales did not violate the terms of the factor's subsequent security agreement in inventory and, even if it did, the buyer had no knowledge that the sales violated the factor's rights.

141. *Madison Capital Co., LLC v. S & S Salvage, LLC*,
765 F. Supp. 2d 923 (W.D. Ky. 2011)
794 F. Supp. 2d 735 (W.D. Ky. 2011) (reconsideration denied)
Scrap metal buyer did not take free of security interest in metal shields created by mining company because the buyer either purchased from an intermediate entity, in which case the security interest was not created by the seller, or the buyer purchased from the mining company, through the agency of the intermediate entity, in which case the seller was not in the business of selling metal shields. The fact that the intermediate company was engaged in the business of selling scrap metal was immaterial; BIOCOB status is not determined from the perspective of the buyer but the perspective of the secured party.

142. *Hammond v. Caterpillar Financial Services Corp.*,
66 So. 3d 700 (Miss. Ct. App. 2011)
Trial court did not err in refusing to allow buyer that admittedly purchased skid-steer subject to a perfected security interest to submit evidence at replevin hearing or in not requiring the secured party to prove it was entitled to immediate possession.

143. *Tolbert v. Automotive Finance Corp.*,
341 S.W.3d 195 (Mo. Ct. App. 2011)
Buyer of used, floor-planned automobile did not prove that he was a bona fide purchaser, and was therefore liable for conversion, because he took possession of the automobile without examining or receiving the certificate of title and did not receive a bill of sale until three months later, and thus was aware of unusual circumstances that should have caused him to question whether he obtained good title.

144. *Cornerstone Bank and Trust v. Consolidated Grain and Barge Co.*,
956 N.E.2d 944 (Ill. Ct. App. 2011)
Buyer of farm products that set off purchase price against prior indebtedness owed to it by the seller took free of security interest created by the seller because the Food Security Act preempts Article 9's protections for buyers of farm products (including the state's non-uniform rules regarding buyers of farm products) and, under the Act, the buyer qualified as a buyer in ordinary course of business even though it paid via the setoff.

– Competing Security Interests

145. *Merrill Lynch Business Financial Services, Inc. v. Kupperman*,
441 Fed. Appx. 938 (3d Cir. 2011)
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 and the successor was a mere continuation of the predecessor.

146. *Domus, Inc. v. Davis-Giovinazzo Construction Co.*,
2011 WL 3666485 (E.D. Pa. 2011)
Secured party which filed its financing statement as to the debtor's accounts before subsequent lender filed or perfected had priority. Although a party who acts in bad faith is not entitled to the protections afforded by the UCC, the secured party did not have unclean hands or overstep its authority when, after default, it filed arbitration claim on the debtor's behalf against the account debtor because the security agreement expressly gave the secured party the right to collect accounts and "to do all acts and things necessary or incidental thereto."

147. *In re Siskey Hauling Co., Inc.*,
456 B.R. 597 (Bankr. N.D. Ga. 2011)
Lender that acquired third security interest in debtor's accounts and whose loan was used to pay off the creditor with the first security interest was not entitled to be subrogated to that creditor's rights because the transaction was structured as a payoff, not an assignment, and because the lender was guilty of inexcusable neglect since it knew of the second security interest but failed to take the steps necessary to give it a superior position.

148. *Prestige Capital Corp. v. Pipeliners of Puerto Rico, Inc.*,
2011 WL 4899968 (D.P.R. 2011)
Secured party with a security interest in the debtor's existing and after-acquired accounts and who filed first had priority over government-run bank with a later perfected security interest even as to account owed by a Commonwealth agency. The secured party's failure to comply with the Puerto Rico Assignment of Claims Act was not relevant to the relative priority of the security interests and the secured party's UCC-3 amending the debtor's name was properly filed even though for some unexplained reason it was no disclosed in a search.

149. *Pascack Community Bank v. Universal Funding, LLP*,
16 A.3d 1097 (N.J. Super. Ct. App. Div. 2011)
Bank with perfected security interest in debtor's accounts was improperly granted summary judgment on its claim against a factor with an unperfected interest in accounts because there was no competent evidence about how much, if anything, the factor collected after the bank's security interest was perfected. Moreover, because accounts are payment intangibles, the factor may have been automatically perfected first, if the factor bought them, and the factor may have been a holder in due course of its collections.

150. *In re Deckers Construction, Inc.*,
461 B.R. 143 (Bankr. D.P.R. 2011)
Even if a PMSI can be created in intangible assets, such as an account, under old Article 9, bank's security interest in contractor's account did not have PMSI status because the bank's loan was not used to acquire the account given that the construction contract – and hence the account – preceded the bank's loan.

151. *Farm Credit of Northwest Florida, ACA v. Easom Peanut Co.*,
2011 WL 4057786 (Ga. Ct. App. 2011)
Lender's perfected security interest in debtor's peanuts and the proceeds thereof may not have priority over unperfected security interests of sellers if lender acted in bad faith in assuring the sellers of the debtor's financial stability and that they would be paid. However, lender's security interest had priority over the possessory lien of a bailee/processor that had not issued warehouse receipt because the applicable Georgia statute expressly provides that a bailee's lien is inferior to a recorded lien, which the lender's security interest was. Although the bailee/processor may have a claim in quantum meruit against the lender for processing services provided at the lender's direction, that claim is not a prior lien on the proceeds of the peanuts.

152. *Comerica Bank v. Jones*,
2011 WL 4407422 (E.D. Mich. 2011)
Secured party with security interest in all of the debtor's assets, including investment property, had priority in proceeds of the sale of the debtor's stock in a Singapore subsidiary over a loan participant that had agreed to subordinate its interest even though the assets of the subsidiary were not collateral and even though the secured party may have made a representation to that effect.

153. *Action Capital Corp. v. Eclipse Bank, Inc.*,
2011 WL 4502080 (Ky. Ct. App. 2011)
Secured party with a senior security interest in accounts had priority in monies received from an auction of inventory, authorized by the defaulting buyer, over the lender with a perfected security in inventory. Even though the defaulting buyer never took possession, title vested in the buyer when the goods were identified to the contract and even if title re-vested in the debtor upon the buyer's default, it would have done so for the benefit of the account lender.

154. *In re Brooke Capital Corp.*,
2011 WL 204278 (Bankr. D. Kan. 2011)
Summary judgment denied on whether creditor with a security interest in debtor's certificated security which was initially perfected by filing and later by control had priority over "participations" in security interest originally granted to debtor's subsidiary and earlier perfected by control. Although the subsidiary had a contractual duty to repurchase the participations, the court could not on summary judgment be sure that the transactions were loans to the subsidiary rather than a partial sale of the subsidiary's security interest. Subsidiary's alleged agreement to subordinate was unclear and it was not evident that subsidiary had actual or apparent authority to bind the participants, so summary judgment on that basis was also denied.

155. *SEC v. Kaleta*,
2011 WL 6016827 (S.D. Tex. 2011)
Although agreement by which seller agreed to subordinate its payment rights and security interest to the buyer's lender extended the subordination to others who provide "replacement financing," investors bilked in the debtor's Ponzi scheme were unable to show that they qualified as replacement lenders under the terms of the agreement because most could not trace the funds they invested to the debtor and those that could did not get a security agreement, as the subordination agreement required.

156. *Platte Valley Bank v. Tetra Financial Group, LLC*,
2011 WL 335595 (D. Neb. 2011)
Even if deposit account funded in connection with sale-leaseback of equipment in which lender had a first priority security interest was proceeds of the equipment, lender's security interest was junior to that of the depositary bank, which had control.

157. *Textron Financial Corp. v. New Horizon Home Sales, Inc.*,
2011 WL 901844 (N.D.W. Va. 2011)
Because lender had a PMSI in modular home and filed a fixture filing before the modular home became a fixture, the lender's security interest had priority over encumbrances on the real estate.

158. *In re Damon Pursell Construction Co.*,
2011 WL 6130528 (Bankr. W.D. Mo. 2011)
Although bank's perfected security interest in two excavators was initially junior to the interests of two creditors, each of which had a perfected PMSI in one of the excavators, when debtor sold one excavator and used the funds to pay the wrong PMSI creditor, the bank's interest became senior in the remaining excavator because the payment terminated the paid creditor's security interest and the unpaid creditor had no security interest at all in the unsold excavator. Presumably, the security interest of the unpaid creditor remained attached to the excavator sold.

159. *Minnwest Bank v. Arends*,
802 N.W.2d 412 (Minn. Ct. App. 2011)
Feed supplier with a perfected livestock production input lien did not have priority bank's earlier security interest because feed supplier did not send notification to the bank in an envelope marked "IMPORTANT–LEGAL NOTICE," as required by the agricultural lien statute.

– Other

160. *In re Arctic Express, Inc.*,
636 F.3d 781 (6th Cir. 2011)
Bank that had a security interest in accounts of regulated motor carrier was liable to independent drivers who obtained class action settlement against carrier for breach of escrow obligations. The Truth-in-Leasing regulations of the Motor Carrier Act created a trust by operation of law that was funded as soon as the carrier's customers paid – not when the funds were later transferred from the cash collateral account to the operating account or when the carrier paid the drivers after subtracting the amount to be held in escrow – and the bank was not a good faith purchaser of the funds because it was a secured lender, not a buyer of the accounts.

161. *Mazon Associates, Inc. v. Heritage Wholesale Nursery, Inc.*,
2011 WL 1107219 (Tex. Ct. App. 2011)
Factor with perfected security interest in accounts that, pursuant to jury's determination, had reached agreement with buyer of debtor's assets other than accounts to forward checks for goods sold after the asset purchase in exchange for assistance in receiving payment for goods sold prior to the purchase, was bound by that agreement despite the factor's priority in the pre-asset sale accounts.

162. *Mississippi County v. First Tennessee Bank*,
2011 WL 2160281 (E.D. Ark. 2011)
Creditor with security interest in hospitals' accounts generated prior to termination of hospitals' leases took those accounts subject to Medicare's right to reimbursement for overpayments.

163. *Variety Wholesalers, Inc. v. Prime Apparel, LLC*,
720 S.E.2d 30 (N.C. Ct. App. 2011)
Creditor with perfected security interest in clothier's accounts was not entitled to funds due from clothier's customer because the goods sold to the customer violated the trademark rights of another entity, and thus the debtor did not have any right in the account to pass to the secured creditor.

164. *Diesel Props S.R.L. v. Greystone Business Credit II LLC*,
631 F.3d 42 (2d Cir. 2011)
Debtor's supplier was not liable to secured creditor for unjust enrichment resulting from its acquisition the debtor's order book, in which the creditor had a security interest, because the supplier had a contractual right to the order book that predated the secured creditor's and a later-in-time assignee has no greater rights than its assignor.

165. *Davis Forestry Products, Inc. v. Downeast Power Co.*,
12 A.3d 1180 (Me. 2011)
Subsidiary of secured party that purported to acquire debtor's deposit account through a § 9-610 disposition did not have priority over subsequent lien creditor because the secured party never acquired control and the only way to foreclose on a deposit account is through § 9-607 or judicial process, and thus the purported disposition did not divest the debtor of its ownership.

166. *Rabbia v. Rocha*,
34 A.3d 1220 (N.H. 2011)
Plaintiff, for whom defendant car dealer, pursuant to court order, wrote checks to its attorney to place funds in escrow, took free under § 9-332 of the security interest of the dealer's floor plan financier.

167. *In re Estate of Lundy*,
804 N.W.2d 773 (Mich. Ct. App. 2011)
Bank's perfected security interest in individual debtor's certificate of deposit had priority over the right of the individual's surviving spouse under the Estate and Protected Individuals Code to claim homestead and family allowance because that Code applies only to a secured creditor's claim for a deficiency, not to a secured creditors' actions against the collateral.

168. *First Dakota National Bank v. First National Bank of Plainview*,
2011 WL 4382147 (D.S.D. 2011)
Pursuant to § 9-341, bank's unperfected security interest in proceeds of debtor's livestock was subordinate to the setoff rights of the depositary bank in which the proceeds were deposited. The prior common law regarding special deposits is no longer applicable and, even if it were, the deposits were not special deposits, even though resulting from sales of livestock purportedly owned by the bank's customers, because they were all made in the ordinary course of the debtor's business. While the depositary bank had acknowledged the bank's interest in the debtor's livestock, it had not agreed to subordinate its setoff rights.

169. *Great West Life & Annuity Ins. Co. v. Texas Attorney General*,
331 S.W.3d 884 (Tex. Ct. App. 2011)
Assignee of lottery prize took free of State's authority to withhold amounts of the lottery winner's subsequent child support delinquency.

170. *In re South Louisiana Ethanol, LLC*,
2011 WL 148053 (Bankr. E.D. La. 2011)
Lender's perfected security interest in debtor's equipment had priority over equipment seller's vendor's lien.

171. *BNP Paribas v. Olsen's Mill, Inc.*,
799 N.W.2d 792 (Wis. 2011)
Trial court could not order receiver to sell collateral free and clear of secured party's lien without the secured party's consent and secured party did not consent merely by initiating and participating in the receivership. Even if the sale proceeds paid the secured party the full amount of its secured claim, the sale order was invalid because it provided for the buyer to honor certain trade obligations of the debtor, thereby improperly giving them priority over the undersecured portion of the secured party's claim.

172. *Hubbard v. HomeBank of Arkansas*,
2011 WL 824325 (Ark. Ct. App. 2011)
Seller of cattle who orally agreed with buyer to retain title until payment did not deprive the buyer of rights in the cattle or prevent buyer from granting a security interest in the cattle. Because that security interest was perfected, the secured party had a perfected security interest in the proceeds of the cattle that the seller received after the buyer defaulted and the seller sold the collateral at auction. No discussion of whether the seller qualified as a holder in due course of the proceeds.

173. *C.G. Automation & Fixture, Inc. v. Autoform, Inc.*,
804 N.W.2d 781 (Mich. Ct. App. 2011)
Die maker did not satisfy statutory lien requirement to file a financing statement and permanently record identifying information on every die, mold or form because the identifying information was put not on the dies themselves, but on risers attached to the dies, and the risers could be and indeed were removed without affecting the functionality of the dies.

174. *In re Thermopylae, LLC*,
2011 WL 3439133 (Bank. D. Md. 2011)
Secured party with perfected security interest debtor's equipment had priority over landlord in the alterations, decorations, additions, and improvements that the debtor made to leased premises because even though such property would normally have become fixtures prior to attachment of the security interest, the lease expressly provided that the debtor would retain the right to such property.

175. *Kazar v. San Gabriel Plaza, Inc.*,
2011 WL 6062019 (Cal. Ct. App. 2011)
Original tenant that retained a security interest in equipment sold when assigning the lease to a buyer of tenant's franchise did not have priority over the interest of the landlord even though the lease expressly provided that any lien of the landlord would be subordinate because the assignee abandoned the leased premises, causing the lease to terminate and title to all equipment to vest in the landlord.

176. *BancorpSouth Bank v. Hazelwood Logistics Center, LLC*,
2011 WL 5900998 (E.D. Mo. 2011)
Lender with a security interest in borrower's right to tax refund, perfected by filed financing statement covering "all Tax and Insurance Deposits," had priority over equitable lien of company that performed tax surveys tax surveys and whose contract entitled it to 35% of the tax savings realized therefrom because the filing predated the contract.

177. *C & G Farms, Inc. v. Capstone Business Credit, LLC*,
2011 WL 677487 (E.D. Cal. 2011)
To establish a valid PACA trust, the supplier of agricultural products must show that the goods were delivered to the commission merchant, dealer, or broker. Because the spinach, turnips and broccoli in this case were not delivered but were instead plowed under when the commission merchant repudiated, no PACA trust was created.

178. *Wiers Farm, Inc. v. Waverly Farms, Inc.*,
2011 WL 1296867 (M.D. Fla. 2011)
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.

179. *Produce Alliance v. Let-Us Produce*,
776 F. Supp. 2d 197 (E.D. Va. 2011)
Produce suppliers' claims for goods sold to distributor were entitled to benefit of PACA trust even though the suppliers violate the PACA rule requiring a written agreement if credit is extended beyond ten but less than thirty days. Violation of that rule merely reduces the credit to ten days, it does not render the claim ineligible for PACA trust rights, and hence distributor's secured party took subject to the supplier's rights.

180. *In re Shulista*,
451 B.R. 867 (Bankr. N.D. Iowa 2011)
Pursuant to Iowa agricultural lien statute, which grants priority to an agricultural supplier who files a financing statement "within thirty-one days after the date that the farmer purchases the agricultural supply," feed supplier had priority in hogs that fed on the feed only to the extent of the price of feed provided within 31 days before the feed supplier's filing. The filing was not relevant to later sales; the statute requires agricultural suppliers to re-file within a month after every sale.

181. *Oyens Feed & Supply, Inc. v. Primebank*,
808 N.W.2d 186 (Iowa 2011)
Pursuant to Iowa agricultural lien statute, an agricultural supplier must comply with notice procedure to share equal priority with a prior perfected secured party generally, but need not comply with the notice procedure to have priority over a prior perfected secured party to the extent of the difference between the acquisition price of the livestock and either the fair market value of the livestock at the time the lien attaches or the sale price of the livestock, whichever is greater.

182. *In re Meadowbrook Farms Co-op.*,
2011 WL 2293389 (S.D. Ill. 2011)
Livestock seller that was entitled under the Packers and Stockyard Act of 1921 to treat the buyer's livestock sale proceeds as being held in trust for the seller until paid in full was also entitled to collect from the trust attorney's fees incurred in litigating its priority because the sales agreement so provided.

183. *Tecnitoys Juguetes, S.A. v. Distributoys.com, Inc.*,
2011 WL 2293855 (N.D. Ill. 2011)
Distributor of toys was entitled to temporary restraining order preventing customer from selling toys because the arrangement appears to have been a bailment due to the fact that: (i) the distributor had retained control over the toys by directing the customer to fulfill orders that the distributor had arranged; and (ii) bore the cost of handling and storing the toy cars for years after the toy cars were delivered to the customer.

184. *Scion, Inc. v. Martinez*,
2011 WL 744912 (Mich. Ct. App. 2011)
Garnishor had priority over secured party whose interest was perfected after two weeks after writ of garnishment was served. Trial court erred in allowing secured party to intervene, post-judgment, in garnishment action.

185. *National City Bank v. Texas Capital Bank*,
353 S.W.3d 581 (Tex. Ct. App. 2011)
Garnishee bank that maintained investment portfolio account for client and had a security interest in that account to secure a line of credit had priority over the rights of the garnishor. The garnishee bank was liable to the garnishor for funds that it returned to the debtor after service of the writ and liquidation of the account, but was not liable for amounts it set off against the client's obligation on the line of credit.

186. *In re J.B. Construction Co.*,
2011 WL 830101 (Bankr. D. Neb. 2011)
Surety on construction contract that paid on surety bonds was subrogated to the rights of both the material suppliers and the project owner and because of this had priority claim to retainage amounts over creditors with a perfected security interest in the accounts of the general contractor.

Enforcement Issues

– Default

187. *Hall v. Ford Motor Credit Co., Inc.*,
254 P.3d 526 (Kan. 2011)
Although the Kansas Consumer Credit Code limits default in a consumer credit contract to nonpayment or significant impairment of the prospect of payment, performance or realization of collateral, the debtor was in default by receiving a bankruptcy discharge after refusing to reaffirm his obligation on a car loan, given that the car was worth less than the debt.

188. *Buzzell v. Citizens Auto. Finance, Inc.*,
802 F. Supp. 2d 1014 (D. Minn. 2011)
Secured party that regularly accepted late payments was required to provide the debtor with notification of its intent to repossess vehicle before doing so, and its failure to provide such notice rendered the repossession wrongful.

– Waiver, Estoppel & Other Defenses

189. *Wells Fargo Bank v. Main*,
2011 WL 449562 (Wash. Ct. App. 2011)
Debtor in secured transaction had no valid defense or claim against lender for failure to lend an additional $103,000 because the alleged oral promise to lend was unenforceable under the statute of frauds. Although the promise was not barred by the general statute of frauds as something that could not be performed within one year, it was barred by the credit statute of frauds because it was not primarily for personal, family, or household purposes.

– Replevin & Repossession

190. *Reed v. Les Schwab Tire Centers, Inc.*,
2011 WL 692904 (Wash. Ct. App. 2011)
Tire seller that had a security interest in customer's tires did not commit conversion by removing tires and wheels from the customer's car, bringing them to the seller's place of business to there separate the tires from the wheels, and returning the wheels the following day. The seller actions were justified and the customer suffered no damages for the temporary loss of the wheels.

191. *Pollitt v. DRS Towing, LLC*,
2011 WL 1466378 (D.N.J. 2011)
Car owner stated a claim under the state Consumer Fraud Act against both secured party and the repossession agent for refusing to release car unless the owner paid a $644 fee for repossession and storage costs, after the owner had already paid the secured party the stated redemption amount.

192. *Whitney National Bank v. Flying Tuna, LLC*,
2011 WL 2669450 (S.D. Ala. 2011)
Secured party that had made a showing of default to which the debtor had not responded was entitled to a preliminary injunction prohibiting the debtor from disposing of any collateral but had not shown the likelihood of irreparable injury necessary for a preliminary injunction requiring the debtor to provide an inventory of collateral, to provide an accounting of accounts receivable, or to turn over artwork subject to the security interest.

193. *VW Credit, Inc. v. Robertson*,
2011 WL 1642597 (E.D.N.Y. 2011)
Secured party was not entitled to pre-judgment writ of possession for collateralized motor vehicle purchased by buyers because, even though the security interest was now noted on the certificate of title for the vehicle, it was not clear from the documents provided whether the secured party perfected its interest in the vehicle before the buyers took possession pursuant to their purchase agreement.

194. *Firestone Financial Corp. v. Maxx Fun, LLC*,
2011 WL 4459388 (M.D. Pa. 2011)
Secured party had no shown that it was entitled to ex parte, pre-judgment seizure of the collateral because the claim that the collateral would decrease in value was unsupported, the assertion that the collateral may be moved outside the jurisdiction was vague and much of it was already outside the jurisdiction, the secured party had not established the value of the collateral, and some of the collateral was in the hands of a non-party.

195. *General Elec. Capital Corp. v. Oncology Associates of Ocean County LLC*,
2011 WL 6945739 (D.N.J. 2012)
Lessor/secured party of medical equipment was entitled to writ of replevin because the lessee/debtor failed to prove that: (i) the equipment had become a fixture, and thus it remained personal property; (ii) the cost of removal would exceed the likely sale proceeds and would therefore render removal commercially unreasonable; (iii) the clause in the agreement providing for immediate removal upon default was unconscionable because it would endanger public health by disrupting numerous, innocent third parties' ongoing cancer treatment; or (iv) would result in forfeiture.

196. *Oyster Technologies, Ltd. v. Environmental Developers Group, LLC*,
2011 WL 6213747 (D. Mass. 2011)
Creditor with nonrecourse loan secured only by A 50% interest in a limited liability company was entitled to preliminary injunction against the debtor withdrawing funds from or pledging the assets of the limited liability company.

197. *Home Savings & Loan Co. of Youngstown, Ohio v. Super Boats & Yachts, LLC*
2011 WL 2447641 (S.D. Fla. 2011)
Creditor with a purchase-money security interest in a vessel perfected by notation on the vessel's certificate of title had neither a maritime lien nor a preferred mortgage, and therefore there was no federal court jurisdiction over the creditor's effort to replevy the vessel from a buyer.

198. *Johnson v. Universal Acceptance Corp. (MN)*,
2011 WL 3625077 (D. Minn. 2011)
Debtors had no cause of action against police for violation of their civil rights in connection with repossession of their car because the officers did not assist in the repossession, instead they merely kept the peace by separating the parties and threatening to arrest one of the debtors when he made threats after the vehicles was already hooked up to the tow truck.

– Notification of Disposition

199. *Aguayo v. U.S. Bank*,
653 F.3d 912 (9th Cir. 2011)
The National Bank Act and the OCC regulations promulgated thereunder do not preempt, with respect to national banks, California law requiring secured parties to provide certain detailed information to the debtor after repossession but before sale of an automobile.

200. *Barclays Bank PLC v. Poynter*,
2011 WL 3794890 (D. Mass. 2011)
Because the Ship Mortgage Act does not preempt state law on enforcement of security interests in vessels, the secured party was permitted to conduct a non-judicial, private sale of the vessel. As a result, the notification provided by the secured party, which did not state the time and place of the sale, merely the date after which the sale would be conducted, was sufficient.

201. *Stern-Obstfeld v. Bank of America*,
915 N.Y.S.2d 456 (N.Y. Cty. Ct. 2011)
Secured party not permitted to conduct disposition of debtor's shares in a residential cooperative apartment because the secured party had not complied with state's non-uniform and detailed notification requirement with respect to such collateral. However, the fact that the value of collateral exceeds the amount needed to cure the default will not prevent an eventual sale from being commercially reasonable.

202. *In re Catipon*,
2011 WL 6934448 (9th Cir. BAP 2011)
Secured party's notification of disposition, which did not state that the debtor had 15 days from the date of the notification to redeem the vehicle or that the secured party intended to dispose of the vehicle upon the expiration of that 15-day period, failed to comply with California statute governing conditional sale contracts for motor vehicles and, therefore, secured party was not entitled to a deficiency.

203. *States Resources Corp. v. Gregory*,
339 S.W.3d 591 (Mo. Ct. App. 2011)
Because a notification of disposition in a consumer-goods transaction that lacks any of the information set forth in § 9-614(1) is insufficient as a matter of law, secured creditor's letter that: (1) did not state that the debtor was entitled to an accounting; (2) failed to provide a description of liability for a deficiency; and (3) incorrectly stated that the collateral would be sold by public auction was inadequate. Accordingly, the secured creditor was not entitled to a deficiency judgment.

204. *Scott v. Nuvell Financial Services LLC*,
789 F. Supp. 2d 637 (D. Md. 2011)
Collateralized vehicles were sold at a public sale, not a private sale, under Maryland's Credit Grantor Closed End Credit law because the public was invited through weekly advertisements in the *Baltimore Sun* and the forum was open to the public, even though non-dealers had to provide a refundable $1,000 deposit to attend. As a result, notification of the sale was proper.

205. *Cappo Management V, Inc. v. Britt*,
711 S.E.2d 209 (Va. 2011)
Automobile seller that repossessed the car subject to a conditional sale contract when the financing fell through was required to give the buyer notification of a resale because, even though the Supplement to Purchase Contract declared that the car remained property of the dealer pending approval of the lender, other contract documents treated the vehicle as belonging to the buyer and the ambiguity had to be construed against the dealer.

206. *Cosgrove v. Citizens Automobile Finance, Inc.*,
2011 WL 3740809 (E.D. Pa. 2011)
Class action settlement against auto financier for allegedly not providing a reasonable disposition notification – due to the fact that the notifications failed to set forth the debtor's reinstatement rights and in many cases overstated the debtor's obligations – would be approved, in part because the merits of the claim were compelling.

207. *Kight v. Ford Motor Credit Company, LLC*,
721 S.E.2d 204 (Ga. Ct. App. 2011)
Secured party that disposed of debtor's vehicle was not entitled to a summary judgment on its claim for a deficiency because even though it had sent by certified mail to the debtor's address listed in the security agreement the notification, required by non-uniform state law, of its intent to pursue a deficiency, the debtor had presented evidence that she had earlier notified the secured party of a change in address.

208. *Mountaineer Investments LLC v. Heath*,
2011 WL 6038450 (Wash. Ct. App. 2011)
Notification that motor home would be disposed of at a public sale on a specified date was not insufficient merely because the sale closed a month afterwards, given that the sale commenced on the date specified. Although no one appeared at the location to place an in-person bid, and the secured party then used telephone inquiries and written submissions to reach an agreement, the process remained a public sale.

– Conducting a Commercially Reasonable Disposition

209. *In re Inofin, Inc.*,
455 B.R. 19 (Bankr. D. Mass. 2011)
Even if lender had a security interest in chattel paper sold at foreclosure sale, the sale was not commercially reasonable because: (i) the first and third notifications contained the wrong date and the second was sent only two days before the date of sale; (ii) the secured party's attorney was unaware whether the debtor was in default and did not cause notification of default to be sent to the debtor; (iii) and no effort was made to solicit bids from individuals or entities in the industry by placing ads in trade publications; there were merely two ads in the *Boston Herald.*

210. *Fifth Third Bank v. Miller*,
767 F. Supp. 2d 735 (E.D. Ky. 2011)
Bank that provided little to no specific information on the method, manner, time, or other terms of its disposition of collateral, no evidence regarding the commercial practices among dealers in horses, and no evidence showing that its actions conformed to these practices was entitled to summary judgment on the issue of liability but not on the amount.

211. *Southern Developers & Earthmoving, Inc. v. Caterpillar Financial Services Corp.*,
56 So. 3d 56 (Fla. Ct. App. 2011)
Lender that sold collateralized earthmoving equipment through private sales and internet auctions and, in resulting deficiency action, provided evidence about the notifications provided to the debtor and the guarantors but no details about the sales transactions themselves or the practices and methodology of selling used equipment in the industry was not entitled to summary judgment after the debtor placed the commercial reasonableness of the dispositions at issue.

212. *UBS Bank USA v. Wolstein Business Enterprises, L.P.*,
2011 WL 129868 (D. Utah 2011)
Because collateralized stock was sold on the New York Stock exchange, a recognized market, no advance notification of the sale was required and the sale is conclusively deemed to be conducted in a commercially reasonable manner, even though the market price of the stock was declining rapidly and later rebounded temporarily.

213. *GMAC v. Jones*,
933 N.Y.S.2d 354 (N.Y. App. Div. 2011)
Debtors failed to raise a triable issue of fact as to whether the secured party sold the collateralized vehicle in a commercially reasonable manner given that the sales price was $1,700 greater than its estimated wholesale value.

214. *Center Capital Corp. v. PRA Aviation, LLC*,
2011 WL 442107 (E.D. Pa. 2011)
In conducting a disposition of a collateralized aircraft, the secured party used a reputable broker in a manner consistent with standard industry practice, aggressively marketed the aircraft between for three months, rejected two low bids, and sold the plane for the best offer it received. Such conduct satisfies the requirement for a commercially reasonable sale.

215. *People's United Equipment Finance Corp. v. Hartmann*,
447 Fed. Appx. 522 (5th Cir. 2011)
Public sales of collateralized equipment at which the secured party was the only bidder were commercially reasonable because they were conducted in accordance with industry standards and the sale prices represented, according to various pricing resources, the equipment's fair market value as of the dates of sale.

216. *In re Adobe Trucking, Inc.*,
2011 WL 6258233 (Bankr. W.D. Tex. 2011)
Public sale of collateralized drilling equipment at which the secured party credit bid $41 million was commercially reasonable given that the price was higher than the amount of one appraisal, the other appraisal had to be discounted because it was prepared well before the sale and the market for such equipment was declining, and the secured party resold the equipment four months later for only $9 million. Advertising for the sale for one day in newspapers of general circulation was adequate because the security agreement provided that it would not be commercially unreasonable "to advertise dispositions of Collateral through publications or media of general circulation, whether or not the Collateral is of a specialized nature." The debtors could not complain about the secured party's failure to clean or paint the equipment prior to the sale or make it available for inspection given their refusal to turn the collateral over, identify its location, otherwise cooperate and because the security agreement provided that the secure party need not incur expenses to prepare the collateral for sale and need not have possession at the time of sale.

217. *Formation Inv. Holding, LLC v. Formation Enterprises, LP*,
2011 WL 1017683 (Cal. Ct. App. 2011)
Sale of debtor's assets arranged by receiver appointed at the request of junior lienor would be judicially confirmed even though the senior creditor was the only bidder, the assets were sold free and clear, and the proceeds were insufficient to provide the junior lienor with any recovery. The receiver did not abuse his discretion in refusing to postpone the sale or refusing the junior lienor's vague offers to provide short-term credit. The allegation that information provided to prospective bidders was inadequate, that fact that bids were due on a holiday, and the claim that prospective bidders were charged a non-refundable $25,000 fee were inadequate to show that the procedures were rigged in favor of the senior lienor.

218. *Mountaineer Investments LLC v. Heath*,
2011 WL 6038450 (Wash. Ct. App. 2011)
Amalgamated public/private sale of motor home was commercially reasonable because the secured party advertised the sale sufficiently to draw six bids, extended the sales process, which resulted in a doubling of the number of bids, and negotiated a $500 increase in the sales price from the high bidder.

219. *SLT Dealer Group, LTD. v. AmeriCredit Financial Services, Inc.*,
336 S.W.3d 822 (Tex. Ct. App. 2011)
Obligation to conduct disposition in commercially reasonable manner never arose because secured party did not take possession of and sell the collateral, instead an unrelated third party foreclosed on a statutory mechanic's lien. The secured party had no obligation to participate in that process to protect its interest in the collateral.

220. *Spizizen v. National City Corp.*,
2011 WL 1429226 (E.D. Mich. 2011)
Secured party was entitled, after the debtors' default, to indefinitely freeze the collateralized securities account containing securities entitlements valued at $1.9 million to secured a total obligation of $1.1 million. The security agreement expressly gave the secured party the right to refuse debtor access to the account and both the agreement and UCC the UCC gave the secured party the *right* to sell the entitlements but not the *obligation* to do so. Secured party's setoff against deposit account was proper regardless of who owned the deposited funds because the deposit account agreement expressly so provided and thus more restrictive common-law rules were irrelevant.

221. *Patel v. Modi*,
2011 WL 1335189 (Cal. Ct. App. 2011)
Pursuant to both Article 9 and the parties' agreement, the secured party need not foreclose on the collateral before pursuing the debtors on the secured note.

222. *First Chatham Bank v. Landers*,
2011 WL 4501968 (D.S.C. 2011)
2011 WL 7064553 (D.S.C. 2011)
Secured party may bring an action against the debtor on the secured obligation despite retaining possession of collateralized stock certificates because the certificates were still in the debtor's name and had not been "repossessed" (*i.e.*, foreclosed upon).

– Collecting on Collateral

223. *Mobile-One Auto Sound, Inc. v. Whitney National Bank*,
78 So.3d 807 (La. Ct. App. 2011)
Bank was not required to provide borrower with notification of default before debiting borrower's checking account of funds that the borrower had earmarked for floor plan financiers.

224. *Rapid Circuits, Inc. v. Sun National Bank*,
2011 WL 1666919 (E.D. Pa. 2011)
Debtor's claim for intentional interference with contractual relations against secured party and its counsel for instructing the debtor's customers to pay the secured party directly would not be dismissed because, even though the security agreement authorized them to collect accounts, it may not have been appropriate for the secured party to rely on an outdated customer list and send collections letters to customers who were not account debtors.

225. *Sterling Commercial Credit - Michigan, LLC v. Phoenix Industries I, LLC*,
762 F. Supp. 2d 8 (D.D.C. 2011)
Factor was not entitled to preliminary injunction prohibiting debtor from selling accounts and receiving the proceeds because it had not provided the required notice to the debtor or the buyer's president, its allegation of irreparable harm was speculative, and despite showing the original factoring agreement with a different party and the assignments that transferred it, the factor had not shown that it was indeed the proper party.

226. *Agri-Best Holdings, LLC v. Atlanta Cattle Exchange, Inc.*
812 F. Supp. 2d 898 (N.D. Ill. 2011)
Secured party that obtained relief from the stay and then notified account debtor to pay it directly was the real party in interest in action against the account debtor that the debtor commenced shortly after filing for bankruptcy and the secured party could be substituted for the debtor.

227. *In re Black Diamond Mining Co.*,
2011 WL 6202905 (Bankr. E.D. Ky. 2011)
Account debtors who purchased coal from debtor pursuant to master sales agreement that permitted the account debtor to recoup the purchase price against liquidated damages for the debtor's breach owed no obligation to the debtor's factor because the breach damages exceeded the amounts due. Factor had no standing to argue that it was the account debtors who in fact breached because it was not a party to the agreement and, in any event, the debtor had never issued an event of default notice to the account debtor. Amounts the account debtor paid directly to the debtor to amend the master sales agreement did not violate the factor's rights because those payments were not "accounts" under Article 9 and did not arise from the sale of inventory, which were the only rights to payment that the factor had acquired an interest in.

228. *Southern Bancorp Bank v. Bayer CropScience LP*,
2011 WL 744947 (E.D. Ark. 2011)
Account debtors that provided evidence that they never received notification of the assignment were entitled to summary judgment in secured party's conversion action based on their payment to the debtor. Court repeatedly referred to notification of the assignment, rather than to notification that payment was due to the secured party.

229. *Maple Trade Finance, Inc. v. Lansing Trade Group, LLC*,
2011 WL 1060961 (D. Kan. 2011)
Account debtor that signed debtor's invoices acknowledging receipt of the goods was not estopped from denying receipt in action brought by factor that had loaned against the invoices in reliance on the account debtor's acknowledgment. Unless it agrees otherwise, an account debtor is entitled to raise defenses arising under the contract and estoppel is not an agreement to waive those rights. Even if estoppel were available, factor would not be entitled to summary judgment because there was evidence indicating that it had not followed its own procedures.

230. *Platinum Funding Services, LLC v. Petco Insulation Co., Inc.*,
2011 WL 1743417 (D. Conn. 2011)
Factor that sent instruction to account debtors to pay it directly had no cause of action against account debtors who nevertheless paid the debtor because the factor had not shown that it had actually purchased the accounts that the account debtors had paid.

231. *WM Capital Partners I, LLC v. BBJ Mortgage Services, Inc.*,
2011 WL 1135642 (E.D. Mich. 2011)
Secured party's written instruction to mortgagees – the account debtors to the debtor mortgage originator – was not tantamount to taking ownership of the collateralized mortgage notes, it was merely an effort to collect, even though the instruction letter to the mortgagees identified the secured party's agent as the "owner" of the mortgages. Even if the secured party's actions were a way of taking ownership of the notes, that would not constitute and election of remedies barring action against the debtor on the secured obligation.

232. *Constructors & Associates, Inc. v. First National Bank of Cameron*,
2011 WL 2770234 (Tex. Ct. App. 2011)
General contractor/account debtor was not entitled to summary judgment on claim brought by bank with a security interest in subcontractor's accounts because the general contractor failed to provide evidence about which contracts the subcontractor breached – thereby giving rise to a contractual setoff right – or how much was owed to the suppliers.

233. *Bank of America v. Trinity Lighting, Inc.*,
2011 WL 3489693 (N.D. Ill. 2011)
Account debtor could had a right, valid against buyer of account, to set off against its account obligation the amounts the debtor owed to the account debtor from other, unrelated transactions and which obligations arose before the account debtor received notification of the assignment.

234. *U.S. Bank v. U.S. Rent a Car, Inc.*,
2011 WL 3648225 (D. Minn. 2011)
Account debtor could use claims against debtor to reduce amount owed but not to seek affirmative recovery from the secured party.

235. *Nova Bank v. Madison House Group*,
2011 WL 6028213 (D.N.J. 2011)
Secured party with security interest in promissory note was not, after the debtor's default, entitled to accelerate the obligation on the note or demand adequate assurance of future performance. Although the security agreement gave the secured party these rights against the debtor, neither the promissory note nor the law gave the debtor or the secured party these rights against the maker.

236. *Citywide Banks v. Armijo*,
2011 WL 4837501 (Colo. Ct. App. 2011)
Bank with a security interest in and possession of negotiable promissory note secured by deed of trust could not enforce obligation of maker who had paid the note in full to the debtor because the bank had allowed the debtor to service the loan and thus the debtor was the bank's agent. No discussion of § 3-602.

237. *CapTran/Tanglewood LLC v. Thomas N. Thurlow & Associates*,
2011 WL 2969835 (S.D. Tex. 2011)
Article 9 provides that a secured party may deduct from collections on collateral its reasonable collection expenses, including attorney's fees, but does not provide for recovery of attorney's fees against the account debtor.

238. *Vogel v. Onyx Acceptance Corp.*,
267 P.3d 1057 (Wyo. 2011)
Buyer of chattel paper did not violate the Uniform Consumer Credit Code by charging account debtors for the option of paying by phone or internet because that fee was not incident to the extension of credit, and thus did not constitute a "credit service charge" within the meaning of the UCCC, and the UCCC does not prohibit such an unenumerated fee.

239. *ITS Financial, LLC v. Advent Financial Services, LLC*,
2011 WL 4810067 (S.D. Ohio 2011)
Debtor and guarantors had no standing to raise subordination agreement as a basis for interfering with secured party's collection against account debtor and, in any event, the subordination agreement did not cover the account at issue.

240. *International Son-Ry's Enterprises, Inc. v. B & T Pools, Inc.*,
718 S.E.2d 424 (N.C. Ct. App. 2011)
Because subordination clause – including standstill requirement – was in the promissory note, the debtor and guarantors had standing to raise the subordination agreement as a defense to an action against them on the note and guarantees.

241. *TFG-Illinois, L.P. v. United Maintenance Co., Inc.*,
2011 WL 5239728 (D. Utah 2011)
Original equipment lessor that had assigned the lease to a bank but continued to service the lease had standing to sue the lessee because: (i) the return assignment from the bank to the original lessor was valid even though not in writing; (ii) the lessee has no standing to raise any statute of frauds problem that may exist with the return assignment; and (iii) its role as servicer gave it a pecuniary interest in the outcome even though it was not paid on a percentage basis.

– Retaining Collateral

242. *First Bank and Trust v. Thomas*,
2011 WL 1944119 (La. Ct. App. 2011)
Voluntary surrender form that debtor signed and presented when surrendering his truck to the secured party attempting and which purported to reduce the secured obligation by $20,000 was not binding on the secured party because the secured party did not sign the form or otherwise agree to accept the collateral in partial satisfaction of the secured obligation.

243. *Smith v. Community National Bank*,
344 S.W.3d 561 (Tex. Ct. App. 2011)
Stipulation and agreed order by which bankruptcy trustee transferred of title to collateral to secured party did not constitute an acceptance of the collateral in satisfaction of all or part of the secured obligation because neither the stipulation nor the order mentioned the indebtedness. As a result, the guarantor of the secured obligation was not discharged, although it would have to be given credit for any amounts the secured party collects through a disposition or from insurance.

– Standing Issues

244. *Bank of America v. Bridgewater Condos, L.L.C.*,
2011 WL 5866932 (Mich. Ct. App. 2011)
Bank with a security interest in condominium buyers' rights in escrow agreements could enforce the buyers' right to recover the deposits due to the invalidity of the purchase agreements.

– Statute of Limitations

245. *Madison Capital Co., LLC v. S&S Salvage, LLC*,
794 F. Supp. 2d 735 (W.D. Ky. 2011)
Secured party's actions for conversion and trespass against buyer of collateral were barred by a two-year statute of limitations.

– Other

246. *Williams v. Gillespie*,
346 S.W.3d 727 (Tex. Ct. App. 2011)
Judgment creditor, who agreed with the debtor to conduct a private sale of a tractor and back hoe rather than a judicial sale, was required to comply with Article 9. Because the judgment creditor retained and used the back hoe without selling it, the creditor was barred from collecting the deficiency pursuant to decisions under pre-revised Article 9.

247. *Amegy Bank v. Monarch Flight II, LLC*,
2011 WL 4948986 (S.D. Tex. 2011)
Even though the debtor had sold the collateral, the secured party was not entitled to a preliminary injunction freezing the debtor's assets because the secured party had not shown a likely irreparable injury due to the fact that its damages would be fully compensable by a monetary award and the debtor testified that he had a substantial net worth. No constructive trust was appropriate because the secured party was not seeking to recover a specific asset and had not proven fraud, despite evidence that the debtor had made misrepresentations.

248. *Intex Livingspace, Ltd. v. Roset USA Corp.*,
2011 WL 1466416 (Tex. Ct. App. 2011)
Manufacturer that had security interest in dealer's inventory was not entitled, after the dealer's default and abandonment of its store, to an injunction: (i) prohibiting use of the manufacturer's trademark; (ii) to keep all its books and records; and (3) against selling any of the collateral, because the manufacturer had not shown irreparable injury.

249. *Ford Motor Co., LLC v. Heinrich*,
808 N.W.2d 174 (Wis. Ct. App. 2011)
Claim preclusion did not bar secured party's action on the secured obligation even though the secured party had previously obtained a judgment and writ of replevin for collateral; the secured party did not recover the collateral because the sheriff was unable to execute the writ.

250. *Ex parte Textron, Inc.*,
67 So. 3d 61 (Ala. 2011)
Secured party did not, by bringing detinue action in Alabama, waive clause in security agreement making Rhode Island the exclusive forum for "all purposes in connection with" the financing agreement because Rhode Island had no jurisdiction over the collateral located in Alabama and such an exception to the forum-selection clause was necessary to harmonize it with the clause granting the secured party the right to repossess the collateral. The forum-selection clause was broad enough to cover tort claims against parent of secured party. However, guarantors' consent to jurisdiction and venue in Rhode Island was not an exclusive jurisdiction clause and thus claim by guarantors would not be dismissed.

251. *Camelot Entertainment Inc. v. Incentive Capital LLC*,
2011 WL 4477317 (C.D. Cal. 2011)
Mandatory forum selection clause in security agreements was binding even though the debtor's note contained a non-exclusive forum selection clause and the parties' escrow agreement contained no forum selection clause because the debtor's claim related to the collateral and was therefore inextricably bound up with the security agreements.

252. *M.L. Private Finance LLC v. Minor*,
2011 WL 1900613 (S.D.N.Y. 2011)
Debtor that had paid all the principal and accrued interest on the secured obligation was entitled to a discharge of the receivership over and security interest in remaining collateral despite secured party's claim that contingent obligations remained for indemnification relating to a separate action against the secured party for unfair debt collection practices. Although the loan and security agreements defined the secured obligation to include "all of the indebtedness, liabilities and obligations of the Borrower to the Lender . . . whether now existing or hereafter rising, whether or not . . . contingent," such language does not encompass anything and everything that might happen in other fora.

253. *Plainfield Specialty Holdings II Inc. v. Worldwide Water, Inc.*,
2011 WL 1005008 (Wash. Ct. App. 2011)
Receiver could abandon all assets of the debtor not sold – including claim against the secured lender – to the lender. Appellate court would not consider on appeal arguments not made to the trial court, and thus would not consider: (i) argument that claim – for which no complaint had ever been filed – was not a contract claim but a commercial tort claim outside the scope of the lender's security interest; or (ii) that even if the lender had a security interest in the claim, abandonment to the secured lender is not consistent with Article 9's enforcement methods.

254. *Heartland Cement Co. v. Ultimax Cement Corp.*,
2011 WL 239660 (E.D. Pa. 2011)
Clause providing for arbitration of "[a]ny controversy or claim arising out of or relating to" Distribution Agreement did not require arbitration of claim to enforce Supply Agreement and Security Agreement even though the Distribution Agreement expressly authorized debtor to setoff amounts owed under the Supply Agreement with amounts due under the Distribution Agreement. The Supply and Security Agreements are not so intertwined as to make them depend on each other for their existence: the Security Agreement exists only to secure the credit line provided for in the Supply Agreement whereas the Distribution Agreement grants a license to distribute certain products.

255. *Alabama Title Loans, Inc. v. White*,
2011 WL 2739652 (Ala. 2011)
Debtor who claimed repossession agent assaulted her and repossessed car after loan had been paid in full had to arbitrate claim because the loan agreement provided that its arbitration clause "shall survive the repayment of all amounts owed" and because the arbitration clause covered all claims, including tort claims, that "relate[] to this Agreement or the Vehicle," not merely those arising under the contract.

256. *Shah v. Santander Consumer USA, Inc.*,
2011 WL 5570791 (D. Conn. 2011)
Language in security agreement that provided for arbitration of any "claim or dispute arising from this Contract of whatever nature" was a broad clause even though it did not refer to disputes "relating to" the agreement or the parties' relationship, and it therefore encompassed the debtor's action for the secured party's alleged failure to comply with state statutes requiring a post-repossession notice and disclosure of certain consumer rights even though such an action did not require interpretation of the security agreement.

257. *Texas Beef Ltd. v. McClave State Bank*,
2011 WL 597027 (N.D. Tex. 2011)
Colorado secured party that made loan to Colorado debtor was not subject to personal jurisdiction in Texas, where the secured party had never conducted business, in connection with action brought by third party seeking to determine priority merely because the collateral had been brought to Texas without the secured party's knowledge or consent.

258. *Davis v. Guaranty Bank and Trust Co.*,
58 So. 3d 1233 (Miss. Ct. App. 2011)
Bank that released its security interest on truck to facilitate sale was not entitled to equitable lien on the truck when debtor failed to remit the sale proceeds as promised. Even if the chancellor did not believe that the debtor had in fact sold the truck, joinder of the putative purchaser who now claimed an interest in the truck was required before an equitable lien could be imposed.

259. *M & I Marshall & Ilsley Bank v. Guaranty Financial, MHC*,
800 N.W.2d 476 (Wis. Ct. App. 2011)
State-law fraudulent transfer claim of lender with security interest in 50,000 shares of stock in Reit corporation that was wholly-owned subsidiary of bank, arising from conversion of that stock into preferred stock of the bank pursuant to direction of Office of Thrift Supervision, was preempted by federal law.

Liability Issues

– of the Secured Party

260. *Nissan Motor Acceptance Corp. v. Dealmaker Nissan, LLC*,
2011 WL 94169 (N.D.N.Y. 2011)
Debtor failed to state cause of action against secured party for fraud, misrepresentation, or bad faith for statements prompting the debtor to sell collateral followed by actions pursuing remedies for default.

261. *KeyBank v. Bingo, Coast Guard Official No. 1121913*,
2011 WL 1559829 (W.D. Wash. 2011)
Secured party had no liability for failing to act to protect the value of the investment property collateral when the markets declined dramatically in 2008 because the loan documents created no fiduciary relationship and the Pledge Agreement's requirement to maintain a 75% loan-to-value ratio was placed on the debtors, not on the secured party. Secured party also had no liability for failing to allocating proceeds to collateral sales to boat loan because the debtors could point to no requirement in the security agreement or in the law requiring the secured party to prioritize sale proceeds this way.

262. *Rashaw v. United Consumers Credit Union*,
2011 WL 2110806 (W.D. Mo. 2011)
The statutory damages available under § 9-625 do not make that provision a penal statute and therefore the limitations period in Missouri for a claim based on an allegedly deficient pre-sale notification was the general 5-year period for actions relating to "liability created by a statute other than a penalty." *See also Moran v. Missouri Central Credit Union,* 2011 WL 2110824 (W.D. Mo. 2011) (identical ruling on the same day by the same judge).

263. *Huffman v. Credit Union of Texas*,
2011 WL 5008309 (W.D. Mo. 2011)
The statutory damages available under § 9-625 do not make that provision a penal statute and therefore the limitations period in Missouri for a claim based on an allegedly deficient pre-sale notification was the general 5-year period for actions relating to "liability created by a statute other than a penalty."

264. *Parks v. Mid-Atlantic Finance Co., Inc.*,
343 S.W.3d 792 (Tenn. Ct. App. 2011)
Because the assignee of a car loan had no duty to have certificate of title amended to replace the seller's name as secured party with its own, buyer's claim for negligence, slander of title, wrongful repossession, and conspiracy, all relating to the seller's wrongful and unauthorized repossession were meritless. Assignee had no liability for invasion of privacy for communicating with seller about buyer's missed payments after buyer made some payments to seller and some to assignee.

265. *DBS Construction Inc. v. New Equipment Leasing, Inc.*,
2011 WL 1157531 (N.D. Ind. 2010)
Although loader that creditor repossessed had debtor's logo on it, evidence showed that it was not owned by the debtor and hence no security interest attached. Nevertheless, creditor was not liable for conversion or tortious interference with contract because its actions were reasonable and it lacked the requisite intent to exert unauthorized control over the loader. However, rightful owner still had a viable replevin action, which could include a claim for damages for wrongful detention.

266. *People's United Bank v. Wetherill Associates*,
2011 WL 383740 (Conn. Super. Ct. 2011)
Because directors of a corporation do not owe creditors a fiduciary duty, regardless of the corporation's solvency, supplier had no cause of action against secured party that allegedly took control of the debtor for either breach of fiduciary duty or aiding and abetting such a breach. Supplier had no claim against secured party for equitable subordination because such a claim is restricted to bankruptcy proceedings. However, supplier had pled a claim for tortious interference with business relations by alleging that the secured party interfered with the supplier's relations with the debtor when the secured party took control of the debtor and refused to pay the supplier what it was owed. Creditor also pled a claim for failing to conduct a commercially reasonable disposition due to the secured party's haste in conducting the sale. Supplier's claim that sale was an avoidable transfer for less than reasonably equivalent value would not be stricken because whether sale was non-collusive - and therefore immune for avoidance - is a question of fact not appropriate to resolve on a motion to strike.

267. *The National Bank v. FCC Equipment Financing, Inc.*,
797 N.W.2d 624 (Iowa Ct. App. 2011)
Secured party that received a wire transfer from buyer's lender for most of amount of the secured obligation was not liable in unjust enrichment to return the funds when the buyer failed to pay the remainder of the secured obligation. There was no unjust enrichment because the transfer reduced a lawful obligation and the lender erred in making the transfer without assuring the rest of the obligation would be paid off.

268. *Great Western Bank v. Branhan*,
804 N.W.2d 447 (S.D. 2011)
Because the debtors had agreed, after default, to surrender and transfer collateralized stock to the secured party, and the value of that stock was used in calculating the amount of a deficiency judgment, the secured party was entitled to retain the stock issuer's refund, announced and made after the debtors paid the deficiency, of a prior capital call.

269. *Homestead Finance Corp. v. Southwood Manor L.P.*,
956 N.E.2d 183 (Ind. Ct. App. 2011)
State statute that makes lienholder on mobile home liable, upon notification from the owner of the land, for ground rent until the mobile home is removed does not impose liability on secured party for any rent accruing after it surrenders its lien.

270. *Symetra Life Insurance Co. v. Rapid Settlements, Ltd.*,
2011 WL 4807901 (S.D. Tex. 2011)
Obligor on structured settlements had claim for tortious interference with contractual relations against assignee of structured settlement payments that attempted to use arbitration to avoid state statutes requiring court approval of the transfers because the assignee had no colorable argument that arbitration could be used in such a manner.

– of Others

271. *Premier Pork, LC v. Westin Packaged Meats, Inc.*,
406 Fed. Appx. 613 (3d Cir. 2011)
Entity that purchased some of the debtor's assets from a foreclosure sale buyer did not have successor liability as a "mere continuation" of the debtor's business because the purchaser and the debtor did not share the same stock, business operations, or location.

272. *Call Center Technologies, Inc. v. Grand Adventures Tour & Travel Publishing Corp.*, 635 F.3d 48 (2d Cir. 2011)

Trial court erred in granting summary judgment against successor liability of new corporation that purchased all the assets of the original debtor at a foreclosure sale because liability as a "mere continuation" of the debtor does not require a continuity of ownership and there were sufficient facts to preclude summary judgment: some of the managers, the majority of employees, the physical location of the business, and most of the services provided were the same, the purchaser assumed at least some of the liabilities of the debtor, and the purchaser was formed for the purpose of acquiring the debtor's assets.

273. *NLRB v. Leiferman Enterprises, LLC*, 649 F.3d 873 (8th Cir. 2011)

Entity that purchased debtor's assets free and clear from court-appointed receiver was liable, as a successor-in-interest, for the debtor's unfair labor practices because the purchaser acquired substantial assets of the debtor with knowledge of the pending unfair labor practice charges and continued, without interruption or substantial change, the debtor's business operation.

274. *Ortiz v. Green Bull, Inc.*, 2011 WL 5554522 (E.D.N.Y. 2011)

Tort claimant pled a cause of action based on successor liability against the newly formed entity that, after debtor's default, purchased the lender's note and security interest, and then entered into a collateral transfer agreement with the debtor pursuant to which it acquired most of the debtor's assets. Although a de facto merger requires some continuity of ownership and the tort claimant pled that it lacked knowledge of any such continuity, dismissal was premature because the transactions were confidential and plaintiff was entitled to discovery on the issue.

275. *Mamacita, Inc. v. Colborne Acquisition Co.*, 2011 WL 881654 (N.D. Ill. 2011)

Entity that purchased assets of debtor at foreclosure sale did not have successor liability under either the de facto merger or mere continuation rules because there was no continuity of ownership even though the family that owned the debtor was alleged to be in control of the purchaser after having recruited its business associates to buy the assets. However, judgment creditor did state a fraudulent transfer claim.

276. *Fifth Third Bank v. Lincoln Financial Securities Corp.*,
2011 WL 3476862 (6th Cir. 2011)
Securities broker breached control agreement with customer's secured party by either: (i) misrepresenting that the value of the customer's account by including in the stated value securities purchased with funds from a check that was later dishonored; or (ii) reversing trades after the check was dishonored despite clauses in control agreement by which broker promised not to execute sell orders without the secured party's consent and "waive[d] and release[d] all liens, encumbrances, claims and rights of setoff it may have." The control agreement was not rendered unenforceable for lack of consideration or mutuality or mistake.

277. *Bluwav Systems, LLC v. Durney*,
2011 WL 5375200 (E.D. Mich. 2011)
Secured party's assignee that conducted partial strict foreclosure of all collateral – including the debtor's "contract rights" – thereby acquired all the debtor's rights under a settlement agreement between the debtor and its former attorney, under which the former attorney released claims and covenanted not to sue. The attorney's later suit against the assignee based on the same transactions as those underlying the settlement agreement constituted a breach of the settlement agreement, giving rise to the liquidated damages provided for in the settlement agreement.

278. *Stanley Bank v. Parish*,
264 P.3d 491 (Kan. Ct. App. 2011)
Although lien creditor's sale of vehicle did not constitute conversion against secured party with a prior security interest in the vehicle, both the lien creditor's refusal to surrender the proceeds and the buyer's refusal to surrender the vehicle were acts of conversion.

279. *New Century Financial, Inc. v. Olympic Credit Fund, Inc.*,
2011 WL 918380 (S.D. Tex. 2011)
Take-out factor had no claim against prior factor for non-disclosure or misrepresentation in describing the factoring relationship with the debtor as "good" despite the debtor's prior conversion of a check because the payoff agreement, drafted by the take-out factor, disclaimed any representation or warranty and included a merger clause.

280. *Stewardship Credit Arbitrage Fund LLC v. Charles Zucker Culture Pearl Corp.*,
929 N.Y.S.2d 203 (N.Y. Super. Ct. 2011)
Assignee of secured party's "rights under the Credit Agreement, Security Agreement, and each document and instrument related to" received thereby assignment of secured party's claim against appraiser for fraud, negligent misrepresentation, breach of contract, professional malpractice, and violation of a state statute that imposes civil liability on appraisers of jewelry, art, and objects containing precious stones or metals. The appraisals, which were required as a condition to funding the loans, were "related to" the loan documents.

281. *Texas Capital Bank v. Ameriprise Financial Services, Inc.*,
2011 WL 6189494 (N.D. Tex. 2011)
Secured party had no cause of action against purported custodian of REIT for violation of control agreement because, even if the person who signed the control agreement on behalf of the purported custodian had actual or apparent authority to do so, the transfer agent for the REIT was actually a different, unrelated entity.

282. *Sequel Capital, LLC v. Pearson*,
2011 WL 4398108 (N.D. Ill. 2011)
Trustee who received assignment for benefit of creditors could not have breached fiduciary duty by failing to determine the value of the inventory or by compromising an action against an account debtor after the senior secured party took control over the assets.

283. *Savary v. Cody Towing and Recovery, Inc.*,
2011 WL 337345 (D. Md. 2011)
Debtor's claim against repo agent for wrongfully repossessing property in which there was no security interest was barred by resolution of claim against secured party for the acts of the repo agent.

284. *Jones v. Koons Automotive, Inc.*,
2011 WL 768832 (D. Md. 2011)
Creditor with a security interest in automobile sufficiently pled a breach of contract claim – as a third-party beneficiary – and a claim for tortious interference with contract against dealership that accepted the automobile as a trade-in and promised to pay off the secured obligation but failed to do so.

285. *In re Colusa Mushroom, Inc.*,
2011 WL 4433595 (Bankr. N.D. Cal. 2011)
Members of unsecured creditors committee had no cause of action against committee's attorney for failure to perfect security interest that debtor retained when it sold assets to a third party because any negligence was on the part of the debtor's counsel, not the creditors committee's counsel, who did not have the right or power to file a financing statement.

286. *DCFS USA, LLC v. District of Columbia*,
803 F. Supp. 2d 29 (D.D.C. 2011)
District of Columbia violated secured creditor's constitutional rights by selling impounded vehicle free and clear of security interest without providing notice of the sale to the secured creditor, whose predecessor's interest was noted in the records of the Virginia office that had issued a certificate of title for the vehicle.

287. *Buckeye Retirement Co. v. Busch*,
2011 WL 846687 (Ohio Ct. App. 2011)
Creditor's loss of motion challenging the dischargeability of debt owed by corporate president and majority stockholder who guaranteed corporate debt and participated in scheme to issue false borrowing base certificates was not res judicata as to claim against corporate CFO who signed the false certificates because the CFO was not in privity with the president.

288. *Cliff Findlay Automotive, LLC v. Olson*,
263 P.3d 664 (Ariz. Ct. App. 2011)
Co-maker of promissory note secured by a new car was an accommodation party and therefore had a partial defense to payment of the deficiency under § 3-605(d) based on the secured party's failure to timely perfect, which led to avoidance of the security interest as a preferential transfer in the other maker's bankruptcy. The defense is limited to the value of the collateral lost.

289. *United States v. Stevens*,
447 Fed. Appx. 488 (4th Cir. 2011)
Debtor was guilty of transporting a stolen vehicle in interstate commerce, in violation of 18 U.S.C. § 2312, because he transported a motorcycle with the intent to dispose of the motorcycle by selling it to a third party and knowing he was depriving the lienholder of its security interest.

290. *United States v. Gilbert*,
2011 WL 652830 (E.D. Mich. 2011)
2011 WL 5904429 (E.D. Mich. 2011)
Debtors' guilty plea embezzlement or theft of public property, in violation of 18 U.S.C. § 641, by selling without permission cattle in which the United States had a security interest and not using the proceeds to pay the secured debt was rejected because the offense requires government ownership of the property, not a mere security interest. However, subsequent indictment for violating 15 U.S.C. § 714m, which criminalizes conversion of property pledged to the Commodity Credit Corporation, would stand.

291. *Timothy v. Keetch*,
251 P.3d 848 (Utah Ct. App. 2011)
Debtor who falsely represented to prospective lender that horse was owned free and clear could be liable to the lender for fraud was well as breach of contract even though a simple search for UCC filings would have revealed that the horse was encumbered. Reasonable reliance does not require a check of the public records.

292. *Hollish v. Maners*,
2011 WL 4390156 (Ohio Ct. App. 2011)
Debtor that resold business he had purchased remained liable for the balance of the purchase price even though the seller had failed to perfect his security interest in the business and the subsequent purchaser had made payments on the debt for several years. The debtor failed to prove any novation or basis for waiver or estoppel.

293. *Wells Fargo Bank v. LaSalle Bank*,
2011 WL 2470635 (N.D. Ill. 2011)
Claim against originator and seller of commercial mortgage loan originator for breach of warranties that origination met industry standards and that property appraisals satisfied the guidelines in FIRREA had to be dismissed because it failed to put the originator on notice of what conduct deviated from industry standards or the reasons why the appraisals violated FIRREA.

294. *Wells Fargo Equipment Finance, Inc. v. State Farm Fire and Casualty Co.*,
805 F. Supp. 2d 213 (E.D. Va. 2011)
Insurance policy on collateralized vehicles that included standard mortgage clause made insurer liable to secured creditor listed as loss payee even though the damages may resulted from the debtor/insured's arson.

295. *Buckner v. Gebhardt*,
2011 WL 4842371 (Cal. Ct. App. 2011)
Former bail bondsman's legal malpractice claim against his attorneys for failure to advise him to retain a security interest in the business he sold was time barred because the cause of action accrued not after default when the buyer's other lender perfected its security interest but when the agreements were signed because the plaintiff was an experienced businessman who had recommended the other lender to the buyers and knew the other lender would require a security interest as a condition of making the loan.

296. *Schultze v. Chandler*,
2011 WL 6778823 (N.D. Cal. 2011)
Attorney for unsecured creditors committee did not owe a duty to individual creditors outside his role as attorney for the committee and was therefore not liable for professional malpractice for failing to make sure that debtor's attorney filed financing statement in connection with a credit sale of the debtor's assets, a transaction in which the attorney for the creditors committee was not involved.

BANKRUPTCY

Property of the Estate

297. *In re Orange Rose, LLC*,
446 B.R. 543 (Bankr. M.D. Fla. 2011)
Fleet of mobile homes that the debtor purchased but which the debtor never had re-titled in its name were not property of the estate because the Florida certificate of title statute requires compliance for the buyer to have marketable title.

298. *In re Lewis*,
2011 WL 5282604 (Bankr. E.D. Ky. 2011)
Automobiles titled in the name of "Lewis Auto Sales" were property of the individual debtor, not a partnership, even though the debtor had agreed to share the net profit from the sale of certain vehicles with the party that had financed the purchase of those vehicles. The debtor paid all expenses of the business and did not share profits generally. As a result, the select sharing of profits on a few vehicles was not an association of persons to carry on a business for profit but merely a creative arrangement to finance the purchase of the vehicles.

299. *In re AE Liquidation, Inc.*,
444 B.R. 509 (Bankr. D. Del. 2011)
Prepaying buyers of aircraft to be manufactured by debtor may have an equitable interest in the uncompleted aircraft and related parts. The fact that the buyers had not recorded their interests with the FAA was immaterial because the FAA registration statute does not apply to aircraft in production that are not capable of flight.

300. *In re Soho 25 Retail, LLC*,
2011 WL 1333084 (Bankr. S.D.N.Y. 2011)
Mortgage providing that assignment of rents was "unconditional and not as an assignment for additional security only," and that, before a default, the debtor had a revocable license in the rent but after default the license is revoked and full rights to the rent are returned to the Lender, prevented the rents from becoming part of the debtor's bankruptcy estate.

301. *In re McCombs*,
2011 WL 4458893 (Bankr. D. Ala. 2011)
Under Alabama law, because the parties' mortgage expressly provided that "Borrower absolutely and unconditionally assigns and transfers to Lender all the rents and revenues," the assignment was absolute and not merely a security interest, and thus post-petition rents were not property of the borrower's bankruptcy estate, even though the assignment terminates upon the extinguishment of the mortgage debt.

302. *In re Biedermann Mfg. Industries, Inc.*,
453 B.R. 802 (Bankr. E.D.N.C. 2011)
Secured party that prepetition had instructed account debtors to pay it directly but had not yet received payment did not thereby become the owner of the accounts; thus the accounts remained property which the debtor could use during its reorganization proceeding, subject to the rules on cash collateral.

303. *In re Siskey Hauling Co., Inc.*,
456 B.R. 597 (Bankr. N.D. Ga. 2011)
Accounts were property of the estate; the debtor's prepetition sale was in fact a collateralized loan, not a true sale, because the purchaser could charge back any receivable that remained unpaid after 90 days, held a reserve of 10% of the purchase price on each receivable against non-collection, and could charge the debtor for any deficiency on an account, and thus the transaction lacked the allocation of risk typically associated with a true sale.

304. *Garcia v. Cage*,
2011 WL 1337109 (S.D. Tex. 2011)
Chattel paper generated by used car dealers remained property of the estate despite purported prepetition transfer to "pool investors" because: (i) the investors were not licensed under Texas law and thus the transfers were void; (ii) the agreement does purport to transfer chattel paper, it merely indicates an intent to transfer chattel paper in the future; (iii) there is no evidence of an actual transfer of any particular chattel paper because the debtors did not endorse any, they did not modify the vehicle titles, the vehicle owners were never informed, the investors did not file a financing statement to perfect their security interests; and there was no servicing agreement yet the debtors continued to service the chattel paper; and (iv) the debtors retained the risk of because they were obligated to substitute chattel paper if an account debtor defaulted and paid the investors a fixed amount regardless of the sums collected. Therefore prepetition payments to the pool investors were avoidable preferences. *See also Strange v. Cage*, 2011 WL 1337130 (S.D. Tex. 2011) (same).

305. *In re Holiday Tree and Trim, Co.*,
2011 WL 1885688 (Bankr. D.N.J. 2011)
Deposit account that the debtor voluntarily created and escrowed prepetition to contain 40% of the net proceeds of stock sale that judgment creditor had a contractual right to receive remained property of the estate even though the judgment creditor levied on the deposit account prepetition. The contract did not make 40% of the sale proceeds the creditor's property or give the creditor a security interest. No discussion of whether the escrow created a security interest.

306. *In re Ruiz*,
455 B.R. 745 (10th Cir. BAP 2011)
Funds on deposit with bank at the time the depositor's petition is filed – not merely the bank's obligation to the depositor – are estate property and trustee has a § 542 claim against the debtor for the amount of checks written prepetition but honored postpetition.

307. *In re Moore*,
448 B.R. 93 (Bankr. N.D. Ga. 2011)
Cars that the debtor had pawned prepetition but for which redemption period had not expired were property of the estate when the petition was filed. However, when the redemption period expired, the cars automatically became the property of the pawnbroker and were no longer property of the estate. The pawnbroker's subsequent repossession of the vehicles was, therefore, not an act to obtain possession of property *of* the estate. While the repossession might nevertheless be an act to obtain property *from* the estate, the pawnbroker was entitled to retroactive annulment of the stay.

Claims & Expenses

308. *In re Wolverine, Proctor & Schwartz, LLC*,
447 B.R. 1 (Bankr. D. Mass. 2011)
Secured creditor's $1.9 million claim would not be re-characterized as equity even though the debtor was undercapitalized and the creditor voluntarily agreed to subordinate the debt because: (i) to evidence the debt the debtor executed a promissory note that contained a fixed maturity date, a fixed interest, rate of interest, and a default rate of interest; (ii) the debtor made all the required payments; and (iii) the debtor treated the funds advanced as a loan in its business records.

309. *In re Moll Industries, Inc.*,
454 B.R. 574 (Bankr. D. Del. 2011)
Claims of secured lenders, who also held equity interests in the debtor, would not be re-characterized as debt merely because the loans accrued interest at a variable rate and lacked a sinking fund and the lenders repeatedly declined to declare a default, extended additional credit, and wrote off a portion of the debt.

310. *In re Bank of New England Corp.*,
646 F.3d 90 (1st Cir. 2011)
Intercreditor agreement that subordinated junior unsecured loans to "all principal . . . and interest due or to become due" on senior unsecured loans applied to principal and prepetition interest, but was not intended to subordinate the junior loans to post-petition interest on the senior loans.

311. *In re Premier Golf Properties, LP*,
2011 WL 4352003 (Bankr. S.D. Cal. 2011)
Prepetition security interest in accounts and revenues generated by debtor's golf courses, including membership initiation fees, green fees, and driving range fees, did not extend to post-petition receipts because they were not proceeds of prepetition collateral.

Automatic Stay & Injunctions

312. *In re Zavala*,
444 B.R. 181 (Bankr. E.D. Cal. 2011)
Debtors lacked standing to assert that bank violated automatic stay by placing administrative freeze on two deposit accounts that debtors claimed as exempt because until the time to object to the claimed exemptions expired, the deposit accounts remained property of the estate.

313. *In re Heflin*,
2011 WL 1656094 (Bankr. D. Conn. 2011)
Secured creditor did not violate stay by repossessing and selling collateralized car because stay had already expired because the debtor took no action other than to file his statement of intention with respect to the car. Because the creditor's letter to the debtor's attorney indicated that it would move for relief from the stay (not repossess) if the debtor failed to pay, the creditor was liable in estoppel for the value of the personal property in the car that the creditor seized during the repossession.

314. *In re Castillo*,
456 B.R. 719 (Bankr. N.D. Ga. 2011)
Secured party wilfully violated the stay by failing, after receiving notice of the bankruptcy filing, to release vehicle that it had repossessed prepetition. Secured party had no right wait until receiving proof of insurance; if it had legitimate concerns about the failure to provide proof of insurance, the secured party should have sought emergency relief from the stay.

315. *In re Houlik*,
2011 WL 4459099 (Bankr. D. Kan. 2011)
Even if the debtors did not receive their discharge at confirmation of their Chapter 11 plan, the secured party violated the § 524 injunction by – and was liable for punitive damages for – failing to properly credit the debtors' post-confirmation payments and then improperly repossessing their truck.

316. *In re Butler*,
2011 WL 806078 (Bankr. C.D. Ill. 2011)
Bank did not violate discharge injunction by prosecuting prepetition detinue action after the debtor received a discharge or by seeking contempt citation for the debtor's failure to comply with court order to turn over the collateral, but the bank did violate the discharge injunction by accepting payments to allow the debtor to avoid contempt after learning that the debtor no longer had the collateral.

317. *In re Easter Seals Tennessee, Inc.*,
2011 WL 1884169 (Bankr. M.D. Tenn. 2011)
Secured party did not violate discharge injunction by giving the debtor's employee an incorrect payoff amount when the employee called to inquire because, after being informed of the error, the secured party informed the employee that she should talk to the bankruptcy department, did not demand payment of the misquoted amount. In fact, the secured party did not demand payment of any kind and did not contact the debtor.

318. *In re Johnson*,
2011 WL 1983339 (E.D. Mich. 2011)
Potentially secured party did not violate discharge injunction by seeking to ascertain from counsel of debtor's former employer whether the secured party in fact had a valid lien on the debtor's disability benefits. A creditor need not prove the validity of its lien to defend its actions in attempting to determine the validity of the lien.

319. *In re Blixseth*,
454 B.R. 92 (9th Cir. BAP 2011)
Termination of the stay under § 362(h) for the debtor's failure to file a statement of intention with respect to collateral applies to all collateral for the secured claim, not merely the collateral listed in the debtor's schedules as securing the claim.

320. *In re Southern Hosiery Mill, Inc.*,
2011 WL 2651580 (Bankr. W.D.N.C. 2011)
Factor that prepetition had acquired debtor's accounts and a security interest in the debtor's credit balance to secure various obligations could not setoff against that credit balance prepetition trade debt that the factor acquired postpetition. Section 553 prohibited the setoff and sections 552, 364, and 549 prohibited the factor from claiming a security interest in the credit balance to secure the trade debt.

321. *In re McKenzie*,
2011 WL 6140516 (Bankr. E.D. Tenn. 2011)
Even though time for commencing avoidance action had expired, trustee could use his status as a lien creditor to successfully resist motion for relief from the stay by a creditor with an unperfected security interest.

Sales of Assets

322. *River Road Hotel Partners, LLC v. Amalgamated Bank*,
651 F.3d 642 (7th Cir. 2011)
Debtor cannot under § 1129 cram down plan that calls for sale of encumbered assets free and clear without allowing the secured claimants to credit bid; such a sale procedure does not provide the secured claimants with the indubitable equivalent of their claims. Decision disagrees with *In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010).

323. *In re Namco Capital Group, Inc.*,
2011 WL 2312090 (C.D. Cal. 2011)
The Ninth Circuit BAP decision in *Clear Channel* is unpersuasive; appeal of a bankruptcy court order authorizing a sale of assets free and clear of a creditor's lien under § 363(f) is moot after the sale is consummated.

Discharge, Dischargeability & Dismissal

324. *In re Bailey*,
2011 WL 6141644 (6th Cir. 2011)
Reaffirmation agreement that bank and debtors executed and court approved was voidable for mutual mistake because it was based on the false assumption that the bank held secured claims in real property and a truck, but the truck was later stolen and the bank settled an action to avoid mortgage, thereby waiving its lien.

325. *In re Asbury*,
2011 WL 44911 (Bankr. W.D. Mo. 2010)
Debt of debtor-wife to bank was nondischargeable because bank reasonably relied on borrowing base certificate signed by husband indicating that couple owned 4,667 head of cattle when, in fact, they owned no more than 2,000 head of cattle. The couple were partners in the cattle business and the wife should have known of the misrepresentation given that she signed the note and security agreement, which included a representation that she owned the collateral.

326. *In re Ferris*,
447 B.R. 516 (Bankr. E.D. Va. 2011)
Used car dealer who presented certificates of title to lender when each loan was consummated thereby represented that he was in possession of the vehicles and would not transfer them without first obtaining the certificates from the lender and repaying the amount owed. The dealer knew these representations were false as to 72 vehicles; the debtor had a history and practice of falsely representing online to the DMV that the dealer had the certificates, so that the dealer could transfer record title to buyers and sell the vehicles out of trust. Thus the dealer's debt was nondischargeable under § 523(a)(2).

327. *In re Chachula*,
2011 WL 2551187 (Bankr. N.D. Ill. 2011)
Because bank's security agreement with car dealer expressly provided that proceeds from any disposition of collateral "shall be held in trust," not commingled with other funds, and immediately paid to the bank, dealer's failure to remit proceeds to the bank could be both fraud in a fiduciary capacity and embezzlement, rendering the obligation nondischargeable under § 523(a)(4).

328. *In re Goldstein*,
2011 WL 5240335 (Bankr. N.D. Ill. 2011)
Even though lender's security agreement expressly provided that the debtor car dealership held proceeds of inventory in trust for the lender, the debtor's failure to remit the proceeds of vehicles to the lender did not render the debt nondischargeable under § 523(a)(4). Inclusion of trust language in a security agreement does not change the debtor-creditor relationship into a fiduciary one and *In re Strack*, 524 F.3d 493 (4th Cir.2008), is unpersuasive on this point. Even if a fiduciary relationship could be created, the agreement here did not require the debtor to segregate the vehicle proceeds and turn them over to the lender; it merely required the debtor to pay down the secured obligation within 48 hours of a sale of collateral.

329. *In re Mills*,
2011 WL 4055169 (Bankr. N.D. Miss. 2011)
Debtor's intentional refusal to remit insurance proceeds of collateral to secured party was willful and malicious, rendering the debt nondischargeable.

330. *In re Doughty*,
2011 WL 4368689 (Bankr. S.D. Ind. 2011)
Debt was nondischargeable under § 523(a)(6) because the debtor concealed the collateral, lied under oath about what he did with it, and then sold the collateral without the creditor's consent and without remitting the proceeds to secured party in accordance with the security agreements.

331. *In re White*,
2011 WL 4368390 (Bankr. D.C. 2011)
Debtor's resistence to repossession efforts after lifting of automatic stay did not warrant dismissal of bankruptcy case.

Avoidance Powers

– Preferences

332. *In re J. Silver Clothing, Inc.*,
453 B.R. 518 (Bankr. D. Del. 2011)
Security interest perfected 28 days after loan was made was substantially contemporaneous even though outside the ten-day period then provided for in § 547(e) because the delay was due to inadvertent error – the initially submitted financing statement was rejected for failure to properly list the debtor's address but a second financing statement was promptly filed after receipt of the rejection letter – and there was no prejudice to third parties.

333. *In re Knowling*,
2011 WL 2632153 (Bankr. D. Or. 2011)
Security interest in equipment created and perfected within the preference period was not in exchange for new value because the security interest in a boathouse that was purportedly released was admittedly invalid because the debtor actually co-owned the boathouse, and even if the creditor had a security interest in the boathouse, that security interest was unperfected because it was not noted on the certificate of title. No explanation of why the debtor could not have granted a security interest in the debtor's co-ownership rights in the boathouse.

334. *In re Brooke Corp.*,
458 B.R. 579 (Bankr. D. Kan. 2011)
Bank that originated loan and then sold 94.44% of it to participants but which continued to service the loan by receiving the debtor's payments and distributing them to the participants was a conduit, not an initial transferee, of the portion of payments distributed to participants and could not, therefore, be liable for preferential payments so distributed. Even though the bank had some discretion in how to enforce the loan, the bank had no discretion in how to disburse the payments. The fact that the bank was the payee of the note, commingled the funds received, and filed a proof of claim for the entire amount due did not prevent the bank from being a mere conduit.

335. *In re LGI Energy Solutions, Inc.*,
2011 WL 6090133 (8th Cir. BAP 2011)
Prepetition payments of utility bills by utility management service on behalf of its customers were preferential transfers of the management service's property even though the management service was contractually required to hold the funds received from customers in trust pending payment of utility bills. The management service, contrary to its contractual obligations, commingled clients' funds with revenue from other sources and, before payment of the utility bills, had depleted the account into which the clients' funds had been deposited, with the result that tracing the transfers to the clients' funds was impossible.

336. *In re Musicland Holding Corp.*,
2011 WL 6880675 (Bankr. S.D.N.Y. 2011)
The new value defense to the preference-like cause of action in the Uniform Fraudulent Transfer Act, which is based on § 547(c)(4), does not apply if the new value is provided by an affiliate of the transferee, rather than the transferee itself.

– Strong-Arm Powers

337. *In re Carter*,
2011 WL 5080153 (Bankr. N.D. Iowa 2011)
Creditor that obtained judicial lien on a vehicle and then, in order to conduct a sheriff's sale, paid off the bank with a security interest in the vehicle, was subrogated to the bank's rights and thus held both a judicial lien and a security interest. Accordingly, the debtor could not use § 522(f)(1)(A) to avoid the creditor's security interest and claim an exemption in the vehicle.

– Fraudulent Transfers

338. *Perkins v. Haines*,
661 F.3d 623 (11th Cir. 2011)
Payments to investors by debtor who ran a Ponzi scheme are necessarily made with fraudulent intent. However, investors are entitled to good faith defense and, for that purpose, the investors gave value in exchange for the transfer by implicitly relinquishing claim for restitution or fraud, even though the investment was structured as equity, not debt. Thus, the investors were protected to the extent that payment returned their initial investment but was not protected to the extent the payment represented fictitious profits from the scheme.

339. *In re Adelphia Recovery Trust*,
634 F.3d 678 (2d Cir. 2011)
Because rescission is not the only remedy for an avoided fraudulent transfer, bankruptcy court's approval of transaction in which secured loans purchased prepetition by the debtor were settled and the collateral sold free and clear did not bar the debtor in possession – under the doctrines of ratification or *res judicata* – from bringing claim that the loan purchases were avoidable transfers for less than reasonably equivalent value. However, counsel's position during the hearing on the motion to approve the sale that the debtor in possession had the sole interest in the loans was a basis for judicial estoppel.

340. *In re TOUSA, Inc.*,
444 B.R. 613 (S.D. Fla. 2011)
Lenders that shortly before bankruptcy received the proceeds of a new loan secured by subsidiaries' assets did not have fraudulent transfer liability for the funds received. The funds were neither not property of the subsidiaries not controlled by the subsidiaries, even though the subsidiaries were co-borrowers. Moreover, the subsidiaries received reasonably equivalent value in indirect benefits: the opportunity to avoid default and bankruptcy.

341. *In re Doctors Hosp. of Hyde Park, Inc.*,
2011 WL 6019336 (Bankr. N.D. Ill. 2011)
On remand after the decision in *Paloian v. LaSalle Bank*, 619 F.3d 688 (7th Cir. 2010), summary judgment denied on whether: (i) subsidiary created as bankruptcy-remote entity was truly a separate entity for fraudulent transfer purposes even though corporate formalities were observed given the apparent lack of separate operations; and (ii) sale of accounts was a true sale.

342. *In re Creative Capital Leasing Group, LLC*,
2011 WL 1042666 (Bankr. S.D. Cal. 2011)
Funds paid by LLC on credit cards issued to its sole member were avoidable transfers for less than reasonably equivalent value because even though the member deposited funds borrowed on the cards in the LLC's bank accounts, those deposits were capital contributions, not loans, and thus the LLC was never liable for the credit card debt.

343. *In re Nieves*,
648 F.3d 232 (4th Cir. 2011)
Although subsequent transferee for value of fraudulently transferred property did not have actual knowledge of facts that would lead a reasonable person to believe that the transfer was voidable, the transferee nevertheless did not act in good faith because numerous facts known to it would have led a reasonable person to inquire further as to the voidability of the transfer. Such facts included the debtor's confusion about the name of his own company, the fact that the certificate of good standing was a month old when the loan was made, and the fact that the transferee never conducted any title search to confirm ownership by the debtor's company and, if it had conducted such a search, would have discovered a transfer to the debtor's brother for no consideration shortly before the debtor's bankruptcy and a subsequent transfer by the debtor's brother for substantially less than market value.

344. *In re Amerigraph, LLC*,
456 B.R. 349 (Bankr. S.D. Ohio)
Although waiver of fraudulent transfer claims in cash collateral order would normally be binding on a trustee after conversion if the order states that its provisions will survive conversion, such a waiver is not binding if parties in interest did not receive adequate notice of the proposed waiver in the motions that gave rise to the order.

– Post-Petition Transfers

345. *In re Indian Capitol Distributing, Inc.*,
2011 WL 4711895 (Bankr. D.N.M. 2011)
Debtor's unauthorized use of cash collateral to pay vendor for goods sold post-petition was not avoidable because there was no injury and thus no case or controversy for the court to have jurisdiction over. Disagrees with *In re Delco Oil, Inc.*, 599 F.3d 1255 (11th Cir. 2010).

346. *In re Billesbach*,
2011 WL 3295299 (Bankr. D. Neb. 2011)
Trustee could avoid lien on truck that was perfected by notation on certificate of title eight days after the bankruptcy petition was filed and one day after expiration of the 30-day period provided for in §§ 362(b)(3) and 547(e)(2)(A). The section 547(c)(1) defense for a substantially contemporaneous exchange does not apply to post-petition transfers.

347. *In re C.W. Mining Company*,
2011 WL 4597443 (Bankr. D. Utah 2011)
Bank that, post-petition, liquidated collateralized certificate of deposit and applied proceeds to secured loan could be liable for amount of the transfer but would have a security interest in the funds returned, making avoidance rather pointless in a Chapter 7 case.

– Protection for Settlement Payments

348. *In re Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*,
651 F.3d 329 (2d Cir. 2011)
Debtor's early redemption of short-term commercial paper through a financial intermediary at significantly above-market price were "settlement payments" under § 546(e) even though not conducted in the ordinary course of business and even though there may not have been a purchase or sale of the commercial paper. The commercial paper qualified as a "security" under the Bankruptcy Code, even though it was not a "security" under the 1934 Act, and the redemption was a "transaction" in securities.

349. *In re Quebecor World (USA) Inc.*,
453 B.R. 201 (Bankr. S.D.N.Y. 2011)
Given the binding nature of the Second Circuit's decision in *Enron Creditors Recovery Corp.*, the repurchase of redemption of privately placed notes that was made to a financial institution acting as agent for the noteholders was a "settlement payment" even though the transaction created no settlement risk.

350. *In re MacMenamin's Grill Ltd.*,
450 B.R. 414 (Bankr. S.D.N.Y. 2011)
Funds wired directly from lender to three shareholders' bank accounts in connection with stock purchase transaction that allegedly qualified as a constructively fraudulent transfer was not insulated from avoidance by § 546(e). Despite the broad language of the definition of "settlement payment," § 546(e) does not apply to a private stock sale that has little relationship with the provision's goal of reducing systemic risk to financial intermediaries and the financial markets. Section 546(e) also does not apply to the loan incurred by the debtor in connection with the transaction.

Equitable Subordination

351. *In re QuVIS, Inc.*,
446 B.R. 490 (Bankr. D. Kan. 2010)
Secured party that re-perfected its own security interest after financing statement filed on behalf of multiple secured creditors had lapsed would not be equitably subordinated to the other, now unperfected, creditors. Although the secured party appointed its managing director to serve as a director of the debtor, that did not make the secured party an insider of the debtor. Moreover, the secured party's actions with the debtor were all done at arm's length. While the secured party did re-file to protect its own interest, the secured party did not orchestrate the lapse or have a duty to inform other creditors of the lapse. Indeed, several other creditors re-filed before the secured party did and the secured party had actually argued in court, albeit unsuccessfully, that the re-filings benefitted all the creditors, not merely those who re-filed.

Reorganization Plans

352. *In re DBSD North America, Inc.*,
634 F.3d 79 (2d Cir. 2011)
Plan that called for senior creditors to gift shares and warrants to interest holders could not be confirmed over the objection of junior creditors. The gift was "under the plan" and was at least partly "on account of the interest holders' equity. Bankruptcy court properly rejected and re-designated the vote of competitor that purchased the first lien debt not to obtain payment but to enter into a strategic transaction with the debtor.

353. *River Road Hotel Partners, LLC v. Amalgamated Bank*,
651 F.3d 642 (7th Cir.), *cert. granted*, 2011 WL 3499633 (2011)
Plan that calls for sale of collateral without allowing the secured party to credit bid cannot be confirmed over the secured party's objection under § 1129(b)(2)(A)(iii); the right to the proceeds of such a sale is not the "indubitable equivalent" of the secured claim.

354. *In re Tribune Co.*,
2011 WL 5142420 (Bankr. D. Del. 2011)
Absent substantive consolidation, confirmation requirement that proposed plan must be accepted by at least one impaired class had to be satisfied on a debtor-by-debtor basis, as to each debtor in the joint plan.

355. *In re SW Boston Hotel Venture, LLC*,
460 B.R. 38 (Bankr. D. Mass. 2011)
Portion of subordination agreement granting senior lender the right to vote the junior lender's claim in bankruptcy was unenforceable.

356. *In re Croatan Surf Club, LLC*,
2011 WL 5909199 (Bankr. E.D.N.C. 2011)
Portion of subordination agreement granting senior lender the right to vote the junior lender's claim in bankruptcy was unenforceable.

357. *In re Weeks*,
2011 WL 144141 (Bankr. E.D. Okla. 2011)
Sole shareholder of corporation could dissolve the corporation, become owner of its equipment, and then modify the secured claim of the equipment lender in the shareholder's Chapter 13 bankruptcy. Because the equipment lender was adequately protected, relief from the stay was not appropriate.

Other Bankruptcy Matters

358. *In re Avondale Gateway Center Entitlement, LLC*,
2011 WL 1376997 (D. Ariz. 2011)
Intercreditor agreement that "subrogated" senior lender to junior lender "with respect to [junior lender's] claims against Borrower" was sufficient to give the senior lender the right to vote junior lender's claim in the debtor's reorganization proceeding.

GUARANTIES & RELATED MATTERS

359. *Stokes v. Southern States Co-op., Inc.*,
651 F.3d 911 (8th Cir. 2011)
Creditor with guaranteed note could not have an objectively reasonable belief that it could allow related entity to intercept the debtor's payments by check and credit them to a unguaranteed note, and thus could be liable for malicious prosecution for its unsuccessful action against the guarantor.

360. *Kearney Const. Co., LLC v. Bank of America*,
2011 WL 693573 (M.D. Fla. 2011)
Secured creditor that had replevied collateral could not pursue guarantors until it completed a sale of the collateral.

361. *Haggard v. Bank of the Ozarks*,
2011 WL 145194 (N.D. Tex. 2011)
Guaranty agreement that unconditionally guaranteed "the last to be repaid $500,000.00 of the principal balance of the Loan" did not require that the creditor, before seeking payment from the guarantor, to collect or forgive enough of the principal to bring the balance due to $500,000 or less.

362. *Black Warrior Minerals, Inc. v. Fay*,
2011 WL 3375659 (Ala. 2011)
Guaranty agreement that first stated that it covered "all existing debt as of the date hereof and all future obligations" and then stated that, in consideration of a $1.2 million advance, the guarantor "guarantees the prompt payment of said amounts" was not capped at $1.2 million. The second statement did not purport to limit the first, merely to elaborate on the debt.

363. *GECC v. Delaware Machinery & Tool Co., Inc.*,
2011 WL 1899203 (S.D. Ind. 2011)
Guarantor of equipment leases had no fraudulent inducement defense merely because the lessor had represented that the lease agreement would be treated as a lease, not as a secured sale; fraudulent inducement cannot be based no the legal effect of the agreement. Guarantor also had no defense based on the lessor's failure to perfect because the guaranty agreement expressly stated that the guaranty obligation would be unaffected by a failure to perfect.

364. *U.S. Federal Credit Union v. Stars & Strikes, LLC*,
2011 WL 1466383 (Minn. Ct. App. 2011)
Individuals who guaranteed existing and future debt of LLC they owned were liable for debts incurred by LLC while under the control of a court-appointed receiver.

365. *In re Trico Marine Services, Inc.*,
450 B.R. 474 (Bankr. D. Del. 2011)
Make-whole payment obligation resulting from early repayment of loan debt was a form of liquidated damages, not unmatured interest, and thus was not disallowed under § 502(b)(2). However, because guarantor's liability was limited to "the unpaid interest on [and] the unpaid balance of the principal of" the loan, guarantor was not liable for the make-whole payment.

366. *Forrest v. Spicewood Development, LLC*,
2011 WL 468027 (W.D.N.C. 2011)
Guarantor whose pledged CD was foreclosed upon and who then purchased the debtor's note from the creditor was subrogated to the creditor's mortgage and could use it obtain contribution for the full amount paid (*i.e.*, both the value of the CD and amount paid for the note) from entity that did not guaranty the debt but had provided the mortgage.

367. *In re Buckhead Oil Co., Inc.*,
454 B.R. 242 (Bankr. M.D. Ga. 2011)
Provision in guaranty agreement by which guarantor agreed "he shall have no right of subrogation, reimbursement or indemnity whatsoever and no 'claim' against Borrower in any [bankruptcy] proceeding" was enforceable, and thus guarantor who paid the borrower's obligation had no claim in the borrower's bankruptcy case.

368. *Textron Financial Corp. v. Ship and Sail, Inc.*,
2011 WL 344134 (D.R.I. 2011)
Jury waiver clause in loan agreement was not binding on guarantors, whose guaranty agreements contained no such clause.

369. *Groth Family Limited Partnership v. TD Bank*,
2011 WL 6268423 (Conn. Super. Ct. 2011)
Guarantors who signed guaranty when loan agreement was executed were bound by waiver of right to jury trial contained in loan agreement but not included in guaranty.

370. *Chemical Bank v. Long's Tri-County Mobile Homes*,
2011 WL 521158 (Mich. Ct. App. 2011)
Guarantors of credit agreement to mobile home dealership did not have defense based on creditor's failure to obtain manufacturer buy-back agreements because that failure related to a small number of mobile homes and was not a material breach.

371. *Paul v. Home Bank*,
953 N.E.2d 497 (Ind. Ct. App. 2011)
Integration clause in replacement guaranty agreement for senior loan did not affect or discharge earlier guaranty of junior loan made by the same creditor.

372. *Leo v. Spotted Zebra, Inc.*,
2011 WL 1562406 (N.J. Ct. App. 2011)
Written guaranty was unenforceable because there was no meeting of the minds. The guarantor intended to guaranty a loan to a corporation and did not intend the guaranty to cover loans previously made to a different individual.

LENDING, CONTRACTING & COMMERCIAL LITIGATION

373. *U.S. Bank v. Ibanez*,
941 N.E.2d 40 (Mass. 2011)
Mortgage noteholders were not entitled to enforce the mortgages non-judicially because they failed to prove that they had received an assignment of the mortgages. In Massachusetts, assignment of a mortgage note does not carry with it the assignment of the mortgage. No citation to or discussion of § 9-607(b).

374. *Residential Funding Co, LLC v. Saurman*,
2011 WL 1516819 (Mich. Ct. App. 2011)
MERS is not permitted to conduct non-judicial foreclosure of mortgage held in its name because it was not the owner of the note and the applicable state statute does not permit an agent of the noteholder to foreclose non-judicially.

375. *In re Gluth Bros. Construction, Inc.*,
451 B.R. 447 (Bankr. N.D. Ill. 2011)
Mortgagee that had been paid in full was required under state law to record release even though it had already been sued to avoid some payments and the mortgage expressly indicated that the lien is reinstated if the mortgagee is required to disgorge any payment.

376. *Bloomfield State Bank v. United States*,
644 F.3d 521 (7th Cir. 2011)
Mortgagee's interest in rents collected by court-appointed receiver after notice of federal tax lien was filed had priority in the rents because they were proceeds of the underlying real property.

377. *Kreisler & Kreisler, LLC v. National City Bank*,
657 F.3d 729 (8th Cir. 2011)
Promissory note providing for a variable "annual interest rate" based on the lender's prime "per annum" rate, to be computed on a 365/360 basis was neither ambiguous nor misleading even though the 365/360 method results in an effective interest rate of 1.01389 times the stated rate in a non-leap year.

378. *McDonald v. Clay*,
2011 WL 6396526 (Ca. Ct. App. 2011)
Because the buyer's promissory note was itself unambiguous, the parol evidence rule prevented consideration of a contemporaneously executed purchase agreement that contained a recital stating that the purchase was "without recourse," even though writings are to be read together if they relate to the same matter and are executed by the same parties as parts of one transaction.

379. *Wells Fargo Bank v. Lake of the Torches Economic Development Corp.,*
658 F.3d 684 (7th Cir. 2011)
Trust indenture used to finance tribal casino was void for lack of advance approval by the National Indian Gaming Commission because the indenture, taken as a whole, constituted a management contract due to the fact that it: (1) required that casino gross revenues be deposited daily in a deposit account controlled by the trustee, subject to many conditions on allocation and disposition; (2) required bondholder consent prior to certain capital expenditures; (3) allowed bondholders to require the corporation to employ an independent management consultant if the debt service ratio fell below a specified level; (4) limited the tribal corporation's ability to replace executive management without the prior consent of bondholders; and (5) upon default, allowed bondholders to require the corporation to hire new management.

380. *First National Mortgage Co. v. Federal Realty Investment Trust*,
631 F.3d 1058 (9th Cir. 2011)
"Final Proposal" signed by both parties and providing that "[t]he above terms are hereby accepted by the parties subject only to approval of the terms and conditions of a formal agreement" created an enforceable agreement to lease real estate with both put and call options, even though the term of the lease was not specified: the lease term could be implied from the put and call options.

381. *Purcell Tire & Rubber Co. v. MB Financial Bank*,
2011 WL 1258299 (E.D. Mo. 2011)
Bank's loan commitment letter was an enforceable contract. Despite clause in letter providing that the letter's terms "may not be waived or modified unless such waiver or modification is expressly stated . . . in writing," factual dispute prevented summary judgment on whether the bank waived the requirement that the borrower provide a first-priority lien on its assets.

382. *Interpharm, Inc. v. Wells Fargo Bank*,
655 F.3d 136 (2d Cir. 2011)
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.

383. *Salmons, Inc. v. First Citizens Bank & Trust Co.*,
2011 WL 4738656 (E.D. Va. 2011)
Borrower alleged a cause of action for unfair and deceptive practices against bank that, in an apparent effort to obtain additional collateral and after having already made several loans to the borrower to meet certain margin calls, inserted in the final loan and security agreement a new condition that prohibited the use of funds for margin calls and failed to disclose that condition, while knowing that the borrower's purpose for the funds was to make margin calls.

384. *In re Southern Golf Partners, LLC*,
452 B.R. 306 (Bankr. N.D. Ga. 2011)
Borrower whose secured line of credit from a bank was assigned to another institution after the FDIC took over the bank had no cause of action or defense against the assignee for the bank's failure to honor its commitment on two letters of credit because only the line of credit was assigned, not the commitment agreement, and the two arrangements were not "inextricably intertwined."

385. *In re B.C. Rogers Poultry, Inc.*,
455 B.R. 524 (Bankr. S.D. Miss. 2011)
Equipment lessor did not misrepresent the equipment covered by the lease by failing to mention that 10 of the 169 items were or might be subject to a prior lease, and thus lessor had no duty to provide correct information when it became known. Although Article 5 leaves open the possibility that an applicant could be subrogated to an account party's claim for breach against a beneficiary that drew on a letter of credit, subrogation was inappropriate in this case because the lessor/beneficiary was not unjustly enriched.

386. *American Bank of St. Paul v. TD Bank*,
2011 WL 1810643 (D. Minn. 2011)
Bank that learned of borrower's insolvency and fraud through its own investigation, not through its relationship with the borrower, had no duty to disclose that information to syndicate formed to provide take-out financing. By releasing its security interest in certain shares of stock so that the syndicate to take a prior interest, the bank did not represent that the stock had value. However, the bank may have aided and abetted the borrower's fraud by releasing its security interest and purchasing a share of the take-out loan to enable the take-out loan to close when it knew of the borrower's fraud.

387. *Liberty Media Corp. v. Bank of New York Mellon Trust Co.*,
2011 WL 1632333 (Del. Ch. Ct. 2011)
Indenture term that prohibited obligor from transferring substantially all of its assets unless the successor entity assumed the obligations under the indenture would not be violated by proposed split-off of certain assets because the assets were admittedly not, by themselves, substantially all of the obligor's assets and the split off could not be aggregated with three previous transactions under the "step-transaction doctrine" because the none of the four transactions was connected contractually to any of the others, each of the transactions was a distinct corporate event separated from the others by a matter of years, and the obligor had not pursued a unified disaggregation strategy with a sufficiently well-defined starting point or a sufficiently definitive end result to warrant applying the step-transaction doctrine.

388. *VFS Leasing Co. v. J & L Trucking, Inc.*,
2011 WL 3439525 (N.D. Ohio 2011)
Lessor under finance lease of four trucks had no obligation, after lessee's default, to conduct a sale of the leased property in a commercially reasonable manner and made no implied warranties of quality to the lessee. Question of fact remained as to whether lessor made express warranties by conditioning the lessee's duty to accept the trucks on whether the trucks were "in good order and in conformance with any applicable purchase order or supply contract."

389. *SportChassis, LLC v. Broward Motorsports of Palm Beach, LLC*,
2011 WL 5429404 (W.D. Okla. 2011)
Consignment agreement that required the consignee to follow any written instructions from the consignor's secured party regarding return of the goods did not, in the absence of such instructions, authorize the consignee to ignore the consignor's instructions to return the goods. Accordingly, the consignee committed conversion by failing to return the goods upon the consignee's demand.

390. *Synectic Ventures I, LLC v. EVI Corp.*,
251 P.3d 216 (Or. Ct. App. 2011)
Because manager of creditor LLCs had actual authority to act on the creditors' behalf, amendment to loan agreement that manager executed with respect to loan made to manager's unrelated business was binding on the creditors.

391. *Silverhawk, LLC v. KeyBank*,
2011 WL 5120703 (Wash. Ct. App. 2011)
Borrower that paid the amount the bank requested for early termination of a swap agreement had no cause of action against the bank for failure to compute the fee pursuant to the terms of the swap agreement because the borrower had not provided the notification that invoked the early termination clause and the parties had therefore entered into an accord and satisfaction.

392. *Volvo Construction Equipment Rents, Inc. v. NRL Rentals, LLC*,
2011 WL 2490999 (D. Nev. 2011)
Settlement agreement covering "all manner of actions . . . claims and demands whatsoever, of whatever kind and nature, whether absolute or contingent, known or unknown, matured or unmatured, at law, in equity" did not cover contractual debt acquired by assignment seventeen months after the settlement agreement was signed.

393. *Radiant Skincare Clinic v. Moore*,
2011 WL 11021 (Cal. Ct. App. 2011)
Clause in contract between medical services corporation and independent contractor by which independent contractor promised to indemnify corporation for expenses, including attorney's fees, incurred in defending claims of third persons, did not give corporation a right to attorney's fees incurred in successfully suing the independent contractor for breach and related torts.

394. *Bank of America v. Jill P. Mitchell Living Trust U/A DTD 06.07.1999*,
2011 WL 5386379 (D. Md. 2011)
Fixed-rate loan agreement that required the borrowers, upon prepayment, to also pay a breakage fee defined as "the cost or expense incurred by the Bank as a result of the payment," was ambiguous as to whether the fee included the prospective loss the bank incurs due to a decline in interest rates and the resulting inability to re-lend the funds at the fixed rate.

395. *Sumitomo Mitsui Banking Corp. v. Credit Suisse*,
933 N.Y.S.2d 234 (N.Y. App. Div. 2011)
Summary judgment denied on whether loan administrator received a "cash distribution," which had to be paid to participants, or a "non-cash distribution," which could be distributed in kind, when the debtor refinanced its obligations.

396. *In re Sokolik*,
635 F.3d 261 (7th Cir. 2011)
Loan agreement in which debtor promised to pay "all reasonable collection costs, including attorney's fees and other charges, necessary for the collection of any amount not paid when due" covered attorney's incurred in successfully challenging the dischargeability of the debt.

397. *In re Steel Network, Inc.*,
2011 WL 4002206 (Bankr. M.D.N.C. 2011)
Loan agreement that provided for the borrower to pay the lender's attorney's fees "in connection with the enforcement or preservation of any rights or remedies under [the loan documents" as well as those "related to the preservation, protection or enforcement of any rights" of lender in a bankruptcy proceeding did not cover attorney's fees incurred in defending an action for tortious interference with contract filed against the lender by a shareholder of the borrower.

398. *Synectic Ventures I, LLC v. EVI Corp.*
261 P.3d 30 (Or. Ct. App. 2011)
Creditor that sought award for attorney's fees in successfully bringing action on a promissory note and security agreement was not entitled to attorney's fees incurred in successful appeal because a contractual provision on attorney's fees must expressly reference appellate proceedings to cover fees incurred during an appeal.

399. *Dewaay v. Dallenbach*,
2011 WL 6656586 (Iowa Ct. App. 2011)
Partners who voluntarily paid required capital contribution of defaulting partner had no cause of action against the defaulting partner to recover that money because the partnership agreement did not provide for such relief.

400. *Capital One Bank v. Fort*,
255 P.3d 508 (Or. Ct. App. 2011)
Statute providing that any one-sided attorney's fee clause in a contract was reciprocal, thereby entitling the prevailing party to attorney's fees from the non-prevailing party, was fundamental policy of the state and overrode choice-of-law clause in consumer's credit card contract.

401. *½ Price Checks Cashed v. United Automobile Insurance Co.*,
344 S.W.3d 378 (Tex. 2011)
Because a check is a contract, holder of dishonored check that successfully sued the drawer is entitled to attorney's fees under state statute allowing a claimant to recover attorney fees in a suit on a contract; the statute does not conflict with Article 3.

402. *Fifth Third Bank v. Automobili Lamborghini S.P.A.*,
2011 WL 307406 (N.D. Ill. 2011)
Summary judgment denied on lender's unjust enrichment claim against debtor's supplier for initiating, two months after it received notification of the termination of debtor's line of credit, an ACH draft for a vehicle shipped prior to termination of the line of credit.

403. *Blue Gordon, C.V. v. Quicksilver Jet Sales, Inc.*,
2011 WL 2583651 (5th Cir. 2011)
Because, in the absence of instructions from the aircraft lessee, lessor may allocate payments in any manner it wishes that is fair an equitable, lessor was entitled to apply payments to debts in a way that did not cure timely lessee's default and thus no reasonable jury could find that lessor's termination of lease was unauthorized.

404. *Speedway Motorsports Intern. Ltd. v. Bronwen Energy Trading, Ltd.*,
706 S.E.2d 262 (N.C. Ct. App. 2011)
Because contracts related to a letter of credit transaction are deemed to be independent, forum-selection clause in agreement between applicant an issuer was inapplicable to action between issuer and confirming bank.

405. *AmerisourceBergen Drug Corp. v. Ciolino Pharmacy Wholesale Distributors, LLC*,
2011 WL 2039000 (E.D. Pa. 2011)
Because the parties' supply agreement, which lacked a forum-selection clause, "supercede[d] prior oral or written agreements by the parties that relate to its subject matter," the forum-selection clause in the earlier credit agreement between the parties was invalidated.

406. *AT&T Mobility LLC v. Concepcion*,
131 S. Ct. 1740 (S. Ct. 2011)
State law could not treat an arbitration clause as unconscionable and unenforceable merely because the clause prohibits classwide proceedings. The FAA permits agreements to arbitrate to be invalidated by generally applicable contract defenses – such as fraud, duress, or unconscionability – but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.

407. *Center of Hope Christian Fellowship v. Wells Fargo Bank*,
781 F. Supp. 2d 1075 (D. Nev. 2011)
Clause in agreement providing that the agreement's arbitration clause "does not limit the right of any party to . . . foreclose against real or personal property collateral" did not constitute a waiver of the right or obligation of any party to submit any dispute to arbitration, in part because the debtor disputed whether a default had occurred. Separate clause providing that no dispute concerning the debt will be submitted to arbitration unless the mortgagee so elects was substantively unconscionable because it was one-sided.

408. *Mims v. Global Credit and Collection Corp.*,
2011 WL 3586056 (S.D. Fla. 2011)
Debt collector could not enforce arbitration clause in contract between debtor and creditor, even though the clause purported to cover the creditor's "successors, assigns, agents and/or authorized representatives." The debt collector was not a successor or assign, it was not a third-party beneficiary, and because its agreement with the creditor expressly declared it to be an independent contractor, not "the agent or legal representative of" the creditor, it was also not an authorized representative.

409. *Rivera v. American General Financial Services, Inc.*,
259 P.3d 803 (N.M. 2011)
Arbitration clause in consumer loan contract that excepted foreclosure and repossession – the only remedies the creditor was likely to need – was so substantively unconscionable that it was void without considering whether the provision was also procedurally unconscionable.

410. *Wells Fargo Bank v. Maynahonah*,
2011 WL 3876255 (W.D. Okla. 2011)
Because tribe had agreed to contractual dispute resolution procedures, including arbitration, and waived the doctrines of exhaustion of tribal remedies, tribal Gaming Commission could not, through its rule-making authority, interfere with arbitration proceeding in which assignee of lessor's rights under a lease of casino equipment sought to enforce those rights.

411. *Schron v. Grunstein*,
917 N.Y.S.2d 820 (N.Y. Sup. Ct. 2011)
Option agreement and credit agreement executed the same day by substantially the same parties and later amended on the same day were to be regarded as separate agreements, in part because of the lack of cross-references and the existence of a merger clause in the option agreement. As a result, funding the loan pursuant to the credit agreement was not a condition precedent to the enforceability of the option agreement.

412. *ZBD Constructors, Inc. v. Billings Generation, Inc.*,
2011 WL 1327144 (S.D.N.Y. 2011)
Subordinated creditor could not bring declaratory judgment action against debtor to determine the amount of interest owing on the subordinated loan because the intercreditor agreement required the subordinated creditor to obtain the consent of the senior lenders before commencing any action relating to the subordinated debt and compliance with this condition was not rendered impossible – merely difficult and expensive – by the fact that the senior debt had been resold to thousands of bondholders all over the world.

413. *NSS Restaurant Services, Inc. v. West Main Pizza of Plainville, LLC*,
2011 WL 6382516 (Conn. Ct. App. 2011)
There was no consideration for existing lender's promise in intercreditor agreement to assume liability for unpaid portion of debt to junior creditor following foreclosure on the collateral.

414. *Asbury Carbons, Inc. v. Southwest Bank*,
2011 WL 1086067 (E.D. Mo. 2011)
Creditor that agreed to subordinate its loan to lender's loan, up to a maximum of $8 million, stated a claim for breach against lender for lending in excess of $8 million and then, after the debtor's default, blocking the debtor's payment to the creditor.

415. *West Ridge Group, LLC v. First Trust Co. of Onaga*,
414 Fed. Appx. 112 (10th Cir. 2011)
Loan agreement that provided that "Borrower may pay . . . a pro-rata share of any outstanding indebtedness to obtain a corresponding pro-rata partial release" of the mortgaged property required borrower to pay based on the relative value – not the relative acreage – of the parcel to be released.

416. *In re FH Partners, L.L.C.*,
335 S.W.3d 752 (Tex. Ct. App. 2011)
Although agreements to extend credit are not normally assignable by the debtor without the creditor's consent, the creditor's rights are assignable without the debtor's consent unless the agreements indicates to the contrary. As a result, bad debt specialist that acquired bank's interest in line of credit was entitled to enforce jury waiver clause.

417. *Sanders v. Ohmite Holding, LLC*,
17 A.3d 1186 (Del. Ch. Ct. 2011)
Creditor that had a security interest in 7.75% of membership units in LLC and which later received a complete assignment of those units and became a member, only to subsequently discover that the units have been diluted to 0.000775% of the total units, was entitled to inspect the books and records of the LLC for the period in which the dilution occurred. Nothing in the LLC agreement restricted members' rights to inspect records, the creditor had a proper motive – investigating a possible breach of the duty of loyalty – and members were not limited to inspecting books and records solely for the period in which they were members.

418. *Banc of America Leasing & Capital, LLC v. Sferas*,
2011 WL 1744943 (Cal. Ct. App. 2011)
Judgment creditor that had levied on deposit account held jointly by judgment debtor and his cousin had to return the funds because the judgment debtor had never made any deposits to or withdrawals from the deposit account and the cousin had added the judgment debtor's name to the deposit account for the purpose of transmitting the funds to the cousin's daughter in the event of the cousin's death, thereby proving that the deposit accounts were the property of the cousin despite being held in joint name.

419. *Beacon Tower Development, LLC v. Great Basin Technologies, LLC*,
2011 WL 835881 (D. Utah 2011)
Creditor had not exercised its right to convert promissory note obligation to equity by sending letter expressing intent to do so because the note expressly provided that conversion will "be deemed to have been effected as of the close of business on the date on which this Note was surrendered by Holder" and the creditor never surrendered the note. Consequently, creditor retained its rights to enforce the note.

420. *Ancile Investment Co. v. Archer Daniels Midland Co.*,
784 F. Supp. 2d 296 (S.D.N.Y. 2011)
Brazilian lender to fertilizer buyer had no cause of action against fertilizer supplier, which had received payment from the lender, for failure to endorse and deliver bills of lading to the lender, pursuant to parties' prior course of dealing, because the lender had no contract with the supplier and was not a third-party beneficiary of the supplier's contract with the buyer.

421. *Webster Business Credit Corp. v. Bradley Lumber Co.*,
2011 WL 5974582 (W.D. Ark. 2011)
Applying New York law, borrower could not have a claim against its secured lender for breach of the parties' loan agreement, based on a modification or waiver arising from course of dealing, because the agreement expressly provided that neither it nor any of its provisions "may be changed, modified, amended, waived, supplemented, discharged, cancelled or terminated orally or by any course of dealing."

422. *MBIA Insurance Corp. v. Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A.*, 2011 WL 1197634 (S.D.N.Y. 2011)

Portfolio manager for synthetic CDO had no liability for selling referenced securities after default because the contracts gave it such a right and the referenced securities, which were conspicuously omitted from the collateral description in the indenture, were not collateral. The portfolio manager might be liable for its failure to provide the requisite notice of the sale.

423. *In re National Century Financial Enterprises, Inc.*, 783 F. Supp. 2d 1003 (S.D. Ohio 2011)

Investment bank that assisted debtor and its special purpose subsidiaries in fraudulently marketing investment grade notes could not be liable to trust that succeeded to the debtor's causes of action because the fraud of the debtor's principals, who controlled the debtor, was chargeable to the debtor and therefore the debtor was *in pari delicto* with the investment bank. Prepetition payments to the investment bank were not avoidable preferences or fraudulent transfers because the investment bank was fully secured.

424. *Finn v. Centier Bank*, 2011 WL 4036107 (N.D. Ind. 2011)

Bank that purchased entire loan from originator that was engaged in a Ponzi scheme by overselling participations and, as servicer, paying off earlier investors with funds received from later investors, was not liable to disgorge payments subsequently received because the loan was real, the borrower paid the debt to the originator, and the originator held those funds in trust for the bank. The fact that the originator had commingled the funds with other monies before paying the bank was immaterial.

425. *Vreeland v. Ferrer*, 71 So. 3d 70 (Fla. 2011)

49 U.S.C. § 44112, which insulates lessors and lienors from vicarious liability for personal injury property loss on land or water resulting from the crash of an aircraft, preempts state law only to the extent the injury occurred to a person or property on the ground or water, not to passengers on the plane.

426. *Kirzhner v. Silverstein*, 2011 WL 4382560 (D. Colo. 2011)

Colorado statute, enacted in 2006, providing that corporate officers and directors "shall not have any fiduciary duty to any creditor of the corporation arising only from the status as a creditor" was not so clear as to abrogate the common-law rule that officers and directors do have a fiduciary obligation to creditors when the corporation is insolvent.

427. *Wavedivision Holdings, LLC v. Highland Capital Management L.P.*, 2011 WL 5314507 (Del. Super. Ct. 2011)

Party that contracted to buy debtor's assets had no cause of action against the debtors secured parties for intentional interference with contract because the secured parties would not have been paid in full from the sale proceeds and were therefore justified in refusing to consent to the sale and instead providing refinancing for the debtor's obligations.