2012 COMMERCIAL LAW DEVELOPMENTS

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- *Gardner v. Montgomery County Teachers Federal Credit Union*, 864 F.Supp. 2d 410 (D. Md. 2012) – A credit union argued that it did not violate the Truth in Lending Act by using depositors' accounts to set off their credit card obligations. This argument required that the credit union prove the existence of a security agreement creating a security interest in the deposit account. The credit union's submission of an unsigned application form purporting to grant the credit union a security interest in the depositor's account did not satisfy this requirement.

- *In re Moye*, 458 Fed. Appx. 385 (5th Cir. 2012) – Putative buyers of chattel paper consisting of retail installment contracts for vehicles did not in fact acquire any interest in the chattel paper because the buyers were not licensed as required by Texas law.

* We would like to express our deep appreciation to Stephen Sepinuck for his important contributions to these materials. We also miss our good friend Jeff Turner.

2. *Insurance*

   - *American Bank, FSB v. Cornerstone Community Bank*, 2012 WL 5195804 (E.D. Tenn. 2012) – An insurance premium financier wired funds to an insurance broker's operating account for payment of insurance premiums. The funds were then swept out of the broker's operating account by the depositary to cover the broker's unrelated debts to the depositary. The court held that Article 9 did not govern the transaction because Article 9 does not cover any transaction arising from a premium financing transaction or any transaction involving collateral consisting of unearned insurance premiums. Under the common law, the premium financier's security interest had priority because it was first in time and the funds were special deposits to which no banker's lien attached.

     Comment: Article 9 should cover the transaction once the funds were deposited to a deposit account.

3. *Consignments*

   - *In re Wolverine Fire Apparatus Co. of Sherwood Michigan*, 465 B.R. 808 (Bankr. E.D. Wis. 2012) – A truck dealer entered into and then abandoned a sales agreement with a buyer. Although the sales agreement had been abandoned, the seller allowed the buyer to take possession of the truck. The seller retained title, never placed the manufacturer's warranty in effect for a new buyer, continued to expose the truck to potential buyers through its listings on its inventory list and commercial trader database, kept its inventory lender informed of the truck's location, never sent a bill showing an amount due, and never listed the sales agreement for the truck on its accounts receivable. Thus the seller remained the owner of the truck. However, the transfer of possession was not a bailment, but rather a consignment because the truck remained for sale in the hands of the buyer, and thus the truck became available to the buyer's creditors and property of the buyer's bankruptcy estate.

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- *Vieira Enterprises, Inc. v. City of East Palo Alto*, 145 Cal. Rptr. 3d 722 (Cal. Ct. App. 2012), *modified and reh'g denied* 2012 Cal. App. LEXIS 972 (Cal. Ct. App. 2012), *request denied* 2012 Cal. LEXIS 11143 (Cal. Sup. Ct. 2012) – A seller of a manufactured home purported to retain title despite installing the home on a foundation. The seller did not in fact have any rights in the home because the home had become a fixture and the sales agreement "did not include any security instrument."

  Comment: The retention of file itself would constitute a "security interest." UCC § 2-401(1).

- *In re Vincent*, 468 B.R. 802 (Bankr. E.D. Va. 2012) – A creditor's security interest in windows and siding did not continue after they were installed in the debtor's home because windows and siding are "ordinary building materials." UCC § 9-334, Comment 3.

- *Epstein v. Coastal Timber Co., Inc.*, 711 S.E.2d 912, 75 U.C.C. Rep. Serv. 2d 85 (S.C. 2011) – UCC § 2-107(2) provides that timber subject to a contract of sale is goods. It follows that Article 9 applies to a security interest in timber subject to a contract of sale. A party with a mortgage on land that existed *prior* to any sale contract for the timber had a perfected interest.

5. *Leasing*

- *Delphi Automotive Systems, LLC v. Capital Community Economic/Industrial Dev. Corp.*, 2012 WL 967568 (Ky. Ct. App. 2012) – A lessor leased equipment to a lessee for 84 months. At the end of the lease the lessee would become the owner of the equipment. The transaction was a "sale" with a retained security interest. UCC § 1-203.

- *Brenner Financial, Inc. v. Cinemacar Leasing*, 77 U.C.C. Rep. Serv. 2d 440 (N.J. App. Div. 2012) – A non-terminable five-year lease of a limousine provided for payments of over $160,000. The lessee had an option to buy the car at the end for $600. The transaction was a "sale" with a retained security interest because the option price was nominal. UCC § 1-203.

- *In re Lichtin/Wade, LLC*, 2012 WL 3260315 (Bankr. E.D.N.C. 2012) – Non-terminable equipment leases that required the lessee to purchase the leased equipment at the end of the lease term for $1 created "security interests". UCC § 1-203.

- *In re Cherry*, 2012 WL 3252231 (Bankr. N.D. Ala. 2012) – A three-year automobile lease that provided the lessee with an option to purchase at the auto end for $650 was a "sale" and secured transaction because the option price was nominal in relation to the predicted value of the vehicle at the end of the lease term. Even though the lessee had a right to terminate early for $495.00 plus payment of "all outstanding payments due," this right did not terminate her obligations under the lease. UCC § 1-203.

- *Midwest Media Group, Inc. v. Fusion Entertainment, Inc.*, 825 N.W.2d 327 (Iowa Ct. App. 2012) – A 30-month lease of equipment included an option for the lessee to buy the equipment for the amount remaining due on the lease. The transaction was a true lease because the lessee could terminate it at any time upon payment of 30% of the remaining balance

due. The terms of the lease did not fit within the "safe harbor" test. The lessee did not argue that the economic realities effectively precluded it from terminating the agreement early.

6. *Sales*

- *In re Biondo*, 2012 WL 162285 (Bankr. D. Md. 2012) – Article 9 does not apply to a debtor's assignment of the debtor's right to termination benefits from his employer because the assignment was absolute, even though the debtor retained the right to a surplus after payment of the loan.

  Comment: It would seem that the debtor retained the benefits of ownership and that the transaction should be treated as creating a "security interest."

- *Calloway v. Comm'r of Internal Revenue*, 691 F.3d 1315 (11th Cir. 2012) – A transaction was structured as a three-year nonrecourse loan of stock during which the putative lender of the stock had no right to the return of the stock early and the putative borrower was entitled to dividends, the right to vote the shares, and the right to sell the shares. The transaction was for federal income tax purposes a "sale" with an option to repurchase at the end. (This decision has been the subject of significant criticism. The decision was abrogated by the New York State Court in *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mat. Inc.,* 962 N.E.2d 765 (N.Y. Ct. App. 2011)).

- *Palmdale Hills Property, LLC v. Lehman Commercial Paper*, Inc. (In re *Palmdale Hills Property, LLC*), 457 B.R. 29 (9th Cir. BAP 2011) – The court held that loan repurchase transactions documented under master repurchase agreements are true sales and not secured transactions. The court based its conclusion on the intent of the parties as stated in the MRA. The court cited *American Home*, 388 B.R. 69 (Bankr. D. Del. 2008) and *Granite Partners*, 17 F.Supp. 2d 275 (S.D.N.Y. 1998), in support of its conclusion. The court relied on statements in the MRA that the

parties intend the transaction not to be a loan, the use of the terms "Buyer" and "Seller", and the use of other purchase-related terms.

Comment: While the decision is consistent with prior repurchase agreement decisions, it is inconsistent with the true sale/property of the estate analysis typically applied for other types of transactions – in which the analysis typically focuses on the economic terms of the transaction, not the stated intent of the parties.

7. *Intellectual Property and Licenses*

- *In re Ciprian Ltd.*, 473 B.R. 669 (Bankr. W.D. Pa. 2012) – A liquor license is personal property under Pennsylvania law and a reference to "general intangibles" in the security agreement's description of the collateral was sufficient to cover the license.

8. *Tort Claims*

- *BMW Financial Services, NA, LLC v. Rio Grande Valley Motors Inc.*, 2012 U.S. Dist. LEXIS 142440 (S.D. Tex. 2012) – A secured party had a security interest in rights under a franchise agreement. The security interest attached to commercial tort claims arising from a dispute under the franchise agreement. UCC § 9-102, Comment 5.g, 9-109(d)(12).

B. *Security Agreement and Attachment of Security Interest*

1. *Security Agreement*

- *Hudson Insurance Co. v. Simmons Construction, LLC*, 2012 WL 869383 (D. Ariz. 2012) – An issuer of surety bond that had received several claims relating to insured construction projects was entitled to a temporary restraining order enjoining the contractor from transferring property other than in the ordinary course of business. The issuer was not entitled to an order that the contractor provide collateral because the issuer had not

alleged irreparable injury even though the issuer's agreement with the contractor provided for such relief and provided that the issuer would suffer irreparable injury upon the contractor's default.

- *Shales v. Pipe-Liners, Ltd.*, 2012 WL 4793499, 2012 U.S. Dist. LEXIS 145019 (N.D. Ill. 2012) – A lender's agreement with the debtor provided that the lender would have the rights of a secured party "[i]f an Event of Default occurs." This language did not create a present security interest. The lender did not have a security interest until default occurred.

- *Burd v. Antilles Yachting Services, Inc.*, 2012 WL 3329249 (V.I. 2012) – A boat owner who signed promissory note and security agreement in favor of former employer was entitled to an evidentiary hearing on whether he did so under duress resulting from a threat of prosecution for embezzlement. The boat owner did not necessarily ratify the agreements by making ten monthly payments because the threat of prosecution may not have ceased.

- *In re Bucala*, 464 B.R. 626 (Bankr. S.D.N.Y. 2012) – A promissory note signed in connection with the sale of a manufactured home provided: (i) the lender could file a motor vehicle lien against the home; (ii) interest would be added to the debt "and secured by the DMV lien", (iii) the lender was to discharge the lien when the note was fully paid; and, most importantly, (iv) if the borrower defaulted the home could be repossessed. The court held that these terms were sufficient to create a security interest. It did not matter that the note misidentified the model year of the manufactured home, especially given that the sales contract properly identified the model year and the documents should be read together.

- *In re Buttke*, 76 U.C.C. Rep. Serv. 2d 875 (Bankr. D.S.D. 2012) – An application for certificate of title and the certificate itself, each of which referred to a security interest, did not create or

provide for a security interest, and thus did not constitute a security agreement.

- *In re Westermeyer*, 2012 WL 2952176 (Bankr. N.D. Ill. 2012) – A signed application for a certificate of title identifying the debtor's parents as the holders of a lien on the debtor's mobile home qualified as a security agreement.

- *State v. Pressley*, 100 So. 3d 1058 (Ala. Civ. App. Ct. 2012) – A grandmother who provided funds for the purchase of a truck for which the certificate of title identified her grandson as the owner did not have a security interest because there was no authenticated security agreement. Consequently, the grandmother was not a protected *bona fide* lienholder for the purposes of a statute authorizing forfeiture of vehicles used in to convey a controlled substance.

- *In re Doctors Hospital of Hyde Park, Inc.*, 474 B.R. 576 (Bankr. N.D. Ill. 2012) – The court rejected the composite document rule and instead held that the scope of the collateral must be decided by the interpretation of the grant in security agreement alone. The court concluded that the collateral covered by the security agreement includes settlement proceeds because they are "related to facility" operations covered by grant.

- *In re Irvine-Hedrick*, 2012 WL 5728625 (Bankr. D.S.D. 2012) – A debtor's parents, who provided funds for the purchase of a vehicle, were listed as co-owners on the certificate of title. Eleven days before the debtor's bankruptcy filing, the parents were added as lienholders on the certificate. The parents did not have a security interest because the written agreement in which the debtor promised to repay them, and which described the vehicle, did not expressly grant a security interest or include any language suggesting the debtor intended to create or provide for such a security interest.

- *Bodiford v. Atlanta Fine Cars, Inc.*, 2012 WL 5428358 (N.D. Ga. 2012) – A certificate of title listed the seller of a car as a lienholder. However the buyer claimed not to have seen the certificate. The bill of sale listed the unpaid portion of the purchase price as "deferred cash pickup down payment," as opposed to "balance to be financed or cash due," which suggested that the transaction did not involve financing or a security interest. While the Precomputed Retail Installment Contract stated "You are giving a security interest in the vehicle being purchased," it did not bear the buyer's signature. None of the documents bore the term "security agreement," references collateral, or described either how the debt is to be repaid and or what happens in the event of default.

- *In re Dwek*, 2012 WL 6011625 (Bankr. D.N.J. 2012) – A security agreement described the collateral as "shares of stock or other securities or certificates as listed on Schedule A." It was not clear for purposes of summary judgment whether this sufficiently described the collateral because it was unclear whether the one page printout – containing an account number, the names of specific stocks, and the quantity held – that was attached to a letter dated five months *after* the security agreement was the "Schedule A" referred to in the security agreement.

2. *Obligation Secured*

- *In re Duckworth*, 2012 WL 986766 (Bankr. C.D. Ill. 2012) – A security agreement described the secured obligation as a note executed on December 13, 2008 was effective even though the note was actually executed and dated December 15, 2008. The court held that the security interest secured the note. The absence of a future advances clause in the security agreement prevented the collateral from also securing a second loan made in 2010 even though the second note expressly provided that "this Note is secured by Security Agreement dated December 13, 2008."

Comment: Nothing in Article 9 prevents the future advance clause from appearing in another document. UCC § 9-204(c).

- *Bank of America, N.A. v. Ledgercare, Inc.*, 2012 WL 1591800 (Conn. Super. Ct. 2012) – The debtor authenticated a security agreement in 2002 to secure an obligation on a promissory note, which was also secured by mortgage. The security agreement did not cover indebtedness under a 2007 line of credit despite language in the security agreement purporting to cover "all indebtedness and obligations now or hereafter owing from the Debtor to the Bank of whatever kind or nature, whether presently existing or hereafter arising" because the security agreement predated the note and mortgage and the reference to future debt was necessary to cover that transaction, not the line of credit.

  Comment: Article 9's future advance claim requirements are not as strict as the court suggests. UCC § 9-204(c), Comment 5.

- *In re Amerson*, 2012 WL 3249603 (Bankr. E.D.N.C. 2012) – A security agreement's dragnet clause provided that the collateral secured "any debt or obligation whatsoever incurred by any Borrower and payable to Secured Party." The court declined to grant summary judgment on whether the security interest secured obligations not listed in the loan agreement's outline of how proceeds of the collateral should be applied.

- *Union Bank Co. v. Heban*, 2012 WL 32102 (Ohio Ct. App. 2012) – The debtor authenticated security agreements that contained a cross-collateralization clause making the collateral secure all of the debtor's obligations to the secured party. The court held that the clauses were insufficient to overcome the fact that the promissory note for one loan – entered into *after* one secured transaction and before several others – expressly stated that the loan was unsecured.

3. *Rights in the Collateral*

   - *Summit Credit Union v. Furrer*, 344 Wis. 2d 520, 822 N.W.2d 737 (Wis. Ct. App. 2012) – A vehicle titled solely in a wife's name may not have been collateral for a creditor's loan to her husband because the wife did not authenticate the security agreement executed in connection with the loan. The wife and husband had authenticated a security agreement years earlier that granted a security interest in her car to secure their obligations under an open-ended credit plan. However, there was no evidence that the new loan was made under that plan.

   - *Branch Banking & Trust Co. of Virginia v. M/Y BEOWULF*, 2012 WL 464002 (S.D. Fla. 2012), 883 F.Supp. 2d 1199 (S.D. Fla. 2012) – A creditor did not obtain a security interest in a yacht because the putative debtor signed the security agreement only in his individual capacity. While he had owned the vessel at some point, at the time he signed the security agreement a wholly-owned corporation was the owner.

   - *In re Delta-T Corp.*, 475 B.R. 495 (Bankr. E.D. Va. 2012) – A debtor sold steel, which was identified when the debtor accepted the purchase orders further steel and was to be delivered to the buyers without movement and without delivery of a document of title. As a result title to the steel passed at the time of contracting. As a result, the sales generated accounts even though the buyer paid shortly after taking possession of the steel. The debtor's bankruptcy trustee, who avoided and preserved for the estate a creditor's perfected security interest in accounts, therefore had priority over creditors of the debtor who later obtained a writ of garnishment against the bank in which the sales proceeds had been deposited.

   - *Shellbird, Inc. v. Grossman*, 2012 WL 208053 (S.D. Ind. 2012) – A seller retained a security interest in a show horse. After the horse's death and the buyer's default, the seller was entitled to

possession of and the right to foreclose upon the horse's frozen semen, Transport Semen Certificates, and the buyer's trademark. The court did not discuss whether the semen, certificates, or trademark were proceeds of the horse or otherwise covered by the security agreement. UCC §§ 9-102(a)(64) and 9-203(f).

- *Jorday, Inc. v. Burggraff*, 2012 WL 1813436 (Minn. Ct. App. 2012) – A creditor did not acquire security interest in amusement park equipment from newly formed corporation because the corporation did not own the proposed collateral. The corporation later claimed a depreciation allowance for the equipment on its tax return and the principals of the corporation represented to the secured party that the corporation had acquired the equipment from the trust that had purchased it, and which they also controlled. However there was no bill of sale or other document of conveyance for the equipment from the trust to the corporation.

- *Sportsman's Guide, Inc. v. Havana National Bank*, 2012 WL 3028517 (C.D. Ill. 2012) – A creditor that financed an importer's inventory did not have a security interest in goods that the importer's supplier sold and delivered to another U.S. buyer even though the importer had allegedly prepaid the supplier for the goods because the importer never obtained possession or constructive possession of the goods.

- *In re WL Homes, LLC*, 476 B.R. 830 (D. Del. 2012) – A parent corporation did not have sufficient rights in a deposit account of its wholly owned subsidiary to grant a security interest in the deposit account. It was not sufficient that the parent 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. However; the subsidiary consented to the

use the deposit account as collateral because the person who signed the security agreement on behalf of the parent was also the president of the subsidiary.

- *Oxford Street Properties, LLC v. Rehabilitation Associates, LLC*, 141 Cal. Rptr. 3d 704 (Cal. Ct. App. 2012) – A creditor bank did not have a security interest in deposit accounts holding some of the proceeds of its refinancing loan to the debtor because the funds were earmarked to pay off a previous partner, and not as security for the loan. The debtor did not have sufficient rights in the deposit accounts to grant a security interest in them. In addition, the security agreement covered only those "deposit accounts . . . arising out of, or relating to, the acquisition, development, ownership, management or use of" certain real property, and the deposit accounts in question were not such accounts.

- *Odell v. Wallingford Mun. Federal Credit Union*, 2012 WL 4466339 (Conn. Super. Ct. 2012) – A credit union's security agreement with a customer purporting to grant the credit union a security interest in the customer's deposit account at the credit union could not, under 42 U.S.C. § 407(a), give the credit union an interest in social security benefits deposited into the account.

- *In re Buchanan Land & Cattle, Inc.*, 2012 WL 1658296 (Bankr. N.D. Tex. 2012) – A secured party had a security interest in "all entitlements, rights to payment, and payments, . . . under any . . . program of the United States Department of Agriculture." The security interest covered post-petition checks that were proceeds of prepetition collateral and thus the security interest was not cut off by Bankruptcy Code § 552. The secured party did not waive the security interest by endorsing the checks to the trustee.

- *In re Premier Golf Properties, LP*, 477 B.R. 767 (9th Cir. BAP. 2012) – A 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 neither rents nor proceeds of prepetition collateral.

- *In re Equipment Acquisition Resources Inc.*, 692 F.3d 558 (7th Cir. 2012) – A settlement approved by the bankruptcy reformed a security agreement between the parties to correct a typo. The underlying security interest was granted in the "Secured Party's" assets in favor of the secured party (not in the "Debtor's" assets). The court focuses its analysis, in part, on the view that the contract was so clearly flawed that it was per se ambiguous and should have put other creditors on notice that something was amiss. However, that settlement did not bind third party creditors who might challenge the security interest.

- *Dragt v. Dragt/DeTray, LLC*, 170 Wash. App. 1048 (Wash. Ct. App. 2012) – A law firm representing defendants involved in civil litigation did not have a security interest in funds that the defendants had previously deposited into the court registry because the funds were held *in custodia legis*, making them subject to further direction of the court, and state law made them immune from garnishment or a security interest. At most, the defendants had a contingent interest in the funds; the security interest could have attached to the funds only if the trial court awarded the funds to the defendants.

4. *Restrictions on Transfer*

- *Sola Salon Studios, Inc. v. Heller*, 2012 WL 5193201 (10th Cir. 2012) – A lease authorized the lessee to license the leased space to independent contractors who provided salon services. The lease prohibited the lessee from assigning the lease or any interest therein. The lessee could grant a security interest in its rights in the licenses because the restriction prohibited assignment of some or all of the real property interest that the lessee held and the assignment to the secured party did not transfer any interest in real property, just personal property.

- *In re McKenzie*, 2012 WL 4742708 (E.D. Tenn. 2012) – A creditor did not have a security interest in the debtor's LLC membership interest because the LLC operating agreement provided that no member could transfer its interest without the prior written consent of the LLC board and that any attempted transfer without consent was void. The creditor's evidence of subsequent consent did not prove that the requisite prior consent was given.

- *Meecorp Capital Mkts., LLC v. PSC of Two Harbors, LLC*, 2011 U.S. Dist. LEXIS 142576 (D. Minn. Dec. 12, 2011) – The Court held several LLC pledges invalid because the pledgors failed to satisfy technical notice and unanimous consent provisions in the governing documents and member control documents of the pledged entities. The court did not discuss whether any of these provisions might have been invalid restrictions on assignment under the UCC.

  Comment: The decision underscores the importance of detailed due diligence into ownership structures and restrictions on assignments when working on equity pledges, especially for LLCs and LPs.

- *Caymus Ventures, LLC v. Jundanian* (In re *Jundanian*), 2012 WL 1098544 (Bankr. D. Md. 2012) – The court interpreted the effect of transfer restriction an LLC membership rights on a trustee's sale.

- *In re Tracy Broad. Corp., Valley Bank and Trust Co. v. Spectrum Scan*, 696 F.3d 1051(10th Cir. 2012), *petition for cert. filed,* No. 12-1071 (U.S. Feb. 27, 2013) – A creditor with a security interest in the general intangibles of a federally licensed broadcasting company has a priority over unsecured creditors in the proceeds of the sale of the license after the company declares bankruptcy. The debtor operated a radio station in Wyoming under a license issued by the FCC. The debtor executed a promissory note secured by an agreement granting the creditor

a security interest in assets that included the debtor's general intangibles and their proceeds. The debtor filed a petition under Chapter 11. At issue was whether proceeds of the sale of the FCC license are property acquired before or after filing a bankruptcy petition. Under the Bankruptcy Code § 552, property acquired after a debtor files for bankruptcy is not subject to a prepetition security interest unless the newly acquired property can be characterized as proceeds of property acquired before filing and subject to the perfected security interest because FCC licenses, or any rights thereunder, may not be transferred without FCC permission, and such permission was not granted until after filing. The district court affirmed. The court held that property rights of this sort are a matter of state law, and Nebraska law recognizes that a security interest in the right to proceeds from the sale of a license whose transfer is subject to government approval…regardless of whether a sale is contemplated at that time."

- *Forman v. Carver Federal Savings Bank*, 2012 WL 6150631 (Bankr. D.N.J. 2012) – Even if state public utility law requires the consent of the Board of Public Utilities to a sanitation company's grant of a security interest in its sanitation collection vehicles – which it does not – that requirement is overridden by UCC § 9-406(f)(1), and therefore each of three secured parties did acquire a security interest in the vehicles.

- *In re Beauchamp*, 483 B.R. 268(Bankr. M.D. Ga. 2012) – Restrictions on the debtor's corporate stock that were properly created and noted on the certificates and that prohibited transfer to anyone for ten years and, at any time, to anyone other than the lineal descendants of the couple who created the business were unreasonable and invalid under Georgia law, in part because they gave the stockholder no means to realize the value of the stock. As a result, a creditor that purchased the stock prepetition at a judicial sale was the owner of the stock and the stock was not part of the debtor's bankruptcy estate.

- *Blythe v. Bell*, 2012 WL 6163118 (N.C. Super. Ct. 2012) – Absent something to the contrary in an LLC's operating agreement, under the North Carolina LLC Act, the assignment of a membership interest to another member transfers both the assignor's economic interest and control interest without the need for consent by the other members. However, an assignment to a non-member transfers only the economic interest unless the other members unanimously consent. As a result, an original member's transfer of its interest to two other members left the original member with no interest in the LLC and it lost status as a member. A subsequent transfer of another member's interest to the original member, without the consent of all the members, effectively transferred only the economic rights related to the LLC interest. The original member acquired no control rights and the transferor retained those rights.

C. *Description or Indication of Collateral and the Secured Debt — Security Agreements and Financing Statements*

- *BMW Financial Services, NA, LLC v. Rio Grande Valley Motors, Inc.*, 2012 WL 4623198 (S.D. Tex. 2012) – A financing statement covered "general intangibles," and thus covered the debtor's rights under its franchise agreement. When the debtor settled a claim against the franchisor for terminating the franchise, the settlement was proceeds of the franchise rights and the security interest in the settlement proceeds was perfected even if the claims were commercial tort claims. UCC § 9-3[__].

- *In re Doctors Hospital of Hyde Park, Inc.*, 474 B.R. 576 (Bankr. N.D. Ill. 2012) – The court would not consider documents executed contemporaneously with a security agreement to determine the scope of the collateral covered by the security agreement. The security agreement described the collateral as general intangibles "relating to the Facility" covered general intangibles relating to the operation of the debtor's medical facility and not just those relating to the land and building. Thus the

description covered the settlement of claims relating to the operation of the facility. However, to the extent those claims were tort claims, rather than contract claims, the security interest did not attach to the settlement proceeds because UCC § 9-108(e) requires a more specific description than by collateral type for commercial tort claims.

- *In re Equipment Acquisition Resources Inc.*, 692 F.3d 558 (7th Cir. 2012) – Even though parol evidence is not admissible to alter an unambiguous security agreement, it might be possible to reform a security agreement that erroneously purports to have the debtor grant the secured party a security interest in the secured party's own assets because such a transfer is impossible, does not make sense, and is ambiguous.

- *In re Ferry Road Properties, LLC*, 2012 WL 3888201 (Bankr. E.D. Tenn. 2012) – A mortgagee's interest in real property, including assignment of rents and leases, extended to proceeds consisting of a cause of action for damages to the property but not to a cause of action for loss of business income. The cause of action for loss of business income is a commercial tort claim, which must be described with some specificity and must exist when the security agreement is executed.

- *In re SOL, LLC*, 2012 WL 2673254 (Bankr. S.D. Fla. 2012) – A security agreement described the collateral to include "real estate listings and listing agreements and . . . the proceeds and products therefrom." The description did not include the debtor's contracts, receivables, and rights to commissions arising from sales not generated from the debtor's listings, and thus did not include rights to commissions from sales in which the debtor represented the buyer in the transaction.

- *In re TMST, Inc.*, 2012 WL 589572 (Bankr. D. Md. 2012) – A security agreement executed by debtor-loan servicer covered only the debtor's rights as "owner" under various servicing agreements, but not the debtor's rights as "servicer." Because

the owner had the right to terminate and replace the servicer without cause, the rights as owner were substantially more valuable than the rights as servicer. A combined sale by the debtor's bankruptcy trustee of all rights would be allocated 95% to the rights as owner and 5% to rights as servicer, with the former therefore qualifying as proceeds of the collateral.

- *Ford Motor Credit Co., LLC v. Hicks*, 2012 WL 1906419 (S.D.W. Va. 2012) – A security agreement that described the collateralized car by its correct vehicle identification number but by an incorrect model year was nevertheless sufficient. UCC § 9-108(a).

- *In re Madawaska Hardscape Products, Inc.*, 476 B.R. 200 (Bankr. D.S.C. 2012) – A security agreement that described the collateral to include the debtor's property "wherever located" covered property in both Maine and South Carolina even though the security agreement also contained a representation by the debtor that, at the time the agreement was authenticated, all property was located in Maine.

- *In re Salander-O'Reilly Galleries, LLC*, 475 B.R. 9 (S.D.N.Y. 2012) – Because the loan agreement excluded goods consigned to the debtor from the borrowing base, those goods might also be excluded as collateral even though the collateral description covered all inventory.

- *In re Grogan*, 476 B.R. 270 (Bankr. D. Or. 2012) – Even if the word "permanent" in the phrase "[a]ll trees, bushes, vines and other permanent plantings" modified "trees," the description reasonably described Christmas trees to be harvested because permanent crops are still crops and are only distinguished from annual crops. The security agreement also granted a security interest in the debtor's trademarks, which referred to Christmas trees and the debtor's primary business was the production of Christmas trees. A reasonable inquirer would not think the

language used excluded the primary source of income needed to repay the secured party's $7 million loan.

- *Harley-Davidson Credit Corp. v. Turudic*, 2012 WL 3314919 (D. Or. 2012) – A security agreement covering "the airframe, engine(s), propeller(s), and spare parts, if applicable, being purchased, and any of the following that are purchased and financed in connection with the Promissory Note" did not necessarily extend to the ballast installed by the debtor after the debtor had already purchased the aircraft because it was not clear that the ballast was "purchased and financed in connection with the Promissory Note."

- *In re Brown*, 479 B.R. 112 (Bankr. D. Kan. 2012) – A security agreement referred to the collateral as "investment property," "securities," and "7.000 shares of preferred stock in Kansas Medical Center, LLC," was sufficient even though the debtor's interest in the LLC was a general intangible, not investment property, securities, or stock, because the property covered was objectively determinable from the description.

- *In re Baker*, 465 B.R. 359 (Bankr. N.D.N.Y. 2012) – A financing statement that identified collateralized cows by name and ear tag number was effective even though the tag numbers were incorrect because the names were referenced in a certificate of registration for each cow, each certificate included a sketch of the cow's distinctive markings, and those markings were used to identify the cows. The fragility of the ear tag method of identifying cows is well known in the dairy industry and this is relevant to the searcher's duty in reviewing a financing statement.

- *Roswell Capital Partners LLC v. Beshara*, 436 F. Appx. 34 (2d Cir. 2011) (unpublished) – In this new iteration of the Roswell Capital UCC-termination case discussed in 2010, the court focused on the conversion of the original secured party's debt to equity. The court concluded that the conversion of debt to

equity terminated any security interest related to the debt and that even if the equity were to be converted back to debt, the holder would not be entitled to jump ahead of intervening secured creditors in terms of priority. The decision does not mention the earlier, troubling District Court opinion regarding debtor-authorized UCC termination statements. It does, however, support the conclusion that the termination statement conclusion was dicta.

- *Paloian v. LaSalle Bank, N.A. (In re Doctors Hosp. of Hyde Park, Inc.)*, 474 B.R. 576 (Bankr. N.D. Ill. 2012) – The newest iteration of this seemingly never-ending case focuses on whether settlement proceeds were included in the pledged collateral; an interesting example of how courts interpret security agreements.

- *Bank of America, N.A. v. Ledgercare, Inc.*, 2012 WL 1591800 (Conn. Super. Ct. 2012) – A dragnet clause in a 2002 security agreement did not cover a 2007 line of credit because court concluded that the 2002 agreement had insufficient language regarding future debt.

  Comment: The court's interpretation seems overly strict.

- *In re Inofin, Inc.*, 455 B.R. 19 (Bankr. D. Mass. 2011) – The court narrowly construed a collateral description ("motor vehicle installment contracts financed with proceeds of its loans"). Because the secured party could not trace loan proceeds to particular contracts, the contracts were not collateral.

- *Oxford Street Properties, LLC v. Rehabilitation Associates, LLC*, 141 Cal. Rptr. 3d 704 (Cal. Ct. App. 2012) – Funds in a deposit account were not the secured party's collateral because grant language was too narrow.

- *In re Coastal Plains Pork, LLC*, 2012 WL 6571102 (Bankr. E.D.N.C. 2012) – A financing statement covering "[a]ll livestock located

at" designated farms. It did not cover hogs located elsewhere and thus the suppliers' agricultural lien in those hogs was not properly perfected and did not have priority over bank's earlier perfected security interest.

- *D & L Equip. Inc. v. Wells Fargo Equip. Fin., Inc. (In re D & L Equip. Inc.)*, 457 B.R. 616 (E.D. Mich. 2011) – The court applied a "liberal" approach to interpreting a collateral description. The original collateral description referred to "all inventory financed by CIT". When the loan and UCC financing statement were assigned to a bank, the collateral description was not amended to refer to the bank. The court held this was not seriously misleading.

D. Perfection

1. Certificates of Title

- *In re Sherman*, 2012 WL 2132379 (Bankr. D. Conn. 2012) – A secured party's security interest in a vessel documented with the National Vessel Documentation Center cannot be perfected by filing a financing statement. The only way to perfect the security interest is to comply with the Commercial Instruments and Maritime Liens Act. The identification of the bank – Commerce Bank, N.A. – by its similarly named predecessor – Commerce Bank/Shore, N.A. – on the preferred ship mortgage recorded with the NVDC substantially complied with the Act and was therefore sufficient to perfect the bank's security interest.

- *In re Jackson*, 287 P.3d 986 (Okla. 2012) – A secured party's proper financing statement perfected its security interest in horse trailer for which a certificate of title was properly issued – but not required – and which did not note the bank's lien.

- *In re Godsey*, 2012 WL 86778 (Bankr. E.D. Ky. 2012) – A certificate of title that misidentified the secured party's name

and address was ineffective to perfect the secured party's security interest even though secured party submitted a proper title lien statement and the certificate referred to the file number of that statement.

- *In re Pierce*, 471 B.R. 876 (6th Cir. BAP 2012) – A security interest in a 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.

- *Brenner Financial, Inc. v. Cinemacar Leasing*, 77 U.C.C. Rep. Serv. 2d 440 (N.J. App. Div. 2012) – A New Jersey certificate of title for a limousine that identified the lessor as owner perfected the lessor's interest, which was in reality a security interest. A subsequent Michigan certificate of title that failed to list the lessor and instead listed the security interest of a different lender neither destroyed the lessor's perfection nor perfected the lender's interest because the Michigan title was void, apparently due to the debtor's fraud in procuring the Michigan title.

- *In re Mouton*, 479 B.R. 55 (Bankr. E.D. Ark. 2012) – A security interest of a secured party that was properly noted on an Illinois certificate of title became unperfected when, upon receiving payment that later failed to clear, the secured party signed the certificate to release its lien and sent the certificate to the debtor even though the debtor never submitted the certificate to any state agency to have the vehicle re-titled.

- *In re Hoffman*, 2012 WL 3070437 (Bankr. E.D. Tex. 2012) – A secured party's security interest on a vehicle was perfected because the lien was properly noted on the vehicle's certificate of title. The use of an assumed name for the secured party did not undermine perfection even though the secured party failed to file an assumed name certificate with the county clerk.

- *In re Gannon*, 461 B.R. 869 (Bankr. D. Kan. 2012) – Under UCC § 9-316(d), a security interest in a boat perfected by a financing statement filed in Kansas remained perfected even after Oklahoma issued a certificate of title for the boat that did not indicate the security interest. Although § § 9-316(e) and 9-337 protect some purchasers in such a situation, a bankruptcy trustee with the status of a lien creditor is not a purchaser. Bankruptcy Code § 544(a)(1).

- *In re MedCorp. Capital Inc.*, 472 B.R. 444 (Bankr. N.D. Ohio 2012) – A secured party's security interest in ambulance company's vehicles was unperfected because it was neither indicated on the certificates of title nor, for vehicles for which no written certificate was issued, noted by the clerk of a court of common pleas into the automated title processing system. The secured party's replacement lien granted by the cash collateral order did not insulate the secured party's security interest from avoidance because it expressly provided that the replacement lien extended only "to the same extent, validity, enforceability, perfection and priority" as the prepetition security interest.

- *In re Negus-Sons, Inc.*, 2012 WL 1110026 (Bankr. D. Neb. 2012) – A secured party's perfected security interest in a welder attached to a truck remained perfected even though secured party did not get its interest noted on the certificate of title for the truck. However, the secured party's security interest in a service body and crane attached to the truck by seller was not perfected by the secured party's subsequent amendment to its financing statement referring to accessions.

- *In re Klein*, 2012 WL 6680308 (Bankr. E.D. Mich. 2012) – A secured party's lien was properly noted on an application for corrected certificate of title but, because of an error by the Michigan Secretary of State's office, was not noted on the certificate issued pursuant to the application was perfected. The security interest was perfected even though the application

was on an outdated form bearing the name of the previous Secretary of State and did not list the number of miles on the vehicle's odometer (as required by the form) because the defects were technical and minor and thus the application substantially complied with the law.

2. *Control*

   - *Citizens Bank v. Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, 2012 WL 5828623 (E.D. Mich. 2012) – The statute of limitations on a secured party's claims against a brokerage for breaching the parties' control agreement and conversion in allowing the debtor to conduct trades and dissipate the account began running on the date of *each* improper trade and *each* failure to send to the secured party the required account statement.

3. *Possession*

   - *In re Dean*, 2012 WL 4634291 (Bankr. M.D. Pa. 2012) – The debtor did not authenticate a security agreement. However, the debtor had voluntarily surrendered possession of the vehicle to the lender and thus the lender's security interest attached because the lender had possession pursuant to an oral security agreement. UCC § 9-203(b)(3)(B).

4. *Financing Statements: Debtor and Secured Party Name*

   In re Miller, 2012 WL 3589426 (C.D. Ill. 2012) – A financing statement identifying the debtor as "Bennie A. Miller" – the name the debtor had used much of his life and on his driver's license, social security card, tax returns, and the deed to his residence – was effective to perfect the security interest. A financing statement must contain the debtor's "correct name," not "legal name" and for this purpose the name on the debtor's driver's license, social security card, and tax returns is the debtor's correct name. Moreover, the debtor had under the common law changed his name to the name on those

documents, so that name was in fact his legal name when the financing statement was filed.

- *In re Camtech Precision Manufacturing, Inc.*, 471 B.R. 293 (S.D. Fla. 2011) – A filed financing statement listing additional debtors on separate paper exhibits but did not indicate in the additional debtors box of the financing statement to look beyond the first page or use the official addendum 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. Whether the financing statements had errors or the filing office failed to properly index the filings was a factual issue that precluded summary judgment.

- *Bank of Nova Scotia v. Four Winds Plaza Corp.*, 2012 WL 3064337 (V.I. Super. Ct. 2012) – A financing statement that identified the debtor by its registered corporate name, rather than its trade name, and which described the collateral to include "all equipment" was sufficient to perfect the security interest.

- *CNH Capital America LLC v. Progreso Materials Ltd.*, 2012 WL 5305697 (S.D. Tex. 2012) – A partnership had rights in the collateral, granted a security interest to the secured party. The partnership's name was misspelled on the financing statement and would not have been disclosed in response to a search under the partnership's correct name.

- *In re Green*, 2012 WL 5550767 (Bankr. D.N.M. 2012) – Even though the name on the debtor's driver's license was "Ron Green," financing statements identifying the debtor by that name were ineffective because a search under the debtor's legal name, "Ronnie J. Green," did not reveal the filings.

- *In re QuVIS*, 469 B.R. 353 (D. Kan. 2012) – A secured party who filed its own financing statement after learning of the lapse of its joint financing statement with other creditors did not

"engage in gross and egregious misconduct" when it did not file on behalf of another creditor – it was contractually permitted to protect itself and it had no duty to other creditors.

5. *Filing of Financing Statement — Manner and Location*

   - *United States v. Reed*, 668 F.3d 978 (8th Cir. 2012) – A criminal defendant who filed fraudulent financing statement against judge and prosecutor was properly convicted of violating 18 U.S.C. § 1521.

   - *United States v. Uptergrove*, 2012 WL 639482 (E.D. Cal. 2012) – A taxpayer's financing statements filed against federal court clerks was declared to have no legal effect and the filing office was ordered to expunge them. The taxpayer was enjoined from filing financing statements without validity or basis in law or fact.

   - *Community Shores Bank v. Babbitt's Sport Center, LLC*, 2012 WL 3139554 (Mich. Ct. App. 2012) – A secured party that sued a buyer of collateral for conversion did not prove that its security interest was perfected because it never authenticated (as an evidentiary matter) the uncertified copy of the financing statement it sought to admit into evidence. Because the buyer submitted evidence that it lacked knowledge of the security interest, the trial court properly concluded that the buyer took free of the security interest.

   - *In re Szerwinski*, 467 B.R. 893 (6th Cir. BAP 2012) – A cottage built on leased land was a fixture even though it was sold through a bill of sale, not a deed, and the lease expressly provided that the cottage remained the property of the lessor. A secured party's recorded mortgage that identified the property as "fixtures" adequately described the cottage and thus satisfied the requirements for a fixture filing, thereby perfecting the secured party's security interest in the cottage.

- *In re Value Investment Properties, LLC*, 481 B.R. 403 (Bankr. E.D. Tenn. 2012) – A security interest in manufactured homes owned and held for sale or lease by manufactured home park could be perfected only by filing a financing statement with the Secretary of State's office. UCC § 9-311(d). Another secured party that recorded a deed of trust, both to perfect its interest in the real property and as a fixture filing, was not perfected because the manufactured homes were not fixtures.

- *Supplies & Services, Inc. v. NACCO Indus., Inc.*, 461 B.R. 699 (1st Cir. BAP 2011) – Where a security agreement was governed by North Carolina law and debtor was a Puerto Rican corporation, Puerto Rican law governed perfection including the question of duration of financing statement filed in Puerto Rico. Puerto Rico has a non-uniform 10 year duration.

- *In re Diabetes America, Inc.*, 2012 WL 6694074 (Bankr. S.D. Tex. 2012) – Even though a security agreement was governed by Texas law, because the debtor, a Delaware corporation, was located in Delaware, the proper place to file a financing statement was in Delaware. A secured party who filed only in Texas was unperfected.

- *In re Scotto Restaurant Group, LLC*, 2012 Bankr. LEXIS 3485 (Bankr. W.D. N.C. 2012) – Court holds that an amendment – even where authorized – cannot cure a financing statement that was unauthorized when filed. Here, the original financing statement was not authorized. A different creditor filed an amendment to cure the filing after the debtor granted a security interest.

  Comment: The court's conclusion is questionable. UCC 9-509, Comment 3.

6. *Termination and Lapse of Financing Statement*

- *In re Hickory Printing Group, Inc.*, 479 B.R. 388 (Bankr. W.D.N.C. 2012) – A security interest became unperfected when the secured party mistakenly filed a termination statement and did not become re-perfected when secured party filed correction statement. A subsequently filed new financing statement did re-perfect the security interest but as of a date that allowed the security interest to be avoided as a preference.

- *In re Miller Brothers Lumber Co., Inc.*, 2012 WL 1601316 (Bankr. M.D.N.C. 2012) – A secured party whose filing lapsed during the debtor's bankruptcy case lost perfection and therefore the debtor in possession could avoid the security interest. Bankruptcy Code § 362(b)(3).

- *Signature Credit Partners, LLC v. Casaic Offset & Silkscreen, Inc.*, 2012 WL 1999494 (W.D. La. 2012) – A security interest became unperfected when a continuation statement submitted by the secured party was improperly rejected by the filing office. Louisiana did not enact UCC § 9-516(d) and has a non-uniform version of UCC § 9-516(a), and thus filings are not effective upon presentation with the applicable fee.

- *Joseph P. Galasso, Jr., Revocable Living Trust v. Surveybrain.com, LLC*, 2012 WL 1698411 (Mich Ct. App. 2012) – The perfection of security interest lapsed because the secured party filed a continuation statement more than six months before the expiration of the 5-year effectiveness period of the filed financing statement.

- *Lange v. Mutual of Omaha Bank (In re Negus-Sons, Inc.)*, 460 B.R. 754 (8th Cir. BAP 2011) – The court held that the secured party had properly authorized UCC termination statements and that the release of the lien would have removed the security interest. The court notes it is "hesitant to endorse" the *Roswell Capital* decision, treating debtor as authorized to file financing

statements, on the grounds it "appears to be contrary to the plain language of the UCC."

- *In re Hickory Printing Group, Inc.*, 78 U.C.C. Rep. Serv. 2d 314 (Bankr. W.D.N.C. 2012) – The court rejected an attempt by a secured party to file a correction statement to cure an unauthorized termination statement. The court relied on Article 9 language that a correction statement has no legal effect (UCC § 9-518).

  Comment: The unauthorized termination statement itself has no effect. UCC § 9-509.

  The real question should have been whether the termination statement itself was authorized by the secured party and therefore effective.

- *In re International Home Products, Inc.*, 2012 WL 6708431 (Bankr. D.P.R. 2012) – A secured party remained perfected despite debtor's filing of termination statement because that filing was unauthorized. Thus, the secured party was entitled to the proceeds of accounts on which it had "foreclosed" prepetition by instructing the account debtors to make payment to the secured party.

- *Official Committee of Unsecured Creditors v. City National Bank, N.A.*, 2011 U.S. Dist. LEXIS 51628 (N.D. Cal. 2011) – A secured party authorized a title company to file "all appropriate amendments" to a financing statement to reflect the partial release of collateral. After the secured party delivered a proper release to the title company, someone at the title company apparently checked the "termination" box and terminated the filing. The Secured Party challenged the termination as unauthorized. The court held that the agency relationship between the secured party and the title company was limited and did not include authority to terminate the financing

statement. Accordingly, the financing statement was not terminated.

E. Priority

1. Lien Creditors

- *In re Reitter Corp.*, 475 B.R. 314 (D.P.R. 2012) – The IRS had priority over an earlier perfected security interest in any accounts generated by the debtor more than 45 days after the notice of federal tax lien was filed.

- *United States v. Montesinos*, 2012 U.S. Dist. LEXIS 134328 (S.D.N.Y. 2012) – A notice of federal tax lien misspelled the taxpayer's first name as "Isreal" instead of "Israel." The court held that the lien was nevertheless valid against a later mortgagee because the lien was indexed in a real property system that permitted searching by last name, by last and partial first name, by partial last name and partial first name, or with a "sounds like" feature that captured names spelled differently but that sound similar to the name being searched. Thus a reasonably diligent searcher would have discovered the notice.

- *In re Naknek Electric Association, Inc.*, 471 B.R. 225 (Bankr. D. Alaska 2012) – A statutory mining lien on a rig for work performed in connection with an exploratory geothermal well had priority over an earlier perfected security interest because the secured party did not, prior to the work being performed, record its interest in the recording district where the property is located.

- *Mill Creek Lumber & Supply Co. v. First United Bank & Trust Co.*, 278 P.3d 12 (Okla. Ct. Civ. App. 2012) – Because Article 9 does not apply to a lien on ordinary building materials incorporated into an improvement on land (UCC § 9-334, Comment 34),

Article 9 did not govern the relative priority of a materialman's statutory lien and a mortgage lien.

- *RMB Fasteners, Ltd. v. Heads & Threads Intern., LLC*, 2012 WL 401490 (N.D. Ill. 2012) – A seller of goods that sent a VCC § 2-702 reclamation demand within ten days after the buyer received the goods was entitled to the goods over the objection of the buyer's secured creditor because the secured party waived its rights by failing to object at the hearing when all parties agreed that the goods were properly subject to reclamation. UCC § 2-702(3).

- *Bode v. State*, 2012 WL 759203 (Alaska Ct. App. 2012) – A secured party's security interest in an airplane could be forfeited to the state as a result of the debtor's criminal activity because the secured party was aware of the debtor's history of using the airplane to violate the law in ways that might lead to forfeiture. Thus the secured party did not qualify for the innocent owner/creditor defense, even if the secured party did not have reason to believe that the debtor, her son, would again violate the statute.

- *United States v. Huntington National Bank*, 682 F.3d 429 (6th Cir. 2012) – A bank with a security interest in a deposit account it maintained was a *bona fide* purchaser of the deposit account entitled to protection under a federal forfeiture statute, 21 U.S.C. § 853(n)(6)(B), even though a deposit account is an intangible asset.

- *United States v. $463,497.72*, 853 F.Supp. 2d 675 (E.D. Mich. 2012) – A pharmaceutical supplier had a security interest in the deposit accounts of its customer pharmacy. The pharmacy had diverted controlled substances for unlawful purposes. The supplier was entitled to the innocent owner defense to forfeiture because, even if the supplier was negligent in monitoring its customer, the supplier's employees had no knowledge of the illegal activity, had reported suspicious

orders of controlled substances, and had credible explanations why the spike in the orders for some controlled substances did not provoke additional suspicious order reports or suspension of shipments. Thus the supplier was not willfully blind to the illegal diversions.

- *In re Willis Enterprises, Inc.*, 478 B.R. 388(Bankr. D. Id. 2012) – A bank waived its banker's lien on deposited funds by voluntarily releasing them to the depositor's bankruptcy trustee and then failing to claim a right to them for five months. While the deposited funds might have been proceeds of the bank's consensual security interest in accounts, the bank offered no evidence to trace the funds to the deposit account in order to identify them as proceeds.

- *Walmart Stores, Inc. v. First American Corp.*, 2012 WL 3957184 (S.D.N.Y. 2012) – A buyer of accounts that filed a financing statement against the debtor/seller had priority over a judgment creditor of the buyer who later served a writ of garnishment of account debtor even though the judgment creditor was a holder in due course of a check drawn by the debtor because the check gave the judgment creditor no rights in the debtor's accounts.

- *Trustees of Iron Workers' Local No. 25 Pension Fund v. Municipal & Indus. Storage, Inc.*, 2012 WL 4368367 (E.D. Mich. 2012) – A secured party with a perfected security interest in a debtor's accounts had priority in the proceeds of those accounts over the rights of union that obtained writs of garnishment against the account debtors. The accounts became subject to the security interest as soon as the account debtors became obligated to the debtor, which occurred before the debtor defaulted on its obligations to the union and the debtor's assets allegedly became subject to a trust in favor of the union.

- *In re Yarnell's Ice Cream Co., Inc.*, 469 B.R. 823 (Bankr. E.D. Ark. 2012) – A seller of frozen strawberries did not comply with

PACA because its invoices, although stating that the seller retains a trust claim "over the commodities sold" until full payment is received, did not state that the seller retains a trust claim over "all inventories of food or other products derived from these commodities," as required by § 4. As a result, the seller was not protected by PACA against the buyer's secured party with respect to the proceeds of the strawberries.

- *Baginski Potato Co. Ltd. v. Custom Cuts Fresh LLC*, 2012 WL 2370437 (E.D. Wis. 2012) – A putative secured party did not have priority in collateral acquired by the debtor before the PACA claimant entered into a PACA transaction with the debtor because all assets of a produce buyer such as the debtor buyer are presumed to be part of a PACA trust, unless it is shown that: (1) no PACA trust existed when the asset in question was purchased; (2) the asset was not purchased with PACA trust assets; or (3) subsequent to purchasing the asset, the produce buyer paid all suppliers in full, thereby terminating the PACA trust. In this case, the assets were purchased with funds derived from the sale of produce and there was never a time when all PACA creditors were paid in full.

- *First National Bank v. Profit Pork, LLC*, 820 N.W. 2d 592 (Minn. Ct. App. 2012) – Because the supplier of feed to the debtor pig farmer had a production input lien on the pigs, not a feeder's lien, under the applicable state statute the supplier's lien was inferior to the security interest of the farmer's secured lender. Because the supplier acknowledged that the fair market value of the pigs was insufficient to satisfy the bank's security interest, the supplier had no cause of action against the bank for disposing of the pigs in an allegedly commercially unreasonable manner.

- *Westlake Styrene, LLC v. United States*, 2012 WL 2133550 (S.D. Tex. 2012) – A secured party that acquired a security interest in

corporate debtor's accounts and filed a financing statement in Texas, where the debtor was incorporated, had priority over a judgment creditor that later sought to garnish the account debtor.

- *Attorney's Title Guaranty Fund, Inc. v. Town Bank*, 345 Wis. 2d 705 (Wis. Ct. App. 2012) – Judgment creditor that served an order for supplemental proceedings on the debtor had priority over a secured party's subsequently acquired interest in the judgment debtor's interest in the proceeds of the debtor's legal malpractice case.

- *In re Gage's Long Creek Marina, Inc.*, 2012 WL 6138489 (Bankr. W.D. Mo. 2012) – A secured party had a security interest in a promissory note and perfected the security interest both by taking possession of the note and by filing a financing statement. The secured party had priority in the debtor's bankruptcy claim against the maker of the note over two purchasers of that claim because the claim was based on the note. The secured party's priority extended to attorney's fees incurred after the purchases of the claim because the security agreement expressly covered all modifications to the secured obligation and the secured party and debtor modified that note to cover those attorney's fees.

2. *Buyers and Other Transferees*

- *State Bank of Cherry v. CGB Enterprises, Inc.*, 964 N.E.2d 604 (Ill. Ct. App. 2012) – A secured party must strictly comply with the notice rules of the Food Security Act for a secured party to retain a security interest in farm products sold to a buyer. A notice that failed to identify the counties in which the farm products were grown or located was ineffective even though the notice stated that it covered "farm products wherever located."

- *In re Printz*, 478 B.R. 876 (Bankr. C.D. Ill. 2012) – A secured party perfected its security interest in the debtor's crops. The secured party failed strictly to comply with the notice provisions of the Food Security Act. Thus a grain elevator operator, which purchased the debtor's corn in the ordinary course of business, took the corn free of the lender's perfected security interest in the debtor's crop. However, the buyer could not setoff against its obligation to pay for the corn unrelated obligations that the debtor owed to the buyer because the Food Security Act allows the buyer to take free of the lien on the crops, but not the lien on the proceeds of the crops. UCC § 9-404(a) does not apply because the lender was not an "assignee" of the debtor's accounts.

- *CIT Group/Commercial Services, Inc. v. Constellation Energy Commodities Group*, 2012 WL 4603049 (E.D. Ky. 2012) – A buyer of coal from debtor/coal merchant was a buyer in ordinary course of business that took free of a secured party's security interest in inventory. A buyer in ordinary course may not buy in "satisfaction of a money debt . . ." UCC § 9-102(b)(9). 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, the seller's breach had not occurred prior to the sales transactions and thus the buyer did not acquire the goods in satisfaction of a money debt. The buyer did not act in bad faith or know that its purchases violated the secured party's rights because the buyer did not know that the secured party had a security interest in the debtor's inventory.

- *Wells Fargo Bank, N.A. v. Associated Dealers, Inc.*, 2012 WL 666651 (Tex. Ct. App. 2012) – A buyer of a manufactured home from a dealer was a buyer in ordinary course of business even though the dealer's distributor retained possession of the manufactured home and the manufacturer's certificate of origin. Thus the buyer took free of all security interests in the manufactured

home. UCC § 9-320(b). Accordingly, the buyer's secured party was the only secured party with a security interest in the home and had priority over the rights of the distributor and the distributor's secured party.

- *In re Taylor*, 2012 WL 2320898 (Bankr. E.D. Ky. 2012), 2012 WL 2325659 (Bankr. E.D. Ky. 2012) – A buyer of heavy equipment from a landscaper was not a buyer in ordinary course of business and took the equipment subject to a perfected security interest regardless of whether the buyer was aware of the security interest and despite the seller's promise to use the sale proceeds to pay the secure obligation. UCC § 9-320.

- *Burnett v. Sullivan*, 2012 WL 4226404 (S.D. Fla. 2012) – A buyer in ordinary course of business can take free of a properly documented preferred ship mortgage because federal law does not preempt Article 9's protections for such buyers. A factual issue remained about whether the purchaser qualified as a buyer in ordinary course of business given that the prior owner was not himself a retailer but had sold the vessel through a dealer.

- *Dawson v. Fifth Third Bank*, 965 N.E.2d 730 (Ind. Ct. App. 2012) – The buyers of a motorcycle did not take free of a security interest in the motorcycle that was noted on a missing certificate of title even though they were presented with an earlier issued duplicate certificate that did not indicate the security interest.

- *La Gar Marketing, Inc. v. W. Finance & Lease, Inc.*, 2012 WL 4898785 (Ohio Ct. App. 2012) – A buyer of a vehicle – even if qualifying as a buyer in ordinary course of business – had no standing to pursue a claim against the seller's secured party for repossessing and selling the vehicle because the buyer was not identified as an owner on the certificate of title.

- *Hilty Family Ltd. Partnership, LP v. Scott*, 379 S.W. 3d 883 (Mo. Ct. App. 2012) – An above-ground irrigation system situated on farmland was a fixture. Thus the buyer of the real estate acquired an interest in the irrigation system. The buyer's interest was superior to the rights of the assignee of the secured party that provided purchase-money financing for the irrigation system because the lender did not make a fixture filing and the financing statement the lender filed with the Secretary of State's office incorrectly identified the debtor as "Deepwater Seed Farm, LLC" instead of "Deepwater Seed Farms, LLC." A search under the debtor's correct name did not disclose the financing statement.

- *Great Plains National Bank, N.A. v. Mount*, 280 P.3d 670 (Colo. Ct. App. 2012) – A debtor purchased Cattle from a supplier in a second state and resold the day after receipt to a buyer in a third state. The cattle were "produced in" the first state within the meaning of the Food Security Act and therefore a buyer that did not register in that state took subject to the security interest of a secured party that had an effective financing statement in that state. The statutory reference to where the farm products were "produced" means the location from which they were sold, not their geographic origin.

- *In re Eastern Livestock Co.*, LLC, 2012 WL 4933294 (Bankr. S.D. Ind. 2012) – A secured party held a security interest in a seller's cattle but which did not comply with the notification provisions of the Food Security Act. The secured party was not entitled to summary judgment awarding it the proceeds paid by the buyer's resale buyer because the original buyer might have qualified as a buyer in ordinary course of business under the FSA despite that fact that the original buyer was engaged in a massive check kiting scheme and paid the seller with a check that was later dishonored. It is unclear whether the FSA requires a buyer to act in good faith to qualify as a buyer in ordinary course of business.

- *West v. Houchin*, 2012 WL 2810298 (M.D.N.C. 2012) – A prepaying buyer of specially manufactured goods had no cause of action against the seller for conversion due to the seller's sale and delivery of the goods to *another* buyer because, unless the sales agreement provides otherwise, title does not pass until delivery and thus the prepaying buyer lacked ownership or a superior possessory interest.

  Hockensmith v. Fifth Third Bank, 2012 WL 5309146 (S.D. Ohio 2012), *objections sustained* by 2012 WL 5969654 (S.D. Ohio 2012) – A buyer of a car left possession with the seller and there were no sales agreements or bills of sale. The buyer may not have had possession or the right to possession because the buyer had left the goods with the seller for resale. Further the buyer may have purchased the goods not from the dealer but from third parties with the dealer acting as the buyer's purchasing agent, and thus the security interest was not created by the buyer's seller.

- *Arthur Glick Truck Sales, Inc. v. Stuphen East Corp.*, 2012 WL 6592343 (S.D.N.Y. 2012) – Buyers of fire trucks did not receive delivery until after the supplier that had consigned the trucks to the seller had perfected its security interest – and thus the buyers did not take free under UCC § 9-317. However, the buyers were buyers in ordinary course of business and took free under UCC § 9-320(a). The fact that the supplier retained the certificates of title to the trucks was immaterial. The buyers did not lack good faith because of their failure to research title to the trucks because, even had they done so and discovered the supplier possessed the certificates, that discovery would not have suggested that the seller lacked authority to validly sell the trucks.

3. *Statutory Liens; Forfeiture*

- *American Bank, FSB v. Cornerstone Community Bank*, 2012 WL 5195804 (E.D. Tenn. 2012) – Under the common law, a security

interest in favor of an insurance premium financier in funds wired to a broker for payment of premiums was superior to the banker's lien of the depositary, which swept the funds out of the deposit account to cover the broker's debts. The premium financier's lien was first in time and the funds were special deposits to which no banker's lien attached.

- *M & I Marshall & Isley Bank v. Kinder Morgan Operating L.P.*, 368 S.W.3d 160 (Mo. Ct. App. 2012) – A perfected security interest in warehoused coal was junior to an earlier warehouse lien, even though some or all of the originally warehoused coal had been replaced with new coal after the security interest was perfected. However, the perfected security interest had priority over a subsequent warehouse lien. The fact that the secured party may have benefitted by the warehouseman's storage of the goods did not give the warehouseman priority and storage of the goods was not an entrustment.

- *United States v. Montesinos*, 2012 U.S. Dist. LEXIS 134328 (S.D.N.Y. 2012) – The IRS continues to get the benefit of a more lenient debtor name filing standard. Here, an IRS tax lien filing in which the debtor name was misspelled and was held to be valid because it was sufficient to give constructive notice of the filing given the flexible search options available in the recording office where the lien was filed. Citing *Spearing Tool*, the court notes "where a system permits a searcher to perform many different searches in a quick, inexpensive manner, the onus is on the secondary lienholder – here, FSB and its title insurance agency – to perform variations of the search…".

- *Pacific Tomato Growers, Ltd. v. Tanimura Distributing, Inc.*, 2012 WL 5899417 (C.D. Cal. 2012) – A factor that engages in a commercially reasonable purchase of accounts from a produce wholesaler takes free of a PACA trust on the wholesaler's assets regardless of whether the purchase is a true sale or a secured loan. Because the factor paid 80% of the face amount of the

accounts purchased and the transaction allowed the wholesaler to convert into cash accounts that were not payable for 30 days and which might be uncollectible, cash that could have been used to immediately pay the PACA beneficiaries, the transaction did not violate the PACA trust imposed on the purchased accounts. Accordingly, the factor had no liability to the PACA beneficiaries.

- *U.S. v. 2008 Ford Expedition SUV*, 2012 WL 6115655 (S.D. Tex. 2012) – A seller that might have retained an unperfected security interest in the vehicle sold when outside financing fell through could qualify as an innocent owner and therefore have a defense against forfeiture arising from the buyer's use of the vehicle to transport a controlled substance.

- *State Bank of Cherry v. CGB Enterprises, Inc.*, 964 N.E.2d 604 (Ill. App. Ct. 2012) – The Federal Food Security Act, not state law, governed special notice requirements for liens relating to crops. Under the Food Security Act, a buyer of crops subject to a lien was required to give precise notice of the lien.

- *Pair A Dice Farms, Inc. v. InSouth Bank of Covington*, 2012 WL 6119847 (Miss. Ct. App. 2012) – A secured party that had perfected a security interest in the borrower's rights to future payments under a governmental agricultural assistance programs had priority over lessors of farm land who had an unperfected agricultural lien. The secured party did not hold the government payments in constructive trust for the lessors because there was no evidence that the bank had a confidential relationship with the lessors or that it abused the lessor's confidence. The bank was not unjustly enriched by receipt of the payments.

- *Leesburg Federal Savings Bank v. McMurray*, 2012 WL 5897608 (Ohio Ct. App. 2012) – A garage that began storing a classic car was not entitled to a common-law artisan's lien on the car for the storage expense because such a lien applies only if garage

imparts or confers value on the vehicle. While the garage's storage may have helped preserve the car's value, it did not impart or confer value. The garage was entitled to a lien for the improvements it made after a secured party acquired and perfected a security interest in the car, but that lien was junior to the security interest under UCC § 9-317.

- *Sato & Co., LLC v. S & M Produce, Inc.*, 859 F. Supp. 2d 923 (N.D. Ill. 2012) – The Perishable Agricultural Commodities Act ("PACA") creates a trust in which the buyer of perishable goods holds produce, and proceeds and receivables from the produce, for the benefit of the seller. A seller sold perishable agricultural commodities to a buyer, and never received payment. The seller obtained a judgment against the buyer. The seller's claim was treated as a properly perfected trust claim under PACA. The seller asserted that the majority shareholder and former president of the buyer was liable for the claim. The shareholder was not involved in the day-to-day operations of the buyer, however his name remained on the PACA license and he occasionally signed pre-written checks if the current president was unavailable to do so. The Court held that he lacked the requisite control over trust assets to be held personally liable.

- *In re Superior Tomato-Avocado, Ltd.*, 481 B.R. 866 (Bankr. W.D. Tex. 2012) – A seller of produce who did not become a PACA licensee, and therefore could not rely on § 4 of PACA, nevertheless was entitled to priority under PACA because it substantially complied with § 3 by including on each invoice to the debtor a statement that the commodities listed on the invoice were sold subject to a PACA trust and substantial compliance is all that is needed.

- *Sadowski v. Commissioner of Revenue*, 2012 Minn. Tax LEXIS 21 (Minn. T.C. 2012) – A secured party foreclosed on stock in which the secured party had a security interest and became sole

owner of corporation. The secured party was liable for taxes of the corporation because he was the party responsible for filing tax returns.

4. *Subordination and Subrogation*

   - *In re Brooke Capital Corp.*, 2012 WL 4793010 (Bankr. D. Kan. 2012) – Two secured parties agreed that the senior secured party would pay the proceeds of collateralized stock to the junior secured party. The agreement was enforceable even though the economic assumptions underlying the agreement proved not to be correct because those assumptions were not made conditions to the subordination. Whether the subordination was binding on the three entities that acquired participations in the senior secured party's loan was moot because those interests were really loans to the senior lienor – given that the senior secured party retained the risk of loss – and therefore those entities could not rely on the senior lienor's perfection. Because those entities had taken no action to perfect their interests, their interests were subordinate to the junior lienor's rights. In contrast, a fourth participant was a true buyer of a portion of the senior lienor's loan and thus its interest was perfected. Moreover, the subordination agreement was not binding on the fourth participant even though the senior lienor remained the servicer of the entire loan because the participation agreement required the participant's consent to any substitution of collateral outside the normal course of dealing with the borrower.

5. *Equitable Claims*

   - *RDLF Financial Services, LLC v. Esquire Capital Corp.*, 950 N.Y.S.2d 610 (N.Y. Sup. Ct. 2012) – A junior secured party that received payment from the debtor out of cash proceeds of the collateral that had been deposited into a commingled deposit account took free under UCC § 9-332(a) of any claim of the senior secured party because there was no allegation that the

junior secured party had colluded with the debtor to violate the rights of the senior secured party. The court also suggested that the commingling rendered the proceeds unidentifiable.

- *Bank of Beaver City v. Barrett's Livestock, Inc.*, 2012 WL 5334761 (Okla. 2012) – A secured party with a security interest in all of the debtor's existing and after-acquired cattle had priority over the rights of unpaid cattle seller. The secured party's decision to terminate funding and dishonor the debtor's checks to the seller, knowing that the debtor owed the seller for the cattle, did not prevent the bank from being a good faith purchaser under UCC § 2-403.

- *Granite Commercial Industries, LLC v. Landmark American Insurance Co.*, 2012 WL 6622683 (E.D.N.Y. 2012) – A secured party had a perfected security interest in the debtor's equipment. The secured party had priority over the debtor's attorney in the proceeds of the debtor's insurance claim for damage to the equipment even though the attorney brought the action against the insurer and was entitled to a charging lien on the proceeds. The secured party's security interest was first in time and the attorney had constructive and actual knowledge of that interest.

6. *Set Off*

- *First Dakota Nat'l Bank v. First Nat'l Bank of Plainview*, 2011 U.S. Dist. LEXIS 106102 (D.S.D. 2011) – A bank's setoff right against a deposit account had priority over a secured party's security interest in proceeds of collateral in the deposit account, UCC § 9-340. The secured party could have achieved priority by perfecting its security interest by control.

7. *Priority — Competing Security Interests*

- *First Financial Bank, N.A. v. GE Commercial Distribution Finance Corp.*, 2012 WL 1340312 (S.D. Ohio 2012) – A secured party with a PMSI in inventory had priority over a second secured party

with a previously perfected security interest because the second secured party received the PMSI secured party's notification of the planned PMSI inventory financing. That notification, though unsigned, was authenticated because it was on the secured party's letterhead. The notification sufficiently described the collateral as including "new and used boats."

- *Peoples Trust & Savings Bank v. Security Savings Bank*, 815 N.W.2d 744 (Iowa 2012) – A secured party with the earlier perfected security interest in the debtor's cattle had priority over a secured party with a subsequently perfected security interest granted by the debtor and a co-borrower. The co-borrower was only a commission agent, not a joint venturer, and did not have an ownership interest in the cattle. Thus the secured party's security interest attached to the cattle and its proceeds without the authentication of a security agreement by the co-borrower. Even if the secured party, by its conduct, authorized the debtor to sell the cattle free of its security interest, that conduct would not waive the secured party's security interest in the proceeds of the cattle.

- *Union Bank Co. v. Heban*, 2012 WL 32102 (Ohio Ct. App. 2012) – A secured party's filed financing statement was effective to perfect subsequent obligations and to give the secured party priority over another secured party that later filed a financing statement.

- *Commercial Capital Bank v. House*, 2012 WL 220214 (W.D. La. 2012) – A secured party who perfected its security interest in equipment in 1997 and twice filed timely continuation statements – as well as new financing statements for additional secured loans – had priority over a subsequent secured party with a security interest perfected in 2003. Even though the original secured party's first loan was paid off, that security agreement covered future advances.

- *Dayka & Hackett, LLC v. Del Monte Fresh Produce N.A., Inc.*, 269 P.3d 709 (Ariz. Ct. App. 2012) – The court held that prior to amendments in 2009, Mexican law did not generally require a filing as a condition to a security interest obtaining priority over the rights of a lien creditor – something (the court held) to be assessed in general, not on a collateral-specific basis. Thus a secured party that filed in the District of Columbia against Mexican debtors' grape crop had priority over a secured party that recorded in Mexico. The junior secured party, which had sold the crop, was liable for conversion because the senior secured party was entitled to possession even if it did not demand possession, although such a demand was in fact made. The court held that even though the junior secured party also acted as the debtor's distributor, and therefore had recoupment rights with the respect to the sale proceeds, was irrelevant.

  Comment: One of the authors assisted the junior secured party in the litigation.

- *Banner Bank v. First Community Bank*, 854 F. Supp. 2d 846 (D. Mont. 2012) – A secured party with a perfected security interest in all of the debtor's assets was entitled to the proceeds of some collateral that the debtor had sold. The debtor had paid the proceeds to another secured party that had provided bridge financing to help reduce the loan to the first secured party. The second secured party did not take the transfers from the deposit account free of the first secured party's security interest under UCC § 9-332 because it colluded with the debtor in violating the first secured party's rights.

- *Caterpillar Financial Services Corp. v. Peoples National Bank*, N.A., 2012 WL 2520922 (S.D. Ill. 2012) – The debtor may have retained some rights in equipment previously transferred to a special purpose entity that granted a security interest in the equipment. The secured party of the transferor failed to produce an authenticated security agreement, just a financing

statement. Accordingly, that secured party was liable to the secured party of the SPE for converting the collateral by selling it after the SPE's secured party demanded possession.

- *In re Wilkinson*, 2012 WL 1192780 (Bankr. N.D.N.Y. 2012) – A secured party's security interest that was perfected by a filing that lapsed during the debtor's bankruptcy proceeding retained priority over the perfected security interest of another secured party because bankruptcy law fixes priority as of the petition date.

- *In re Salander-O'Reilly Galleries, LLC*, 475 B.R. 9 (S.D.N.Y. 2012) – The law of the jurisdiction on which the consignee is located, not the law chosen in the consignment agreement, governs the priority between the consignor and the consignee's inventory secured party and the priority between the consignor and the consignee's bankruptcy trustee. UCC § 9-301.

  Comment: In connection with priority issues, the law of the location of the goods governs. UCC 9-301(3)(C).

- *Kerr v. Commercial Credit Group, Inc. (In re Siskey Hauling Co., Inc.)*, 456 B.R. 597 (Bankr. N.D. Ga. 2011) – A debtor granted a security interest in its accounts to SP1, who filed the first financing statement. Then debtor granted a security interest in its accounts to SP2, who filed the second financing statement. *Then* the debtor granted a security interest in and sold its accounts to SP3, who filed a financing statement SP3, in exchange for paying off debtor's obligation to SP1, obtained a release and termination of SP1's security interest. SP3 subsequently argued it should be prior to SP2 because it should be equitably subrogated to SP1's claim. The court rejected this assertion, on the grounds that the transaction was not an assignment from SP1 to SP3 but a release; that SP3 knew of an intervening creditor and could not jump ahead of it; and that the equities did not lie in favor of subrogation. SP3 also argued that its "purchase" of the receivables placed them outside the

debtor's estate and gave SP3 sole access to them. The court also rejected this argument, because the "purchase" was a full-recourse factoring arrangement. Even if it were a "sale", the purchased assets would remain subject to SP2's prior lien.

- *Metropolitan Bank & Trust Co. v. Desert Valley Financial LLC*, 2012 WL 6082400 (9th Cir. 2012) – A secured party with a security interest in chattel paper perfected by filing had priority under the pre-revision version of Article 9 over a subsequent purchaser that took possession. The purchaser, which had the burden of proof on whether it acquired the chattel paper with knowledge of the prior security interest, failed to prove that it acted without knowledge given that it admitted that it acquired knowledge at some time but failed to state when and, in conducting due diligence, it might have seen the security agreements that identified the encumbered chattel paper.

- *Platte Valley Bank v. Tetra Financial Group, LLC*, 682 F.3d 1078 (8th Cir. 2012) – The court considered conversion claims by senior secured parties against junior secured parties relating to collateral transferred subject to a security interest and sale proceeds deposited in a holdback account.

8. *Purchase-Money Security Interests*

- *Signature Credit Partners, LLC v. Casaic Offset & Silkscreen, Inc.*, 2012 WL 1999494 (W.D. La. 2012) – A purchase-money security interest became unperfected and lost priority to a previously perfected competing security interest when continuation statement submitted by secured party's agent was improperly rejected by the filing office.

  Comment: An improperly rejected filing is still effective, except as against a purchaser who gave value in reasonable reliance on the absence of the filing. UCC § 9-516(d).

- Louisiana did not enact UCC § 9-516(d) and has a non-uniform version of UCC § 9-516(a), and thus filings are not effective upon presentation with the applicable fee.

9. *Proceeds*

   - *1st Source Bank v. Wilson Bank & Trust*, 2012 WL 4711989 (M.D. Tenn. 2012) – A secured party that acquired a security interest in a trucking companies' accounts as well as their rigs. The financing statement was limited to the rigs and the proceeds thereof. The secured party was not perfected in the debtors' accounts because the accounts were neither included in the collateral indication in the financing statement nor were they proceeds of the rigs since the use of equipment does not generate proceeds. UCC § 9-102(a)(64).

   - *In re Mary Holder Agency, Inc.*, 2012 WL 6021481 (Bankr. D.N.J. 2012) – An affidavit from the debtor's principal that all funds in the debtor's deposit account were proceeds of the debtor's real estate listing agreements, and therefore proceeds of the secured party's original collateral, was sufficient to defeat the bankruptcy trustee's motion for summary judgment on issue of attachment. Although tracing evidence is normally needed to identify proceeds in commingled deposits, tracing was not required here given that the testimony indicated that there had been no commingling. However, because the principal had guaranteed the obligation to the secured party, the affidavit was self-serving and therefore insufficient to support the secured party's own motion for summary judgment.

   - *In re Lake at Las Vegas Joint Venture, LLC*, 2012 WL 5352976 (9th Cir. 2012) – A security interest in payments due or to become due under or in connection with a specified acquisition agreement did not cover payments made post-petition because they were not proceeds of prepetition collateral and attachment was prevented by Bankruptcy Code § 552.

- *Hamilton Equity Group, LLC v. Juan E. Irene, PLLC*, 101 A.D. 3d 1703, 957 N.Y.S. 2d 527 (N.Y. Sup. Ct. App. Div. 2012) – An individual attorney who was the sole member of a PLLC could not be the successor by *de facto* merger to the PLLC after the PLLC was dissolved. As a result, while the PLLC's secured party might have a security interest in fees generated in personal injury cases previously handled by the PLLC and now handled by the individual attorney, the individual attorney, who did not guaranty the loan, had no personal liability.

- *Banner Bank v. First Community Bank*, 854 F.Supp.2d 846 (D. Mont. 2012) – SP1 possessed a perfected security interest in essentially all of the debtor's assets and any proceeds therefrom. Two principals of the debtor subsequently took out a loan from SP2, the purpose of which was repayment of the SP1'S loan. SP2's loan was secured by some of the debtor's assets. A portion of the loan from SP2 was used for partial repayment of the SP1 loan before the debtor defaulted on its obligations to SP1. At an unknown time after the default occurred, the debtor sold two propane tanks to a third party, the proceeds of which was used to repay a portion of the SP2 loan. SP1 learned of this sale and payment and sued to recover the proceeds of the sale from SP2. SP2 claimed the payment from the debtor's principals to SP1 was a repurchase of the propane tanks. SP1, however, believed the payment was for what it was owed on the note to it and never granted a release of its security interest, nor was it aware that such a release was being sought. The court found *de facto* collusion between SP2 and the debtor because SP2 was aware of SP1's superior security interest in the propane tanks and accepted the proceeds anyway. Accordingly, the court held SP2 must comply with SP1's demand for the proceeds.

F. Default and Foreclosure

1. Default

- *GMAC v. Everett Chevrolet, Inc.*, 2012 WL 3939863 (Wash. Ct. App. 2012) – A secured party whose security agreement provided that the secured obligation was due on demand had no duty of good faith to defer exercising the right to demand payment.

- *CGI Finance, Inc. v. C and V Sportfishing, LLC*, 2012 WL 5077139 (S.D. Fla. 2012) – A secured party with a security interest in collateral had shown that it had probable cause to believe that the prospect of payment was significantly impaired, giving rise to a default. The debtor had a long history of late payments, his credit score was below 600, he failed to comply with offer to cure, and in the hours prior to the repossession, he told the secured party that he had been was forced to sell some of his real estate holdings, had lost $1 million in various investments, and was unwilling to take on any additional obligations. The secured party had not proven that a default occurred based on the alleged unauthorized use of the collateral, failure to pay storage charges for the collateral, refusal to allow inspection of the collateral, or failure to maintain the condition of the collateral.

- *WestLB AG v. BAC Florida Bank*, 2012 WL 4473445 (S.D.N.Y. 2012) – A secured party with a security interest in mortgage loans did not state a claim for breach of contract against borrower or loan servicer in connection with their renting, rather than selling, foreclosed real estate. The servicing agreement, which gave the borrower authority to direct how dispositions were conducted, subject to the secured party's consent, spoke only to sales of the foreclosed properties and thus did not require the secured party's consent in connection with leases of the properties.

- *Zorin Properties, LLC v. Denney*, 2012 WL 751978 (Ky. Ct. App. 2012) – A secured party that sent to the debtor notification of the secured party's intention to repossess the collateral on a specified date did not thereby waive the right to repossess earlier. Neither the security agreement nor the law required notification of repossession and the security agreement expressly provided that no notice to the debtor would entitle the debtor to further notice in the future. The notification was a courtesy and did not create a course of dealing that overrode the express terms of the security agreement.

- *JPMorgan Chase Bank, N.A. v. Jeffco Cinnaminson Corp.*, 2012 WL 996617 (N.J. Super. Ct. App. Div. 2012) – A debtor and co-borrower may have an impairment of collateral defense based on the secured party's release of its security interest on two vehicles upon receipt of subsequently dishonored payoff checks from a consignee of the collateral.

- *Paladin Shipping Co. Ltd. v. Star Capital Fund, LLC*, 491 Fed. Appx. 42 (11th Cir. 2012) – A secured party that sued on a promissory note after the debtor surrendered the collateral – his 50% interest in a vessel in which the secured party owned the other half – was entitled to summary judgment for the full amount of the debt because the debtor bore but failed to satisfy the burden of proving the value of the collateral surrendered as part of his affirmative defense of payment.

- *Goia v. CitiFinancial Auto*, 2012 WL 6013206 (11th Cir. 2012) – Even if the debtor on an auto loan had insured the vehicle for its full value, the debtor nevertheless defaulted by failing to provide proof that the secured party was listed as the loss payee. Accordingly, the secured party had the contractual right to procure insurance and to charge the debtor for the cost of the insurance.

- *Wells Fargo Bank, N.A. v. Architectural Door Systems, Inc.*, 2012 WL 6608567 (D. Utah 2012) – A secured party was entitled to a

default judgment – including a writ of replevin entitling it to possession of the collateral – against a debtor that failed to pay the secured obligation.

2. *Repossession of Collateral*

- *Harley-Davidson Credit Corp. v. Monterey Motorcycles, Inc.*, 2012 WL 1309151 (N.D. Cal. 2012) – A secured party with a purchase-money security interest in a motorcycle dealer's inventory was entitled, *ex parte*, to a temporary restraining order enjoining the dealer from selling any collateral due to evidence that, after previously selling some inventory out of trust and agreeing not to do so further, the debtor continued surreptitiously to sell inventory out of trust and to use the funds to pay other creditors.

- *All Points Capital Corp. v. B.C.A. Leasing Ltd.*, 950 N.Y.S.2d 490 (N.Y. Sup. Ct. 2012) – A secured party with a security interest in an auto dealer's inventory, as well as a mortgage on real property, was not entitled to a preliminary injunction awarding it possession of the inventory. Even though the secured party had established a likelihood of success on the merits based on the auto dealer's admitted default on the loan, the secured party had not shown that it would suffer irreparable injury without obtaining injunctive relief.

- *De Lage Landen Financial Services, Inc. v. Tri State Crane Rental Corp.*, 2012 WL 484244 (D. Me. 2012) – A secured party had perfected security interest in crane. The secured party was not entitled to an *ex parte* pre-judgment writ of attachment even though the debtor had sold and delivered the crane to a buyer in another state. The secured party had not shown that there was an immediate danger that the defendants will damage or destroy any property to be attached, if notified in advance of the request for an attachment, particularly given that the crane was already gone. There was no evidence the proceeds were

still on hand, and no evidence that the corporate guarantors were linked to the debtor's improper conduct.

- *Gati v. Americredit Financial*, 2012 WL 345916 (Ohio Ct. App. 2012) – An assignee of a security interest in an automobile that was perfected by notation of original secured party's security interest on the certificate of title was entitled to repossess the vehicle even though the assignee's interest was not noted on the certificate of title.

- *Wecker v. Crossland Group, Inc.*, 939 N.Y.S.2d 481 (N.Y. Sup. Ct. App. Div. 2012) – A repossession company that contracted with an independent contractor to repossess collateral was not responsible for torts committed by independent contractor during repossession. Although a secured party's duty not to breach the peace is nondelegable, the repossession company was not the secured party.

- *Smith v. AFS Acceptance, LLC*, 2012 WL 1969415 (N.D. Ill. 2012) – A debtor stated a claim for breach of the peace – and, therefore, for violation of the Fair Debt Collection Practices Act – against its secured party. The debtor alleged that after the debtor and the debtor's daughter jumped into the car, the repossession agent continued to hook the car up to the tow truck, raised the rear of the car, and towed the car from the driveway with the door open, all while the debtor's family members and neighbors yelled at the agents to stop.

- *Reinhart v. PNC Bank*, NA, 2012 WL 1104685 (E.D. Pa. 2012) – Police officers that allegedly assisted in repossession by ordering the debtor's son away from the collateralized boat and opening the enclosure where the boat was stored could be liable under § 1983. However, the borough that employed police officers was not liable for failure properly to train its employees based on this one incident.

- *Brown v. City of Philadelphia*, 2012 WL 1758172 (E.D. Pa. 2012) – A city was not liable under § 1983 for the assistance its police officers allegedly provided during the repossession of the debtor's car by demanding that the debtor exit the vehicle. By the time the officers arrived on the scene, the car was attached to the tow truck and had been driven down the street. Thus the repossession had already occurred, even though the debtor entered the car while it was still in his driveway.

- *Marcum v. Eastman Credit Union*, 2012 WL 1795058 (E.D. Tenn. 2012) – A towing company attached the vehicle to the tow truck and towed the vehicle from its parking spot into the flow of traffic before the debtor exited the vehicle, made her presence known to the agent, and objected to the repossession. Thus the repossession had been completed *before* the objection was made.

- *Emigrant Mortgage Co. v. Greenberg*, 950 N.Y.S.2d 608 (N.Y. Dist. Ct. 2012) – A secured party purchased the debtor's shares in a condominium. The secured party was entitled to use summary eviction proceedings to remove the debtor. Even though the shares were personal property and the summary proceeding is for real estate, ownership of the shares carries with it ownership of a proprietary lease, and therefore an interest in a chattel real.

- *Thompson v. Gateway Financial Services, Inc.*, 2012 WL 5989240 (N.D. Ill. 2012) – A debtor stated a claim against both the secured party and the repossession agents for breach of the peace during an effort to repossess a vehicle, as well for violation of the Fair Debt Collection Practices Act. The debtor's children, who witnessed the repossession effort but who had no interest in the vehicle, had no claim for the breach of the peace but did have a claim under the Fair Debt Collection Practices Act. The debtor had no evidence to support her claim against the secured party and the repossession company for negligent hiring and supervision of the individual repossession agents.

The defendants were entitled to summary judgment on the plaintiffs' claims for emotional distress because the only evidence was their own testimony; they offered no medical records because none of them consulted a physician and while a severely degrading event may lead to an inference of emotional distress, the incident was not so degrading as to excuse the plaintiffs' failure to explain their emotional distress with more specificity.

3. *Notice of Foreclosure Sale*

   - *Zwicker v. Emigrant Mortgage Co.*, 936 N.Y.S.2d 158 (N.Y. Sup. Ct. App. Div. 2012) – A notification of disposition sent by certified mail, return receipt requested, was reasonable despite use of an incorrect zip code because the address itself was otherwise correct. Further the debtor acknowledged receipt of at least one notification and her counsel acknowledged receipt of notification.

   - *In re MarMc Transportation, Inc.*, 469 B.R. 84 (Bankr. D. Wyo. 2012) – A secured party's notification of disposition provided on January 21 and stated that the collateral would be sold no later than January 31. The secured party did not give ten days notice of the pending sale and was therefore inadequate, particularly since the buyer had previously paid for the aircraft. It did not matter that secured party did not actually transfer title by providing a bill of sale until May 23.

   - *VFS Leasing v. Bric Constructors, LLC*, 2012 WL 2499518 (Tenn. Ct. App. 2012) – A secured party was not entitled to summary judgment on the reasonableness of the disposition notification it provided because the notification indicated the date after which the collateral would be sold at a "private sale" when in fact the collateral was sold via a public online auction.

   - *In re Boone*, 2012 WL 1118988 (Bankr. E.D.N.C. 2012) – A secured party in consumer transaction on August 30 sent

notification of a private sale to be held no earlier than September 9. The court held that the secured party had given reasonable notification even though the interval included a national holiday and the debtors claimed that they lacked the time to withdraw money from their retirement account to redeem the collateral.

- *Limtiaco v. Auction Cars.com, LLC*, 2012 WL 4911726 (D. Nev. 2012) – A secured party failed to give proper notification of a disposition of collateral in a consumer-goods transaction because the notification failed to state that the debtor was entitled to an accounting of the unpaid indebtedness. The secured party was therefore liable for statutory damages equal to 10% of the principal amount of the obligation at the time of the notification.

- *Bank of America, N.A. v. Sea-Ya Enterprises, LLC*, 872 F.Supp. 2d 359 (D. Del. 2012) – A secured party provided a commercially reasonable notification to the debtor and guarantor by informing them of the date on or after which the collateral would be sold at a private sale. The secured party conducted a commercially reasonable disposition of aircraft because its expert marketing firm inspected the aircraft, determined that expensive repairs would be needed to make the aircraft airworthy, marketed the aircraft over four months, and accepted the highest of three offers. Although the security agreement indicated that "Bank will advise Debtor in its Notice of Resale . . . what kind of repair, maintenance or make ready service it will perform prior to offering the Aircraft for resale," no such work was done to the aircraft and thus there was nothing to notify the debtor about. Further, even if a statement to that effect was required, it was a harmless error. The secured party's failure to address notification to the guarantor's spouse, who also guaranteed the secured obligation, freed her of personal liability even though she resided at the same address

and likely had actual notice of the secured party's disposition plans.

- *Epps v. JP Morgan Chase Bank, N.A.*, 675 F.3d 315 (4th Cir. 2012), *remanded by* 2012 U.S. LEXIS 153549 (D. Md. 2012) – The National Bank Act and the OCC regulations promulgated thereunder preempt, with respect to national banks, state laws requiring disclosures relating to an extension of credit but not notices relating to debt collection. Thus they did not preempt state law requiring secured parties to provide certain detailed information to the debtor after repossession of tangible personal property.

- *White v. Wells Fargo Bank, NA*, 2012 WL 4958516 (N.D. Ohio 2012) – The National Bank Act and the regulations promulgated thereunder do not preempt state law, specifically Article 9, with respect disposition of personal property collateral. Therefore, the debtors stated a claim against a national bank/secured party that received assignment of the debtors' secured obligation and which admittedly did not comply with Article 9 by selling the collateral at a public sale on a date other than the one specified in the notification and for a price below the minimum stated in the notification.

4. *Commercial Reasonableness of Foreclosure Sale*

- *Tex Star Motors, Inc. v. Regal Finance Co.*, 2012 WL 58945 (Tex. Ct. App. 2012) – Evidence was sufficient to support a jury's determination that a chattel paper financier acted in a commercially reasonable manner in selling 906 repossessed automobiles at wholesale, by having dealers make sealed bids. Pursuant to UCC § 9-601(g), the financier, as a *buyer* of chattel paper, had no duty to provide notification to its debtor, the car dealer, before selling the cars of the account debtors.

- *Regions Bank v. Hyman*, 2012 WL 4479080 (M.D. Fla. 2012) – A secured party had a duty to conduct its disposition of aircraft in

a commercially reasonable manner even though the debtor had abandoned the aircraft to the secured party in connection with its assignment for the benefit of creditors. The deficiency owing must be based on the actual sales price, not the value of the aircraft on the date it was abandoned to the secured party. The secured party's disposition was commercially reasonable because it was conducted through a reputable, experienced broker who sold the aircraft in a manner consistent with standard industry practice. Specifically, the broker marketed the aircraft, obtained offers from various entities, rejected a low bid, and ultimately sold the aircraft for the best offer it could get at that time.

- *VFS Leasing v. Bric Constructors, LLC*, 2012 WL 2499518 (Tenn Ct. App. 2012) – A secured party was not entitled to summary judgment on the commercial reasonableness of its disposition of dump trucks via a public online auction because its only evidence was an affidavit by the auction house manager stating that such a sale "typically commands fair market value and therefore a commercially reasonable price." An affidavit by the debtor's principal owner indicated, among other things, that she was familiar with industry standards for the sale of construction equipment, that such standards require that the potential purchasers have the opportunity to inspect the equipment, and that no prospective purchaser was permitted to view or test any of the equipment in person.

- *In re MarMc Transportation., Inc.*, 469 B.R. 84 (Bankr. D. Wyo. 2012) – A secured party did not prove that its private sale of an airplane was commercially reasonable even though the secured party claimed the sale price exceeded the appraised value of the collateral. The secured party did not provide any evidence that the sale was conducted in the usual manner on any recognized market, that the price was current in any recognized market at the time of disposition, or that the sale was in conformity with the reasonable commercial practices among dealers of aircraft.

- *Foley v. Capital One Bank, N.A.*, 383 S.W.3d 644 (Tex. Ct. App. 2012) – In a consumer transaction, a secured party seeking a deficiency judgment has the burden of pleading that its disposition of the collateral was commercially reasonable, a burden that it can satisfy by pleading that disposition was reasonable or that "all conditions precedent have been performed or have occurred." Because the debtor responded by denying commercial reasonableness of the disposition, the burden shifted back to the secured party to prove commercial reasonableness. UCC § 9-6[__]. Because the only evidence of commercial reasonableness presented at trial were business records indicating the collateral sold for $4,700 sometime between December 26, 2009 and February 16, 2010, and no documents or testimony indicated how the collateral was sold, the evidence was legally and factually insufficient to support a deficiency judgment for the secured party.

- *Universal Truck & Equipment Co., Inc. v. Caterpillar, Inc.*, 2012 WL 5398929 (D.R.I. 2012) – A secured party, one of the leading sellers of construction equipment, was entitled to summary judgment on claims that it failed to conduct sale of construction equipment in a commercially reasonable manner. Three of the four items were listed on the secured party's own web site to generate a world-wide audience of potential buyers. Two were sold at an auction, one to a private buyer, and the one to a buyer on whose lot the item was held. All four items sold at prices comparable to that of other used equipment at the time, as well as the values assigned by the Green Book.

- *M & T Bank v. Bolden*, 2012 WL 6628947 (Del. Ct. Com. Pl. 2012) – A secured party that sought to collect a deficiency after selling a Mercedes–Benz at a dealer's-only auction at of the world's largest sales facilities for automobiles failed to demonstrate that it had acted in a commercially reasonable manner. It offered no evidence about how the sale was advertised or conducted, how many bidders were present, how many bids were made, or

whether the sale was done in accordance with the accepted practices of reputable finance companies for, or dealers of, automobiles. The debtor was therefore presumptively entitled to statutory damages under UCC § 9-625(c).

- *Prinsburg State Bank v. Abundo*, 2012 WL 6721075 (Utah 2012) – A secured party stipulated to the only unresolved issue – that it had held a commercially unreasonable disposition of collateral – was bound by the stipulation and estopped from challenging that issue on appeal.

- *Adobe Oilfield Servs., Ltd. v. PNC Bank, N.A. (In re Adobe Trucking, Inc.)*, 2011 Bankr. LEXIS 4929, (Bankr. W.D. Tex. 2011) – The court made a detailed analysis of what constitutes commercially reasonable foreclosure sale.

5. *Effect of Failure to Give Notice, Conduct Commercially Reasonable Foreclosure Sale, or Otherwise Comply with Part 6 of Article 9*

   - *Hassler v. Account Brokers of Larimer County, Inc.*, 274 P.3d 547 (Colo. 2012) – The limitations period on secured debt began running on either the day the secured party was first entitled to accelerate the debt or the day, shortly after repossession, that it did in fact accelerate. The period did not begin running on the day when the disposition occurred and the resulting deficiency became liquidated.

   - *In re Crossover Financial I, LLC*, 477 B.R. 196 (Bankr. D. Colo. 2012) – A clause in security agreement provided that, upon default, the debtor's rights as the sole member of limited liability company to vote and give consents, waiver or ratifications shall cease and that the secured party may vote any or all of the pledged interest. The clause did not operate automatically. The applicable LLC Colorado law requires that a secured party must enforce the security agreement and become admitted as a member before the secured party may

exercise voting rights associated with a membership interest pledged as collateral.

- *Cole v. Erwin*, 729 S.E.2d 128 (N.C. Ct. App. 2012) – A secured party may assume ownership and control of debtor's pledged ownership interests in closely-held entities by sending notification thereof to the entities.

- *Lombard v. Station Square Inn Apartments Corp.*, 942 N.Y.S.2d 116 (N.Y. Sup. Ct. App. Div. 2012) – A cooperative association that had security interest in shares to cooperative apartments may foreclose on the shares. The debtor did not attempt to cure the default until almost 3 months after the expiration of the 10–day cure period in the notice of default and thus failed to show a likelihood of success on the merits. The debtor also failed to show that he would sustain irreparable harm absent a preliminary injunction.

- *Secure US, Inc. v. Security Alarm Financing Enterprises, Inc.*, 2012 WL 1253002 (N.D.W. Va. 2012) – A secured party with a senior, perfected security interest in the debtor's accounts was not entitled to prevent a junior judgment lienor from selling the debtor's accounts even though such a sale may not generate any proceeds for the judgment creditor.

- *Arrowhead Capital Finance, Ltd. v. Seven Arts Pictures PLC*, 957 N.Y.S.2d 263 (N.Y. Sup. Ct. 2012) – A secured party with subordinated debt and junior security interest was, despite standstill agreement, entitled to judgment against the debtor and to foreclose on the collateral after the senior lender assigned the note to one of the borrowers. The assignment was without the required consent of the junior and effectively meant that nothing remained due on the senior note.

- *Canyon Development Co., Inc. v. Holcomb Storage*, 2012 WL 3242076 (Ala. Ct. Civ. App. 2012) – A storage company that had a contractual lien on personal property in storage unit did not,

upon that tenant's default, have to comply with sale procedures under the Alabama Self–Service Storage Act but could instead enforce its contractual lien. No discussion of whether the storage company complied with Article 9 in selling, without taking an inventory of the property or advertizing the sale, property allegedly worth more than $350,000 for only $500.

- *Spencer v. Public Storage*, 2012 WL 4479002 (N.D. Ala. 2012) – A storage company had a contractual lien on personal property in storage unit because the storage agreement stated that "if no payment has been received for a continuous 30-day period," the occupant may be denied access to the storage area and the property "will be sold." Accordingly, the storage company did not have to comply with sale procedures under the Alabama Self–Service Storage Act and its sale of the unit's contents was not conversion.

- *Newton v. Bank of McKenney*, 2012 WL 1752407 (E.D. Va. 2012) – The Servicemembers' Civil Relief Act, which forbids secured parties from foreclosing on collateral owned by an active military member and pledged before activation, unless the creditor obtains court permission to do so, does not apply to collateral owned by a corporation that the service member in turn owns and controls.

- *Fifth Third Bank v. Rivera*, 2012 WL 1831460 (M.D. Fla. 2012) – A secured party's action against the debtor was not subject to arbitration even though the collateralized brokerage account – for which an affiliate of the secured party was the broker – contained an arbitration clause. The secured party itself neither signed nor benefitted from the brokerage account agreement and there was no allegation that it even knew of the arbitration clause.

- *Johannsen v. Morgan Stanley Credit Corp.*, 2012 WL 90408 (E.D. Cal. 2012) – A debtor claimed that the secured party mismanaged investment property serving as collateral. The

debtor also claimed that it was unconscionable for the secured party to acquire a security interest in both the investment property and real property to secure a residential real property loan. Both claims were subject to arbitration.

- *FDIC. v. Katzowitz*, 2012 WL 368672 (E.D. Mich. 2012) – A nominal borrower signed promissory note waiving any defense relating to the secured party's failure "to realize upon the Collateral." The "borrower" had no defense based on the secured party's release of collateral to the person who received the loan proceeds. Even if the release violated the duty to dispose of the collateral in a commercially reasonable manner, it would not bar a deficiency action but only result in a reduction of the deficiency.

- *FDIC v. Cashion*, 2012 WL 1098619 (W.D.N.C. 2012) – A promissory note that expressly provides that the secured party may "fail to realize upon . . . the collateral" does not require the secured party's assignee to seek recovery from the collateral before obtaining a judgment on the note.

- *Chuhar v. AMCO Insurance Co.*, 2012 WL 589369 (N.D. Ind. 2011) – A secured party had a mortgage and security interest in a motel and related personal property and was also a loss payee and additional insured under the debtor's insurance policy. The secured party could be substituted for the debtor in the pending action against the insurer for breach of the property damage coverage and the claim for bad faith relating thereto but not for breach of the policy provision covering lost business revenue or the claim for bad faith relating thereto. The bank had not been assigned an interest in the loss of business policy provision.

- *Sadowski v. Commissioner of Revenue*, 2012 WL 1414924 (Minn. Tax. Ct. 2012) – A secured party, after the debtor's default, exercised his rights in the debtor's pledged corporate stock to become the sole director of the corporation. The secured party

was personally liable for the corporation's unpaid sales tax liability incurred prior to when the secured party took control because, after he took control, he was the person responsible for filing the returns and paying the taxes. There were corporate funds available to pay the taxes, but the funds were used for other purposes. The secured party's lack of knowledge about the tax liability and lack of access to the corporation's records was not a defense.

- *WP Devon Associates, L.P. v. Hartstrings, LLC*, 2012 WL 3060513 (Del. Super. Ct. 2012) – A landlord stated a claim for tortious interference with contract against a tenant's parent company for selling substantially all the tenant's assets so that the tenant could pay a secured obligation to the parent company.

- *LFG Nat. Capital, LLC v. Gary, Williams, Finney, Lewis, Watson, and Sperando P.L.*, 874 F.Supp. 2d 108 (N.D.N.Y. 2012) – A secured party's letters to account debtors instructing them to pay the secured party were authorized under Article 9 and the loan agreement and thus did not violate the duty of good faith and fair dealing, constitute interference with contractual relations, or constitute an unfair business practice. UCC § 9-406(a).

- *Kendall State Bank v. Archway Insurance Services*, 2012 WL 3758647 (D. Kan. 2012) – A debtor stated a cause of action against a secured party for tortious interference with existing business relationships by alleging that the secured party had released the debtor from personal liability on the secured obligation, falsely informed account debtors that the debtor had defaulted, and attempted to collect from companies that were not current clients of the debtor and did not owe money to the debtor.

- *IP of A West 86th Street 1, LLC v. Morgan Stanley Mortgage Capital Holdings, LLC*, 686 F.3d 361 (7th Cir. 2012) – A secured party did not breach its agreements with the debtor or its principals by

selling the loan and permitting the buyer to use reserve funds – which comprised part of the security – to pay part of the purchase price, even though the buyer later failed to replenish the reserve.

- *Platte Valley Bank v. Tetra Financial Group, LLC*, 682 F.3d 1078 (8th Cir. 2012) – A secured party with a perfected security interest in the debtor's equipment had no cause of action for conversion against the bank (or its assignee) with which the debtor entered into a sale-leaseback of some equipment. The bank did not interfere with the secured party's repossession and sale of the equipment and the funds provided by the bank were held in a deposit account in which the bank's assignee had control, and therefore priority over the secured party, even if the funds were proceeds of the equipment.

- *Jones v. West Plains Bank and Trust Co.*, 2012 WL 4458154 (E.D. Ark. 2012) – An alleged owner of recording equipment and master recordings, which had been in the possession of the debtor, stated a cause of action for conversion and copyright infringement against the secured party bank that repossessed and sold the equipment and recordings. The debtor was not a necessary party to either cause of action.

- *United States v. Boardwalk Motor Sports, Ltd.*, 692 F.3d 378 (5th Cir. 2012) – A secured party had a security interest in a debtor's automobile which was junior to IRS tax lien. The secured party was not liable for conversion for receiving and failing to remit to the IRS proceeds of the vehicle but was liable for failure to honor a levy issued after it received the proceeds and applied them to the secured obligation because the funds could be traced, were still in the secured party's "possession," and no dissipation of them occurred.

- *Harley-Davidson Credit Corp. v. Turudic*, 2012 WL 3314919 (D. Or. 2012) – A secured party was not required to provide the debtor

with a valuation for the collateral, assist the debtor in selling the aircraft, or otherwise protect the debtor's financial interest.

- *Lamka v. KeyBank*, 281 P.3d 639 (Or. Ct. App. 2012) – Neither the economic loss doctrine nor an intervening criminal act of a boat dealer barred a negligence action by debtor – who had purchased a boat from the dealer and stored it with the dealer – against his own secured party for financing the dealer's sale of the boat to a different buyer.

- *BrooksGreenblatt, L.L.C. v. C. Martin Co., Inc.*, 2012 WL 911882 (M.D. La. 2012) – An account debtor improperly paid the debtor after receiving an instruction to pay the secured party. The account debtor later paid the secured party and received in return an assignment of rights against the debtor and guarantors. The account debtor had a valid action against the debtor for the sums the debtor received from the account debtor and failed to remit to the secured party. UCC § 9-406(a).

- *Klinker v. First Merchants Bank*, 964 N.E.2d 190 (Ind. 2012) – Although summary judgment on contract claim was appropriate against a car dealer that had sold vehicles out of trust and lied about it, summary judgment was not appropriate on a fraud claim – which gives rise to treble damages – because the requisite fraudulent intent was still a disputed factual issue.

- *Exchange Bank of Missouri v. Gerlt*, 367 S.W.3d 132 (Mo. Ct. App. 2012) – A secured party that sold collateral without giving notice to the debtor failed to rebut the presumption that no deficiency was owing. The only evidence the secured party provided was the buyer's testimony of what he was willing to pay, not what the truck was worth. Even if the testimony did relate to the truck's value, it did not deal with what a complying disposition would have brought and the trial court was free to find that the testimony lacked credibility. UCC § 9-626(2).

- *Home Savings & Loan Co. v. Midway Marine, Inc.*, 2012 WL 2522565 (Ohio Ct. App. 2012) – A debtor who not only failed to produce the collateral pursuant to a court order but also refused to disclose during his deposition the information he did possess concerning the location of the collateral could not avoid a contempt citation for failing to turn over the collateral by claiming it was no longer available to him.

- *Volvo Const. Equipment Rents, Inc. v. NRL Rentals, LLC*, 2012 WL 10893 (D. Nev. 2012), 2012 WL 27658 (D. Nev. 2012) – A secured party with a security interest in a deposit account had no cause of action for conversion or unjust enrichment against an entity to whom the debtor sent a wire transfer from the deposit account. The secured party made no effort to exercise its rights while the funds were in the debtor's deposit account.

- *BancorpSouth Bank v. 51 Concrete, LLC*, 2012 WL 1269180 (Tenn. Ct. App. 2012) – A secured party that brought a conversion claim against the buyers of the debtor's equipment for failing to turn over the proceeds they received upon resale has a right to attorney's fees under UCC § 9-607(d) and under the security agreement with the original debtor, which became effective against the buyers under UCC § 9-201(a).

- *Los Angeles Federal Credit Union v. Madatyan*, 147 Cal. Rptr. 3d 768 (Cal. Ct. App. 2012) – The owner of auto repair shop who endorsed a check from the insurer made payable jointly to the debtor and the shop, but whose shop did not perform any work on the vehicle, was liable in conversion to the credit union with a security interest in the vehicle. The credit union had an equitable lien on the check. It did not matter that the owner was unaware of the credit union's interest in the vehicle or the check.

- *Bank of Nova Scotia v. Four Winds Plaza Corp.*, 2012 WL 3064337 (V.I. Super. Ct. 2012) – A secured party with a perfected security interest in the debtor's equipment was entitled to the

proceeds received by the debtor's landlord when the landlord sold the equipment. The secured party's security interest attached to the proceeds. The landlord was not entitled to deduct rent for the time that the collateral remained in the leased premises after the debtor defaulted on the loan or on the lease because the secured party was not responsible for storage costs given that it was only a secured party, not an owner or possessor of the collateral, and that the landlord had asserted a lien and refused to release the collateral. However, the secured party had no claim against the landlord for conversion because, in resisting the landlord's claim for rent, the secured party had conceded that did not have actual or constructive ownership of the collateral.

- *Former TCHR, LLC v. First Hand Management LLC*, 2012 WL 3127336 (Colo. Ct. App. 2012) – A landlord that had an unperfected security interest in a tenant's inventory and equipment had a conversion claim against a buyer that, with knowledge of the security interest, purchased and subsequently resold the collateral. UCC § 9-317(b).

- *In re Fish & Fisher, Inc.*, 2012 WL 1027230 (Bankr. S.D. Miss. 2012) – A secured party's claim against the debtor's law firm for negligently disbursing proceeds of an arbitrated claim – which the secured party argued were proceeds of an account and imbued with a constructive trust – was dismissed because conversion requires an intentional act, not negligence. The secured party's notification of its rights did not indicate how much it was owed or demonstrate the priority of its security interest.

- *Malbec, Inc. v. M & D III, Inc.*, 169 Wash. App. 1022 (Wash. Ct. App. 2012) – An escrow agent failed to perform in accordance with the escrow instructions and breached his fiduciary duties by failing to conduct a UCC search that would have identified a security interest in the purchased assets.

- *Israel Discount Bank of New York v. First State Depository Co., LLC*, 2012 WL 4459802 (Del. Ch. Ct. 2012) – A secured party stated a cause of action against the bailee of collateral that, despite having entered into agreement directly with secured party to honor the secured party's instructions, refused to release the collateral to the secured party. The bailee released the collateral to the debtor. Even though the bailee's agreements with the debtor contained exculpatory clauses shielding the bailee from liability, those clauses did not apply to intentional misconduct. In any event they provided no defense to the *secured party's* claims based on its *own* agreement with the bailee. The secured party was not subject to the arbitration clause in the debtor's agreements with the bailee even though the secured party was a third-party beneficiary of those agreements because the secured party's claim rested on breach of its direct agreement with the bailee, not on breach of the debtor's agreements with the bailee.

- *Valley Community Bank v. Progressive Casualty Insurance Co.*, 854 F. Supp. 2d 697 (N.D. Cal. 2012) – An insurer provided Bond and Safe Depository Coverage to a secured party that made a loan purportedly secured by a securities account maintained at brokerage firm. The insurer not liable for losses the secured party incurred because even if the control agreement was forged, the proximate cause of the loss was the fact that there were no securities.

- *North Shore Bank v. Progressive Casualty Insurance Co.*, 674 F.3d 884 (7th Cir. 2012) – A borrower defrauded a secured party by presenting a fake certificate of origin for motor home that was to secure loan. A secured party did not have action against its insurer because although the insurer agreed to indemnify the secured party for losses resulting from "counterfeit" documents, the fake certificate of origin did not qualify as a "counterfeit" because it was a complete fabrication and there

was no original certificate for a motor home with the vehicle identification number listed.

- *Repossession Specialists v. Geico Insurance Co.*, 33 A.3d 1242 (N.J. Super. Ct. 2012) – A repossession company is not covered by debtor's automobile insurance policy as someone using the vehicle with the debtor's permission. Thus the insurer was not responsible for injuries the debtor suffered when attempting to retrieve items from her vehicle as the repossession company was towing the vehicle away.

- *Rawlinson v. Law Office of William M. Rudow, LLC*, 460 Fed. Appx. 254 (4th Cir. 2012) – The aunt of a debtor stated a cause of action under the Fair Debt Collection Practices Act against the law firm that brought a replevin action against her, as well as the debtor, on the theory that she lived with the debtor and therefore might be in possession of the collateral.

- *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776 (Del. Sup. Ct. 2012) – A security agreement provided that the secured party's "sole remedy for payment of the Secured Obligations is the Pledged Securities pledged under this Agreement." The secured party might still have a personal claim because the promissory note appeared to create a carve-out for certain "Mandatory Payments."

- *Complete Credit Solutions, Inc. v. Cianciolo*, 2012 WL 5504875 (D. Mass. 2012) – The limitations period on a deficiency claim of secured party that was assignee of a PMSI seller was the four-year period under Article 2, not the six-year period under Article 9.

G. Collection

- *Bank of America v. Illumination Station, Inc.*, 2012 WL 1030321 (N.D. Ill. 2012) – A secured party with a security interest in accounts, after default, bought the accounts at a public auction.

The secured party may have acquired the accounts pursuant to UCC § 9-617 free of any right of the account debtor normally preserved by UCC § 9-404. Factual questions about whether the creditor really had a security interest, whether the sale was conducted in a commercially reasonable manner, and whether proper notification was provided, prevented a determination of whether the creditor qualified as a good faith transferee. The account debtor's claims under UCC § 9-404 are limited to those that would reduce the obligation (no affirmative recovery is available against an assignee) and to those that either arose out of the same contract as the account or prior to notification of the assignment. UCC § 9-404.

- *Riviera Finance of Texas, Inc. v. Capgemini U.S., LLC*, 855 F. Supp. 2d 179 (S.D.N.Y. 2012), *vacated and remanded by,* 2013 WL 516133 (2nd Cir. 2013) – An account debtor, after receiving notification of the assignment of the account, received reports that the debtor was not paying subcontractors and entered into a second agreement with the debtor regarding payment to subcontractors. The account debtor could not use the debtor's breach of *that* agreement to offset its liability to the factor that received the assignment of the account. The debtor's breach of the original agreement did not cause any damage to the account debtor. Instead all of the account debtor's expenses incurred in paying contractors directly arose from the debtor's failure to abide by the second agreement and its statements to contractors.

- *Puritan Finance Corp. v. Bechstein Construction Corp.*, 980 N.E.2d 135 (Ill. Ct. App. 2012) – An account debtor could not set off against its $22,000 obligation on assigned accounts the amounts that the debtor owed to the account debtor on unrelated cartage contracts because setoff is limited to claims that "accrue" before the account debtor receives notification of the assignment. UCC § 9.4__. Although the account debtor had fully performed its duties under the cartage contracts before it received such

notification, its claim had not "accrued" because no cause of action yet existed, presumably because no invoice had yet been issued and payment was not yet due.

- *PNC Equipment Finance, LLC v. California Fairs Financing Authority*, 2012 WL 5465841 (E.D. Cal. 2012) – A secured party was not entitled to pre-judgment writ of attachment against a debtor's bank accounts because it failed to show that the collateral was of insufficient value to satisfy its claim.

- *Insurasource, Inc. v. Phoenix Ins. Co.*, 2012 WL 6044880 (S.D. Miss. 2012) – An insurance premium financier had no cause of action against the insurer for failure to return unearned premiums for an insurance policy that was never issued because the broker who embezzled the funds had neither actual nor apparent authority to act as agent for the insurer.

- *IP of A West 86th Street 1, LLC, v. Morgan Stanley Mortgage Capital Holdings, LLC*, 686 F.3d 361 (7th Cir. June 11, 2012) – An assignor of a loan was not liable for breach of contract, conversion or breach of fiduciary duty for failing to confirm that the assignee re-established escrow accounts supporting the investors in the loan.

H. Retention of collateral

- *Tex Star Motors, Inc. v. Regal Finance Co.*, 2012 WL 58945 (Tex. Ct. App. 2012) – A chattel paper financier's acceptance of cars from some account debtors in satisfaction of their debts did not release the debtor-car dealer of its liability for a deficiency based on its obligation to repurchase nonperforming loans.

- *In re Kentwood Pharmacy, L.L.C.*, 475 B.R. 602 (Bankr. W.D. Mich. 2012) – Michigan does not recognize a common-law landlord's lien on the tenant's personal property in the leased premises.

- *BAC Home Loans Servicing, LP v. Semper Investments L.L.C.*, 277 P.3d 784 (Ariz. Ct. App. 2012) – A lender that refinanced existing senior mortgages was subrogated to them because the junior mortgagee was not prejudiced thereby. The refinanced loan required interest at a variable rate and the new loan carried a fixed rate of interest that was lower than the maximum variable rate. Also, the junior mortgagee's predecessor was not notified of the refinancing transaction before the predecessor made subsequent advances.

- *Niday v. GMAC Mortg., LLC*, 284 P.3d 1157 (Or. Ct. App. 2012) – An assignee of a mortgage note also acquires the mortgage securing the note. However, the assignee cannot foreclose nonjudicially in Oregon without previously having recorded the assignment. Using MERS as an agent does not avoid this requirement.

- *Bain v. Metropolitan Mortg. Group, Inc.*, 285 P.3d 34 (Wash. 2012) – If MERS never held the promissory note secured by the deed of trust, MERS is ineligible to be a "beneficiary" of a deed of trust under the Washington Deed of Trust Act.

- *Edelstein v. Bank of New York Mellon*, 286 P.3d 249 (Nev. 2012) – When MERS is the named beneficiary of a deed of trust and a different entity holds the promissory note, the note and the deed of trust are split, making nonjudicial foreclosure by either improper. However, any split is cured when the promissory note and deed of trust are reunited. In this case, because the foreclosing bank became both the holder of the promissory note *and* the beneficiary of the deed of trust, it had standing to foreclose nonjudicially.

- *Cadlerock Joint Venture, L.P. v. Lobel*, 143 Cal. Rptr. 3d 96 (Cal. Ct. App. 2012) – An assignee of a loan secured by a junior deed of trust, which was created simultaneously and by the same originator as the loan secured by the senior deed of trust, was not subject to the state's anti-deficiency statute and thus was permitted to pursue the debtor on the debt after the senior lender foreclosed nonjudicially, thereby "wiping out" the junior lien. The decision distinguishes *Bank of America v. Mitchell*, 204 Cal. App. 4th 1199 (2012) (single lender with both senior and junior deeds of trust cannot avoid the application of section California CCP § 580d by assigning the junior loan after the trustee's sale on the senior lien).

- *Baer v. Douglas*, 2012 WL 917190 (Cal. Ct. App. 2012) – The relative priority of two simultaneously executed deeds of trust that were stamped as recorded at the same time was not determined by which received the lower indexing number. Although neither of the trust deeds indicated on its face the relative priority of the lien created thereby, the trial court acted within its legal discretion when it based priority on the grantor's intent.

- *Onyeoziri v. Spivok*, 44 A.3d 279 (D.C. 2012) – A mortgagee that conducted a foreclosure sale at which it purchased the property for $59,000 after learning that the debtor had a contract to sell the property for $280,000 to a buyer who was pre-approved for financing could potentially be liable for intentional interference with business relations.

III. GUARANTIES

A. *Existence and Formation*

- *Capitol Grp., Inc. v. Collier*, 365 S.W.3d 644 (Mo. Ct. App. 2012) – A corporate president who signed an application for credit to the corporation did not thereby guaranty the resulting debt even though the application stated "we the undersigned, agree to be jointly, severally, and individually responsible for the payment of any and all goods and/or services furnished . . . to or for our business or to us individually." The purpose of the application, as evidenced by its structure and single signature block, was to bind the corporation but not the individual president.

- *U.S. Bank v. Polyphase Elec. Co.*, 2012 WL 1394397 (D. Minn. 2012) – Guaranty agreements were enforceable even though not signed by the creditor because the agreements waived notice of acceptance and the act of extending credit is sufficient acceptance. Although the guaranty agreements expressly stated that "only those terms in writing . . . signed by the parties are enforceable," the creditor was not a "party" to the agreement.

- *Sherwin-Williams Co. v. Culotta*, 2012 WL 1550589 (La. Ct. App. 2012) – Guaranty that "remained in full force and effect until written notice of revocation is received by" the creditor was not implicitly revoked once the creditor's representatives learned that the guarantor had retired from business and sold the corporate debtor to his son.

- *MB Fin. Bank v. Paragon Mortg. Holdings, LLC*, 89 So. 3d 917 (Fla. Ct. App. 2012) – The transfer of senior loan to a newly formed entity owned by two of the four guarantors did not operate as a payment of the senior loan and thus did not terminate the subordination agreement and its standstill provision. Language in the subordination agreement providing for the senior loan to be paid in full before any payment was made "by or on behalf of" the

debtor did not prevent the junior lender from obtaining a judgment against the guarantors, although it prevented enforcement of the judgment until the senior loan was paid in full.

- *BHC Interim Funding II, L.P. v. FDIC*, 851 F. Supp. 2d 131 (D.D.C. 2012) – An assignment agreement pursuant to which the bank agreed to assume responsibility for obligations arising out of customer deposit accounts and pooled deposit accounts established on behalf of customers did not cover a guaranty agreement that was secured by the fees generated by the deposit agreements.

- *In re Estate of Afrank*, 291 P.3d 576 (Mont. 2012) – The estate of a co-debtor was not obligated to pay half of the secured obligation owing on a motor home which the other co-debtor acquired full and complete title to by right of survivorship.

- *In re Royal Manor Mgmt., Inc.*, 480 Fed. Appx. 362 (6th Cir. 2012) – A loan agreement signed by individuals without any indication that they did so on behalf of the business entities they owned and controlled, and which referred in several places to the obligations of the individuals without ever referring to an obligation of the business entities, bound the individuals but not the business entities.

- *Merrill Lynch Capital Serv., Inc. v. VISA Finance*, 2012 U.S. Dist. LEXIS 51109 (S.D.N.Y. Apr. 10, 2012) – A corporate guaranty of a swap transaction was enforceable even though it was not authorized by a formal, written board resolution. The officers signing guaranty had actual and apparent authority to bind the company.

B. Scope

- *Haggard v. Bank of Ozarks Inc.*, 668 F.3d 196 (5th Cir. 2012) – An unconditional guaranty that did not require the lender first to seek payment from the borrower but which was "limited to the last to

be repaid $500,000" of a $1.6 million loan and which also provided that "until the principal balance of the Loan is reduced to less than $500,000, there will be no reduction in the amount guaranteed hereunder" was ambiguous as to whether the creditor could pursue the guarantor before the balance of the loan was reduced to $500,000.

- *SSI Holdco, Inc. v. Mourton*, 2012 WL 4094301 (N.D. Okla. 2012) –A guaranty agreement that covered the interest due on a secured loan required the creditor to apply to the guaranteed obligation "[a]ll payments received from the debtor or on account of the Guaranteed Indebtedness from whatsoever source." The secured party's credit bid at a foreclosure sale did not result in a "payment received" and thus the secured party was free to apply the credit bid to the principal portion of the secured obligation rather than to the guaranteed interest obligation.

- *Eagerton v. Vision Bank*, 99 So. 3d 299 (Ala. 2012) – In a debtor's bankruptcy, the consolidation of two loans that did not alter the interest rate of the first loan or change the collateral for either discharged the guarantors of the first loan even though the guaranty agreement covered extensions, renewals, and replacements of that loan and waived "any and all defenses . . . pertaining to Indebtedness" because the consolidation increased the amount of the debt. It did not matter that the creditor sought to allocate foreclosure proceeds proportionally.

- *LFG Nat. Capital, LLC v. Gary, Williams, Finney, Lewis, Watson, and Sperando P.L.*, 874 F.Supp. 2d 108 (N.D.N.Y. 2012) – A guaranty agreement provided that "a separate action may be brought against Guarantor irrespective of whether an action is brought against Debtor" and that "Guarantor's liability hereunder shall not be contingent upon the exercise or enforcement by Creditor of any remedies it may have against Debtor." This language was sufficient to waive the guarantor defenses of California Civil Code §§ 2845 and 2849. Those provisions require, respectively, the creditor to pursue the collateral and the principal obligor before

proceeding against the guarantor. Further, an additional clause generally waiving all suretyship defenses and then expressly listing five defenses other than sections 2845 and 2849 did not alter this conclusion because nothing indicated that the enumerated defenses were the only ones waived.

- *Mid-Wisconsin Bank v. Koskey*, 819 N.W.2d 563 (Wis. Ct. App. 2012) – Although a bank's statement to a guarantor that it would pay off the existing lender and obtain a first lien on the collateral was not an actionable promise because of the integration clause in the guaranty, it *was* a misrepresentation that entitled the guarantor to rescind the guaranty.

- *JP Morgan Chase Bank v. Winget*, 2012 WL 5342412 (E.D. Mich. 2012) – An individual and his living trust each guaranteed a commercial loan. The guaranty expressly stated that it could be enforced against the individual only with respect to certain pledged stock – but had no such limitation with respect to the trust. The court reformed the guaranty due to mistake to impose the same limitation with respect to the trust because the trust was added to the guaranty late in negotiations due to uncertainty about who owned the stock. The lender had never investigated the creditworthiness of the trust and the parties had had no discussions about the lender's position being enhanced by an unlimited guaranty from the trust.

- *Porter Capital Corp. v. Thomas*, 101 So. 3d 1209 (Ala. Civ. App. Ct. 2012) – A guarantor was not a third-party beneficiary of a loan agreement and thus was not bound by the arbitration clause in that agreement. The guarantor was also not compelled to arbitrate his claims against the lender based on an arbitration clause in the guaranty agreement because that clause defined arbitrable claims to "mean" those between the lender and borrower, even though the clause then went on to indicate that it "includes" claims "arising out of, in connection with, or relating to" the guaranty.

- *Uhlmann v. Richardson*, 287 P.3d 287 (Kan. Ct. App. 2012) – A guarantor who paid the guaranteed debt had no claim for unjust enrichment against co-guarantors, but was entitled to contribution from them, subject to any equitable defenses that may apply.

- *In re Basil Street Partners, LLC*, 2012 WL 6101914 (Bankr. M.D. Fla. 2012) – An entity formed by one guarantor to purchase a note and guaranties at a steep discount from a lender could not collect the entire amount due from the other guarantors, and collection was limited to contribution toward the amount paid. The guarantor, as president of the debtor, breached a fiduciary obligation to the debtor by buying the note for himself. The guarantor owed no fiduciary duties to the other guarantors, who were themselves negotiating with the lender, unless all the guarantors impliedly agreed, at meeting shortly before the purchase of the note, to create such a fiduciary duty by forming a common negotiating strategy.

- *Bank of America v. Freed*, 2012 IL App. (1st) 110749 (Ill. Ct. App. 2012) – A "carve-out" provision in a guaranty provided that the guarantors, who otherwise guaranteed only $50.3 million of the $205 million loan, would be liable for the full amount of the debt if they contested, delayed or otherwise hindered any action taken by the lenders in connection with foreclosure or the appointment of a receiver. The provision was enforceable and thus the guarantors were liable for the full debt. The carve-out provision was not an unenforceable penalty because the lenders were still permitted to recover only their actual damages: the amount remaining on the loan. The carve-out provision was also not an unenforceable restraint on the guarantors' right to defend themselves and to seek due process because they could – and did – contest the appointment of a receiver, they were merely subject to consequences for doing so.

C. Discharge

- *J. Remora Maint. LLC v. Efromovich*, 943 N.Y.S.2d 792 (N.Y. Sup. Ct. 2012) – Language in a guaranty by which the guarantor purported to "waive, and agree not to assert any defense in any action" to enforce the guaranty barred the guarantor's alleged defenses based on fraudulent inducement and failure of consideration even though the guaranty did not otherwise state that it was "absolute and unconditional" and even though the waiver language appeared under the heading "Governing Law." The agreement also expressly provided that captions were inserted for convenience only and were not relevant to the interpretation of the agreement.

- *Biel Loanco III-A, LLC v. Labry*, 862 F.Supp. 2d 766 (W.D. Tenn. 2012) – Although creditor must act in good faith in deciding whether to foreclose on the collateral before seeking payment from the guarantors, the guarantors failed to present any evidence that the creditor acted in bad faith. While failure to protect and preserve the collateral can discharge guarantors, a failure to foreclose does not meet such threshold. Any problems that made the realty collateral unmarketable were not caused by the creditor. Thus, the creditor was entitled to summary judgment against the guarantors.

- *Principal Commercial Acceptance, LLC v. Buchanan Fund V, LLC*, 2012 WL 6095236 (Tex. Ct. App. 2012) – A guaranty agreement obligated the guarantor to pay the borrower's unfunded deferred equity contributions to a construction project. The guaranty was not triggered when the borrower defaulted in another manner by failing to fund an operating escrow. The lender's acceleration of the loan did not accelerate the obligation to pay the deferred equity contributions and hence there was nothing due on the guaranty. This was true even if the guarantor controlled the borrower and could therefore cause it to default other than by failing to make deferred equity contributions.

- *In re Mirant Corp.*, 675 F.3d 530 (5th Cir. 2012) – New York law, which by contract governed "the rights of the parties" to a guaranty agreement, applied to a claim that guarantee was an avoidable fraudulent transfer rather than the law of Georgia, the jurisdiction in which the guarantor was located.

- *In re TOUSA, Inc.*, 680 F.3d 1298 (11th Cir. 2012) – Lenders that shortly before bankruptcy were paid off with the proceeds of a new loan secured by subsidiaries of the borrower received a fraudulent transfer because they were entities for whose benefit the liens were transferred. Even if the opportunity to avoid default and bankruptcy constitutes "value" for this purpose, the value received by the subsidiaries was not, as the bankruptcy court found, reasonably equivalent to what they transferred.

- *Wachovia Sec., LLC v. Banco Panamericano, Inc.*, 674 F.3d 743 (7th Cir. 2012) – A corporation's grant of a blanket lien to a lender controlled by the corporation's subsidiaries was an intentionally fraudulent transfer designed to shield the corporation from its financial obligations because: (1) the debtor entered into the transaction shortly before or after incurring substantial debt to its stock broker; (2) the loan was between insiders; (3) the debtor retained possession or control of the property; (4) the transfer was of most of the debtor's assets; and (5) the debtor was insolvent or became insolvent shortly after the transfer.

- *In re Barton-Cotton, Inc.*, 2012 WL 2803742 (Bankr. D. Md. 2012) – A trustee stated a claim for both intentional and constructive fraudulent transfers in connection with a leveraged buyout by which the debtor – the target – granted a security interest in its assets to secure a loan that it received but distributed upstream to its stockholders, who transferred their interests to the acquirer. The trustee also stated fraudulent transfer claims for a subsequent

cash out by which the debtor borrowed from a non-insider to repay the leveraged buyout lender, an insider.

- *In re Tronox Inc.*, 464 B.R. 606 (Bankr. S.D.N.Y. 2012) – Liability for a fraudulent transfer – even one avoided pursuant to Bankruptcy Code § 544 and state law designed to protect creditors – is not limited to the amount of creditor claims, but may extend to the entire value of the property transferred, subject to the limitations and offsets provided for in the Bankruptcy Code.

- *Jefferson-Pilot Investments, Inc. v. Capital First Realty, Inc.*, 2012 WL 1952656 (N.D. Ill. 2012) – Because a cash collateral order expired when the bankruptcy case was dismissed, a secured party had no claim against the entities to whom the debtor transferred the funds post-petition for unjust enrichment, aiding a breach of fiduciary duty, tortious interference with contract, or conversion. The secured party also failed to plead with particularity a claim for an intentionally fraudulent transfer and failed to explain how the transfers were to insiders within the meaning of state fraudulent transfer law. However, the secured party did state a claim for a constructive fraudulent transfer.

- *U.S. Bank v. Verizon Communications Inc.*, 2012 WL 3100778 (N.D. Tex. 2012) – Even if the debts assumed and notes issued by a former subsidiary in a spin-off transaction were avoidable as fraudulently incurred obligations, they were not fraudulent transfers. Thus, while the obligations could be rendered unenforceable, no recovery was permitted under Bankruptcy Code § 550 even though the former parent transferred some of the newly issued notes to discharge its own obligations.

- *Bash v. Textron Financial Corp.*, 483 B.R. 630 (N.D. Ohio 2012) – The refinancing of secured loan pursuant to which the parties "amended" and "restated" the terms of their relationship and reduced the amount of credit available to the debtor — which operated a Ponzi scheme – was not a novation and did not create a new security interest in the collateral. Thus, the security interest

could not be avoided as a fraudulent transfer. Even if the lender engaged in bad faith after the initial loan transaction so that its claims could be subordinated, the bad faith would not invalidate its lien to cause the refinancing to be a new transfer.

- *In re Sentinel Mgmt. Group, Inc.*, 704 F.3d 1004 (7th Cir. 2012) – A debtor granted a security interest in customer funds which the debtor was required to keep segregated. Court rejected claims that (i) the violation of customer segregation rules was *per se* intent for an intentional fraudulent transfer claim, (ii) the secured party should be equitably subordinated and (iii) the secured party's contracts should be declared unenforceable because it facilitated the illegal pledge of customer segregated funds.

V. LENDER AND BORROWER LIABILITY

A. Regulatory and Tort Claims – Good Faith, Fiduciary Duties, Interference With Prospective Economic Advantage, Libel, Invasion of Privacy

- *In re Adam Aircraft Indus., Inc.*, 2012 WL 646273 (Bankr. D. Colo. 2012) – In a prepetition forbearance agreement, the debtor released all claims against the secured party arising from the credit agreement or the secured party's conduct. The release did not preclude third-party creditors from pursuing causes of action under the Bankruptcy Code that inured to the benefit of unsecured creditors. Thus, the release did not preclude the trustee from pursuing a claim for equitable subordination based on the secured party's refusal to fund the entire loan pursuant to the commitment letter and its declaration of default under the credit agreement for "technical" defaults without providing the debtor an opportunity to cure.

- *Gaia House Mezz, LLC v. State Street Bank and Trust Co.*, 2012 WL 1530385 (S.D.N.Y. 2012) – A bank agreed, subject to certain conditions, to waive $4.5 million in accrued interest to induce a borrower to complete a project and pay off a loan. The lender could not, after the borrower fully performed, rely on the fact that for a time, those conditions had not been satisfied. The bank's conduct violated the duty of good faith. The court held that the bank was equitably estopped by its months of silence, during which time the borrower continued to perform, and equitable principles prohibit such a forfeiture.

- *In re Singer*, 469 B.R. 293 (Bankr. W.D. Wis. 2012) – A bank entered into a forbearance agreement with debtors, which permitted partial payments for six months. The agreement did not expressly indicate when the deferred payment amounts would be due. The court construed the agreement against the bank, which had drafted it. As a result, the deferred payment amounts fell under the "due on maturity" clause of the loan agreement, not the clause

providing that acceptance of partial payments does not constitute a waiver of the bank's rights and remedies, and thus were not due until the end of the loan term.

- *FH Partners, LLC v. Complete Home Concepts, Inc.*, 378 S.W. 3d 387 (Mo. Ct. App. 2012) – An entity contracted with the FDIC to purchase a loan participation that the FDIC had previously sold to a different buyer. The entity did not acquire any interest even though the FDIC attempted to cure the defect by contracting with the other buyer to reacquire the participation interest retroactively to immediately before the second sale. It was not shown that both parties intended the transaction to be retroactive and, even if they had, that would not have affected the rights of a third party so as to automatically give the second buyer rights in the participation interest.

- *Wells Fargo Bank v. Baker*, 139 Cal. Rptr. 3d 502 (Cal. Ct. App. 2012) – The National Bank Act preempts a state law that requires a foreign corporation, but not a resident of the state, to obtain a certificate of authority to transact business in that state before using substituted service. Accordingly, a national bank may acquire personal jurisdiction over a defendant using substituted service even if the bank lacks such a certificate.

- *Am. Bank of St. Paul v. TD Bank, N.A.*, 2011 U.S. Dist. LEXIS 49646 (D. Minn. May 9, 2011) – A bank sued a secured bank, arguing the second bank was partially liable for damages that the first bank incurred under loans to the promoter for music "legends" 'N Sync and Backstreet Boys. The second bank was the original lender to the promoter and, after having discovered suspicious accounting and other information, declared the loan in default. The first bank was the "servicing lender" in a new facility to buy out the second bank. The second bank, although it ultimately purchased a small share of the new deal, allegedly did not disclose the negative information it had on the promoter. On summary judgment, the court rejected the first bank's claims for fraud by omission,

fraudulent misrepresentation, breach of contract and breach of duty of good faith and fair dealing. It refused to dismiss claims against the second bank for aiding and abetting and conspiracy, citing the need for further fact finding.

- *Odco Asset Mgmt. v. Barclays Bank PLC*, 973 N.E.2d 735 (N.Y. App. 2012) – The collateral managers for an SIV-Lite transaction did not have any fiduciary duty to noteholders.

- *Lotsadough, Inc. v. Comerica Bank*, 2012 WL 5258300 (E.D. Mich. 2012) – A loan applicant granted to its prospective landlord a security interest in all of its business assets, including its liquor license. The tenant/applicant was unable to provide the prospective lender with a first-priority security interest in those assets. The tenant/applicant did not have a cause of action against the prospective lender for refusing to make the loan because the term sheet signed by the applicant made the loan expressly subject to documentation satisfactory to the lender and other loan documents required the applicant to represent and warrant that the collateral was not and would remain not subject to any other security interest.

B. Obligations Under Corporate and Securities Laws

- *In re BankAltantic Bancorp, Inc. Litigation*, 39 A.3d 824 (Del. Ch. Ct. 2012) – A bank holding company's proposed sale of a bank constituted a sale of "all or substantially all" of its assets, but the buyer had not agreed to assume the holding company's debts, the proposed sale violated contractual covenants of the holding company and would be enjoined.

- *Dawson v. Pittco Capital Partners, L.P.*, 2012 WL 1564805 (Del. Ch. Ct. 2012) – The members of an LLC held secured notes and could not be forced to surrender the notes in connection with a merger to which they objected because the LLC agreement did not unambiguously provide for a mandatory capital contribution in

connection with an approved merger. Consequently, the notes survived the merger, as did the security interest.

- *Retirement Board of the Policemen's Annuity & Benefit Fund v. Bank of New York Mellon*, 2012 WL 1108533 (S.D.N.Y. 2012) – Certificates issued under a pooling and servicing agreement for mortgage-backed securities are debt, not equity, and are therefore subject to the Trust Indenture Act. The investors stated a claim against indenture trustee for failing to require the master servicer to cure, substitute, or repurchase defective loans.

- *Oddo Asset Management v. Barclays Bank PLC*, 973 N.E.2d 735 (N.Y. 2012) – A mezzanine note holder had no cause of action for a breach of fiduciary duty against asset managers of an SPV holding mortgage backed securities and no cause of action for aiding and abetting a breach of fiduciary duty against the warehouse lender that sold the securities to the SPV or the rating agency that rated them. The note holder was a debt investor, not an equity investor, and thus was owed no fiduciary duty.

- *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC*, 360 S.W.3d 152 (Ky. 2012) – Piercing the corporate veil was appropriate because the grandparent and parent corporations deprived the wholly-owned subsidiary of all income and rendered it an asset-less shell by: (i) making all employees of the subsidiary employees of the grandparent; (ii) having all payments by the subsidiary's customers go into a "lock box" account controlled by the grandparent and then treating the funds as property of the grandparent; (iii) having the grandparent pay all the vendors and lessors who provided goods, services, or property to the subsidiary; (iv) listing the parent and grandparent as the named insureds on the property damage insurance for the subsidiary's leased premises; (v) failing for numerous years to hold an annual board of directors' or shareholders' meeting for either the parent or the subsidiary; and (vi) failing to file sales and use tax returns for the subsidiary, but instead including all of the subsidiary's

transactions in the returns of the grandparent and another affiliate.

- *CBR Event Decorators, Inc. v. Gates*, 962 N.E.2d 1276 (Ind. Ct. App. 2012) – The shareholders of a corporation formed to purchase assets of an existing business were not liable for the corporation's breach of the purchase contract because piercing the corporate veil requires some causal connection between the principal's misuse of the corporate form and the fraud on third parties. The only fraud alleged was the corporation's claim that the seller made misrepresentations that were contradicted by the merger clause in the purchase agreement, which had no relationship to the corporation's status. The seller was aware that the corporation was newly formed and thus would lack corporate records.

- *In re Perry H. Koplik & Sons, Inc.*, 476 B.R. 746 (Bankr. S.D.N.Y. 2012) – The officers of closely-held corporation violated their duty of care with respect to extensions of credit to a customer and their duty of loyalty in forgiving loans to themselves. Their liability for breach of the duty of care was limited by the failure to prove that the breach was the proximate cause of the losses given accounting fraud by the customer.

- *Ret. Bd. of the Policeman's Annuity & Benefit Fund v. Bank of New York Mellon*, 2012 WL 1108533 (S.D.N.Y. Apr. 3, 2012) – MBS certificates are subject to the Trust Indenture Act because they are debt, not equity.

C. *Borrower Liability*

- *In re BankAltantic Bancorp, Inc. Litigation*, 39 A.3d 824 (Del. Ch. Ct. 2012) – A transaction in which a bank holding company would: (i) sell all of its equity interest in its regulated savings bank; (ii) receive 100% of the equity in a newly formed entity owning the savings bank's principal assets and (iii) no longer function as a federally regulated bank holding company, constituted a sale of

substantially all of its assets in violation of a trust indenture and was therefore permanently enjoined.

- *Thomison v. State*, 2012 WL 5989193 (Tex. Ct. App. 2012) – Debtor who was unable to account for more than 500 head of cattle subject to a security interest was guilty of a first degree felony and sentenced to fifteen years in prison.

- *Synectic Ventures I, LLC v. EVI Corp.*, 294 P.3d 478 (Or. Sup. Ct. 2012) –A debtor exercised an option to convert the secured party's loan to equity after the secured party's manager agreed to an extension of the debt. The manager – who was also chairman of the board and treasurer of the debtor and who stood to benefit personally from the extension – had a conflict of interest and the extension may not have been fair to the secured party, in which case the manager lacked authority to agree to the extension. Although the secured party's operating agreement expressly gave members permission to: (i) invest in other ventures with no obligation to account to the secured party for such opportunities; and (ii) own securities issued by, and participate in the management of, other companies in which the secured party invested, neither of these authorizations expressly waived a conflict of interest by the managing member.

D. Disputes Among Creditors and Intercreditor Issues

- *In re Lexi Development Co., Inc.*, 2012 WL 1596717 (Bankr. S.D. Fla. 2012) – A senior creditor and its assignee breached an intercreditor agreement by failing to provide notice of the debtor's default to the junior lender concurrently with notice to the debtor. Because the intercreditor agreement authorized the junior lender to cure a default to avoid the accrual of default rate interest and the concomitant erosion of its junior lien, the senior creditor's failure to provide notice precluded the senior creditor from charging interest at the default rate.

- *Huntington Nat'l Bank v. RDJ Land & Property Group, LLC*, 2012 WL 4357443 (S.D. Ind. 2012) – An intercreditor agreement provided for lien subordination but contained no provision for debt subordination. The agreement had no applicability once the collateral was sold and the creditors were pursuing the guarantors for the deficiency.

- *Prudential Ins. Co. of America v. WestLB AG*, 37 Misc. 3d 1208(A) (N.Y. Sup. Ct. 2012) – A credit agreement and related documents required that payments received be distributed on a *pro rata* basis among all the lenders and required the consent of all lenders – not just the Required Lenders – to an amendment to the credit agreement or to the release of substantially all the collateral. The administrative agent for the credit facility was not permitted to distribute the proceeds of the collateral in a manner that substantially benefitted those lenders that provided exit financing.

- *Domus, Inc. v. Davis-Giovinazzo Constr. Co., Inc.*, 2011 U.S. Dist. LEXIS 93426 (E.D. Pa. Aug. 22, 2011) – In an interpleader proceeding, the court considered the "doctrine of unclean hands" to determine whether a UCC first priority perfected secured creditor should be subordinated to other creditors. The court concluded that the doctrine would permit subordination where secured party engaged in "egregious misconduct," acted fraudulently, acted with bad faith, or acted unconscionably.

- *Citizens Bank and Trust Co. v. Riederer (In re Brooke Capital Corp.)*, 2011 Bankr. LEXIS 210 (Bankr. D. Kan. Jan. 20, 2011) – A lender subsidiary loaned cash to a parent and took back a security interest in the parent's interest in a sister subsidiary. The lender subsidiary's agent took possession of the pledged stock certificate. The lender subsidiary granted participation interests in this loan to third parties. No financing statements were filed to reflect the participation. The parent later granted another lender a second lien in the pledged stock, which the lender perfected by filing a financing statement (and perhaps by possession through the

subsidiary lender's agent). The second lender sought summary judgment that its interests in the shares were senior to those of the lender subsidiary and its participants, in part arguing that the participations should be recharacterized as loans. After significant analysis of legal precedent on "true" participation interests and the relevant facts, the court concluded there was not enough evidence to grant summary judgment in the second lender's favor.

VI. U.C.C. – SALES AND PERSONAL PROPERTY LEASING

A. Scope

1. General

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2. Software and Other Intangibles

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3. Leasing

- *Wells Fargo Bank Northwest v. RPK Capital XVI, LLC*, 360 S.W.3d 691 (Tex. Ct. App. 2012) – A post-bankruptcy sale of aircraft as part of the orderly liquidation of business by aircraft lessor was not a sale in ordinary course of business and therefore the buyer did not acquire (under UCC § 2A-310(d)) rights to goods that were an accession to the aircraft. UCC § 9-10__(b)(__).

B. Contract Formation and Modification; Statute of Frauds; "Battle of the Forms"; Contract Interpretation; Title Issues

1. General

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2. Battle of the Forms

- *Leica Geosystems, Inc. v. L.W.S. Leasing, Inc.*, 872 F.Supp. 2d 1191 (D. Colo. 2012) – A seller's standard terms, which the seller's written price quotations referenced, but did not include, describe, or provide a link to, were not part of the initially-formed agreement. The seller's invoice containing a link to the standard terms which was sent the following day operated as a confirmation. The choice-of-law clause became part of the agreement because it was an immaterial additional term, but

the disclaimers of the implied warranty of fitness, incidental damages, and consequential damages were material changes that did not become part of the agreement. UCC § 2-207.

C. Warranties and Products Liability

1. Warranties

- *Wells Fargo Equip. Fin., Inc. v. Titan Leasing, Inc.*, 2012 WL 6184896 (N.D. Ill. 2012) – An equipment lessor that, in connection with its grant to lender of a security interest in an equipment lease, warranted that the lessee had accepted the goods and had not defaulted on its payment obligations was not liable for breach of those warranties. Even though the lessee did not receive the goods until after the warranty was given and never used the goods because they were damaged in transit, the lessee had in fact accepted the goods because the lease agreement gave the lessee a right to inspect before shipment and expressly provided that shipment constituted acceptance, and further, the goods had in fact been shipped before the warranty was given. There was no payment default because no payment was yet due under the lease when the warranty was given.

2. Limitation of Liability

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3. "Economic Loss" Doctrine

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D. Performance, Breach and Damages

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E. Personal Property Leasing

- *In re Qimonda Richmond, LLC*, 476 B.R. 431 (Bankr. D. Del. 2012) – An indemnification clause in a participation agreement relating to equipment lease which required the lessee to indemnify certain parties for costs and expenses "which may be imposed on, incurred by or asserted against any Indemnitee" did not cover claims for the lost residual value of equipment after the debtor filed bankruptcy and rejected the lease because the clause covered only claims asserted against the indemnitees by third parties, not claims they asserted against the lessee for their lost investment opportunity.

VII. COMMERCIAL PAPER AND ELECTRONIC FUNDS TRANSFERS

A. Negotiable Instruments and Holder in Due Course

- *Carver Fed. Sav. Bank v. 3 Whale Square, LLC*, 959 N.Y.S. 2d 88 (N.Y. Super. Ct. 2012) – A promissory note contained a waiver of notification of default. The note was not rendered ambiguous by another clause requiring notifications to be sent by certified mail because the note also required the borrower to provide notification of certain prepayments.

- *JCC Development Corp. v. Levy*, 146 Cal. Rptr. 3d 635 (Cal. Ct. App. 2012) – A promissory note which authorized the lender to accelerate the debt upon the borrower's default and, in the same paragraph, provided that "[t]hereafter, interest shall accrue at the maximum legal rate," did not call for default-rate interest after the note matured. The default-rate interest applied only after acceleration and, upon maturity, there was nothing to accelerate.

- *Murphy v. Aurora Loan Serv.*, 699 F. 3d 1027 (8th Cir. 2012) – Homeowners who borrowed money for the purpose of purchasing a home brought suit against MERS, the lender and its servicer to quiet title based on seven alleged defects in the ability of either MERS or the lender to foreclose on their homes. MERS was the homeowners' nominal mortgagee. The homeowners' promissory notes were pooled, securitized, and sold into the secondary market, after which MERS assigned each mortgage to the lender. The lender foreclosed after homeowners defaulted on their mortgages. Homeowners then brought suit alleging that neither MERS nor the lender had the authority to foreclose. The lower court dismissed all seven claims as variations of the "show-me-the-note" theory, which has been rejected in Minnesota. Show-me-the-note claims argue the holder of legal title to a mortgage cannot foreclose without producing the underlying promissory note. The court upheld the dismissal of five claims, but reversed and remanded with respect to two quiet title claims that did not

rely on the show-me-the-note theory. In these two claims, homeowners allege that assignments to MERS or the lender were either unrecorded or executed by individuals lacking authority to do so.

- *California Bank & Trust v. Shilo Inn*, 2012 WL 5605589 (D. Or. 2012) – A term in a promissory note providing for the interest rate to increase by 5% upon default was an unenforceable liquidated damages provision under California Civil Code § 1671 because the creditor offered no evidence that the higher interest rate bore any relation to the anticipated harm arising from the default.

- *Jones v. Wells Fargo Bank*, 666 F.3d 955 (5th Cir. 2012) – The court found that the lower court properly found a bank liable for conversion and breach of contract based on a cashier's check purchased by the plaintiff, where the bank deposited the check into the wrong account. UCC § 3-420.

B. Electronic Funds Transfer

- *Licci v. Lebanese Canadian Bank, SAL*, 2012 U.S. App. LEXIS 4525 (2d Cir. Mar. 5, 2012) – Companion cases alleging American Express was liable for Lebanese terrorist attacks because it made wire transfers to terrorists. The court states banks do not have a duty to protect non-customers from torts by bank customers.

- *Charles Russell, LLP v. HSBC Bank USA, N.A. (In re Awal Bank, BSC)*, 455 B.R. 73, 75 U.C.C. Rep. Serv. 2d (Callaghan) 245 (Bankr. S.D.N.Y. 2011) – A bank received almost $13 million in an inadvertent wire transfer two weeks before another bank opened insolvency proceedings in Bahrain. The recipient bank set off the $13 million against outstandings on the other bank's credit facility. The administrator for the other bank's insolvency brought common law claims against the recipient bank seeking return of the money (including conversion and unjust enrichment). The recipient bank countered that Article 4A of the UCC, governing electronic transfers, governed the transaction and that, pursuant to

the version of Article 4A in effect in New York, § 4A-209(b)(2) treated the wire transfer as complete and cut off all common law claims. The court concluded that Article 4A governed if the setoff was accomplished before the recipient bank had notice of the error (UCC § 4A-211(b)) and that Article 4A's rules were focused on transfers of funds to an unintended beneficiary (UCC § 4A-205(a)) and not transfers to an intended beneficiary but the wrong account/bank. The court refused to dismiss the complaint, pending further factual information on when the recipient bank had notice. The case also includes discussion of Article 15 Bankruptcy Rules.

- *Patco Constr. Co., Inc. v. People's United Bank d/b/a Ocean Bank*, 684 F.3d 197 (1st Cir. 2012) – A bank's security procedures for confirming authenticity of instructions – involving verification questions that were not frequently updated – were inadequate under UCC Article 4A because they were not commercially reasonable.

VIII. LETTERS OF CREDIT, INVESTMENT SECURITIES, AND DOCUMENTS OF TITLE

A. Letters of Credit

- *Fish Creek Capital, LLC v. Wells Fargo Bank*, 485 Fed. Appx. 924(10th Cir. 2012) – A lender did not violate the duty of good faith and fair dealing by extending a letter of credit that it had issued to ensure the beneficiary's completion of infrastructure improvements to the borrower's property.

- *Michigan Commerce Bank v. TDY Indus., Inc.*, 76 U.C.C. Rep. Serv. 2d 279 (W.D. Mich. Dec. 1, 2011) – A letter of credit was not a "perpetual" letter of credit with a five year statutory expiration under UCC § 5-106(d) because the magic word "perpetual" was not used. The court follows the Ninth Circuit *Golden West* case.

B. Investment Securities

- *Smith v. Powder Mountain, LLC,* 492 Fed. Appx. 981 (11th Cir. 2012) – A creditor that received a court order awarding it the debtor's securities accounts and then reached an agreement with securities intermediary on how to transfer the entitlements had "control" under UCC § 8-106(d)(2) sufficient to defeat the rights of intervening garnishor, even though the intermediary's agreement was conditioned on receipt of additional documentation. The court held that control can exist even though subject to a condition other than the debtor's consent. As a result, the creditor was a protected purchaser with priority over the garnishor.

  Comment: The status of the creditor as a protected purchaser should not have been relevant to the rights of a later-in-time lieu creditor.

IX. CONTRACTS

A. *Formation, Scope, and Meaning of Agreement*

- *Edelman Arts, Inc. v. Art Int'l (UK) Ltd.*, 841 F. Supp. 2d 810 (S.D.N.Y. 2012) – The placement of a signed purchase order in escrow was a mechanism to create a condition precedent to the validity of the parties' contract, not just a condition to the buyer's duty to pay.

- *Green Tree Servicing, LLC v. Woods*, 388 S.W.3d 785 (Tex. Ct. App. 2012) – A loan servicing agreement, its amendment, and sub-servicing agreement established that the sub-servicer had capacity to bring an action against the debtors on an allegedly securitized loan. Whether the sub-servicer could establish that the loan was transferred from the original creditor to one of the parties to the servicing agreement and whether the loan remained subject to the servicing agreement relates not to capacity, but to standing, an issue that could not properly be determined in a no-evidence motion for summary judgment.

- *Epitech, Inc. v. Kann*, 139 Cal. Rptr. 3d 702 (Cal. Ct. App. 2012) – Creditors were not third-party beneficiaries of a contract between the debtor and its financial advisor and, thus, their action against the advisor for misrepresentation – based on statements made before, during, and after the advisor's contractual relationship with the debtor – was not subject to the arbitration clause contained in that contract.

- *BKCAP, LLC v. CAPTEC Franchise Trust*, 2000-1, 688 F.3d 810 (7th Cir. 2012) – The court interpreted loan agreement language regarding prepayment yield maintenance and expense payments.

- *Louisiana Stadium & Exposition v. Fin. Guar. Ins.*, 701 F.3d 39 (2d Cir. 2012) – A party to an agreement failed to state a valid basis

for rescission of an agreement to purchase bond insurance. In connection with a bond issuance, the issuer of the bonds obtained bond insurance from the tax issuer of such insurance. Two years later, the issuer of the insurance lost its triple-AAA credit rating and was eventually ordered by the New York Insurance Department to stop paying all claims against existing policies. The bond issuer then commenced suit claiming that the insurance issuer falsely represented its investment strategy and creditworthiness going forward. The court affirmed the lower court's dismissal for failure to state a claim, holding that the cause of the agreement was to protect the bond issuer's bondholders in the event of default by the bond issuer. To the extent that the insurance issuer's AAA rating at the time of contract reduced the interest rate at which the bond issuer issued bonds, this benefit was ancillary to the principal cause of the agreement.

- *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49 (Minn. 2012) – Pursuant to the state constitution, a debtor was entitled to a jury trial on a bank's contractual claim for attorney's fees in connection with action to enforce a secured loan. The claim is legal, not equitable, because it is more like one for indemnity than one for restitution or specific performance.

- *Bayerische Landesbank v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42 (2d Cir. 2012) – Investors in collateralized debt obligation that sold interests in a credit default swap, sufficiently alleged that they were third-party beneficiaries of the portfolio management agreement entered into between CDO issuer and the registered investment adviser. The agreement specifically stated the adviser's obligations and liabilities to the investors. Although the agreement identified the swap counter-party as an intended third party beneficiary and disclaimed the existence of other third-party beneficiaries "except as otherwise specifically provided herein,"

the exception might refer to the entire agreement, not merely the clause on third-party beneficiaries.

- *In re Guggenheim Corp. Funding, LLC*, 380 S.W.3d 879 (Tex. Ct. App. 2012) – A credit agreement contained a jury waiver clause, which applied to any "legal action or proceeding relating to this agreement or any other loan document," including "any amendment" or "modification" thereto. The court held that it covered claims relating to amended warrants given that a contemporaneous fee letter identified the original warrants as a "loan document" and the parties had agreed that the credit agreement and fee letter should be construed together.

- *Bank of America v. FDIC*, 2012 WL 6105147 (D.D.C. 2012) – The FDIC stated a claim against a custodian of mortgage loans despite an exculpatory clause in the Custodial Agreement because the clause excepted not only gross negligence, willful misconduct, and a bad-faith material breach not cured within 10 days of notice, but also "other malfeasance," which was undefined and too broad to constitute clear and unequivocal notice of what rights were contracted away.

- *Lehman Bros. Holdings Inc. v. Bethany Holdings Group, LLC*, 801 F.Supp. 2d 224 (S.D.N.Y. Aug. 5, 2011) – The court concluded that jury trial waivers in guaranties are enforceable where the guarantor had sufficient bargaining power and "business acumen." The guarantor had authorized his attorney to attach his pre-signed signature page and the jury trial waiver was sufficiently conspicuous.

B. Choice of Law

- *Crastvell Trading Ltd. v. Marengere*, 90 So. 3d 349 (Fla. Ct. App. 2012) – A forum-selection clause in loan agreements was not binding on the debtors' affiliates or their controlling shareholder because the agreements expressly indicated that there were no third-party beneficiaries entitled to enforce the agreements.

- *IDACORP, Inc. v. American Fiber Systems, Inc.*, 2012 WL 4139925 (D. Id. 2012) – A clause in a stock purchase agreement selecting New York as the exclusive forum to litigate disputes was not a basis for a federal court in Idaho to dismiss or transfer an action brought for breach of that contract because Idaho law invalidates choice-of-forum clauses that restrict access to Idaho courts.

- *Citizens Bank v. Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, 2012 WL 5828623 (E.D. Mich. 2012) – Because no contrary intention was manifest in the choice-of-law clause in the parties' control agreement, Michigan procedural law, including its six-year statute of limitations, applied to tort and contract claims brought under New York law, rather than the chosen law of New York with its three-year limitations period.

C. Arbitration

- *Newton v. American Debt Serv., Inc.*, 854 F. Supp. 2d 712 (N.D. Cal. 2012) – An arbitration clause in a consumer's contract with a debt settlement company was procedurally unconscionable because the contract was one of adhesion. The arbitration clause was located on the back of a double-sided form which was incorporated into the actual contract by reference, but was not contained within the contract itself or signed by the consumer. The arbitration clause was substantively unconscionable because it: (i) limited the debt settlement company's liability to the amount the consumer paid, even though federal law expressly authorizes greater recovery; (ii) allows for the prevailing party to recover reasonable attorney's fees, even though state law permits such an award in a consumer contract only if the action was not brought in good faith; (iii) required arbitration in Tulsa, the debt settlement company's home city, thereby requiring the consumer to incur substantial expense; and (iv) gave the debt settlement company the unilateral right to choose an arbitrator.

- *Grosvenor v. Qwest Corp.*, 854 F. Supp. 2d 1021 (D. Colo. 2012) – An arbitration clause in an internet subscriber agreement was illusory

and not enforceable because the provider reserved the right to modify any of the agreement's provisions, including the arbitration clause, at its sole discretion.

- *MV Insurance Consultants v. NAFH National Bank*, 87 So. 3d 96 (Fla. Ct. App. 2012) – Because agreements executed contemporaneously by the same parties and concerning the same transaction are construed together as a single contract, an arbitration clause in the parties' Collateral Assignment of Termination Payments and Economic Interests applied to claims brought under the promissory note, security agreement, and guaranty.

- *Amegy Bank Nat'l Ass'n v. Monarch Flight II, LLC*, 870 F.Supp. 2d 441 (S.D. Tex. 2012) – A secured party's claims for conspiracy and fraudulent transfer against a debtor's wife and entities controlled by the debtor were subject to arbitration between the secured party and the debtor because the conspiracy claim alleged substantially interdependent and concerted misconduct between the debtor and the nonsignatory defendants and the fraudulent transfer claim was premised on the security agreement.

- *Ping v. Beverly Enter., Inc.*, 376 S.W.3d 581 (Ky. 2012) –A mother's durable power of attorney regarding financial decisions and medical treatment gave her daughter authority "[t]o generally do any and every further act and thing of whatever kind, nature, or type required to be done on my behalf" and directed that "the language of this document be liberally construed." The power of attorney did not give the daughter authority to enter into an arbitration agreement with a long-term care facility (which was not a condition to admission to the facility) because the agency was limited to managing the mother's property and finances and making healthcare decisions on her behalf, and did not authorize the daughter to waive the mother's access to courts when there was no reasonable necessity to do so.

- *Clay v. New Mexico Title Loans, Inc.*, 288 P.3d 888 (N.M. Ct. App. 2012) – An arbitration clause in a security agreement covered "any

claim, dispute or controversy . . . that in any way arises from or relates to this Agreement or the collateral." It defined "claim" to include actions based in tort. It did not cover the debtor's action against the secured party for injuries suffered when the debtor was shot by a repossession agent because the action did not relate to the agreement.

- *Hosier v. Citigroup Global Markets, Inc.*, 858 F. Supp. 2d 1206 (D. Colo. 2012) – Federal law governs the award of post-judgment interest in federal cases, including those confirming an arbitration award. The arbitration panel may not establish a post-judgment rate different from the federal statutory rate unless it determines the parties have clearly, unambiguously, and unequivocally contracted for their own rate.

D. Damages

- *Cataphora Inc. v. Parker*, 848 F. Supp. 2d 1064 (N.D. Cal. 2012) – Under applicable state law, a successful plaintiff on a contract action is entitled to prejudgment interest if either the contract so provides or the amount of the damages is certain or capable of being made certain with calculation. Here, the amount of damages was uncertain and the contract provided for 18% interest on "any payments that are late" but not on any other breach or dispute. Similarly, although parties are free to contract around federal law on post-judgment interest in diversity actions, here the agreement covered only late payments and did not expressly state that the parties agreed to a specified post-judgment interest rate or an intent to contract around 28 U.S.C. § 1961.

- *Lane v. U.S. Bank*, 2012 WL 3670467 (Cal. Ct. App. 2012) – A clause in a deed of trust entitled a lender to attorney's fees "in connection with Borrower's default" and "for the purpose of protecting Lender's interest in the Property and rights under this Security Agreement." The clause was broad enough to cover quasi-contract claims for unjust enrichment and imposition of a constructive trust. Such claims were "on the contract" within the

meaning of California's reciprocity statute. Thus, the lender was liable for the attorney's fees incurred by the borrower's representative in successfully defending against those claims of the lender.

- *Commercial Real Estate Inv., L.C. v. Comcast of Utah II, Inc.*, 285 P.3d 1193 (Utah 2012) – Contractual liquidated damages clauses are enforceable unless unconscionable at the time the parties enter into the contract.

- *Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n*, 2011 U.S. Dist. LEXIS 93927 (W.D. Okla. Aug. 23, 2011) – The court considered whether a repurchase agreement in a CMBS transaction requiring the seller of mortgages to repurchase non-complying loans at the purchase price plus interest and costs, constituted either an impermissible requirement of specific performance or unenforceable liquidated damages. The court cited competing CMBS precedent in concluding that on the facts of this case, the failure by the purchaser to mitigate damages should offset only the requirement to repay the purchase price as a result of any failure by the special servicer to service the loans post-default.

- *In re Makris*, 482 Fed. Appx. 695 (3d Cir. 2012) – A promissory note's clause made the borrower liable for the lender's attorney's fees incurred "in enforcing this Note." The clause was not broad enough to cover attorney's fees incurred in unsuccessfully pursuing the borrower for fees the lender incurred in suing the guarantor.

- *In re Glazier Group Inc.*, 2012 WL 6005764 (Bankr. S.D.N.Y. 2012) – A creditor's claim for attorney's fees incurred subsequent to the payoff of loan survived even though the payoff letter provided that upon receipt of payment "all obligations of the Borrower and any guarantors under any and all of the Loan Documents shall be deemed paid in full." The payoff letter expressly stated that the amount owed was "[a]s of December 5, 2011" and, in any event, the loan agreement contained an all-encompassing unambiguous

survival clause that provided that all indemnification obligations survive repayment of the loan.

X. OTHER LAWS AFFECTING COMMERCIAL TRANSACTIONS

A. Bankruptcy Code

1. Automatic Stay

- *In re Michigan BioDiesel, LLC*, 2012 WL 1941648 (Bankr. W.D. Mich. 2012) – The automatic stay did not apply to a creditor that, minutes after inadvertently filing a post-petition termination statement instead of an assignment, filed a correction statement. Consequently, the termination and correction statements stand as filed, for whatever effect they may have on the rights of the parties.

- *In re Burrell*, 2012 WL 3727130 (S.D. Tex. 2012) – A car dealer repossessed a car, provided the debtor with notification of a planned foreclosure sale, entered into contract for sale, and received payment under that contract. The dealer had not completed the foreclosure sale because the dealer had not delivered the car to the foreclosure buyer pre-petition. Accordingly, the debtor still had rights in the car when she filed her bankruptcy petition and the dealer was liable for both compensatory and punitive damages for violating the automatic stay by refusing to return the car upon demand.

- *In re Herbst*, 469 B.R. 299 (Bankr. W.D. Wis. 2012) – A secured party that replevied collateral prepetition violated the automatic stay by refusing to return it after the debtor filed for bankruptcy protection and demanded return of the collateral.

- *Weber v. SEFCU*, 477 B.R. 308 (N.D.N.Y. 2012) – A secured party that lawfully repossessed the debtor's vehicle before the debtor filed for bankruptcy protection violated the automatic stay by failing to promptly return the vehicle upon learning of the

bankruptcy proceedings because the vehicle became property of the estate.

- *In re Sauls*, 2012 WL 1224379 (Bankr. M.D.N.C. 2012) – A secured party that, after being informed of the bankruptcy case, refused to return an automobile it had repossessed prepetition and refused to allow the debtor access to the personal property in the car, violated the stay and was liable for the debtor's attorney's fees and punitive damages which would reduce the amount of the creditor's secured claim.

- *In re Velichko*, 473 B.R. 64 (Bankr. S.D.N.Y. 2012) – A secured party, post-petition, refused to return a vehicle it had repossessed prepetition unless the debtor paid arrearages and provided proof of insurance, and thereby violated the automatic stay and was liable for both compensatory and punitive damages.

- *In re McBride*, 473 B.R. 813 (S.D. Ala. 2012) – A lessor that willfully violated the automatic stay by repossessing leased vehicles post-petition was liable for compensatory damages, but was not liable for punitive damages because the repossession was a one-time incident, as opposed to ongoing conduct, and there was no evidence that the creditor was motivated by malice, vindictiveness, or bad faith.

- *In re Mwangi*, 473 B.R. 802 (D. Nev. 2012) – Prior to expiration of the 30-day period for objecting to exemptions, a bank did not violate the automatic stay by refusing to release funds on deposit to a Chapter 7 debtor who claimed them as exempt because the debtor had no right to possess the funds. After expiration of the 30-day period, the funds were not property of the estate, the stay therefore did not apply to them, and thus the debtor again had no claim against the bank for violating the stay by failing to turn over the funds. The debtor had no

standing to pursue the trustee's turnover claim under Bankruptcy Code § 542. Even if the above conclusions are incorrect, the bank still did not violate Bankruptcy Code § 362(a)(3) because a deposit account is nothing more than the bank's promise to pay and a bank does not exercise control over property of the estate when it refuses to perform its contractual obligation to pay the account owner. The court declined to adopt analysis of *In re Mwangi*, 432 B.R. 812 (9th Cir. BAP. 2010).

- *In re Jernigan*, 475 B.R. 535 (Bankr. W.D. Va. 2012) – A bank did not violate the stay by placing an administrative hold on a depositor's account after receiving notice that the depositor had filed a Chapter 7 bankruptcy petition. The bank immediately mailed a letter to the trustee inquiring what to do with the account funds and released the hold promptly upon receiving a reply from trustee. Thus, the bank's actions were taken to maintain the status quo and preserve property of the estate.

- *In re Williams*, 474 B.R. 604 (Bankr. N.D. Ill. 2012) – A secured party did not violate the stay by foreclosing on collateral in which the bankruptcy debtor, as guarantor of the secured obligation, had a right to redeem.

- *In re Blixseth*, 684 F.3d 865 (9th Cir. 2012) – The termination of the stay under Bankruptcy Code § 362(h) for the debtor's failure to file a statement of intention with respect to collateral applied to all collateral for the secured claim, not just the collateral listed in the debtor's schedules as securing the claim.

- *In re Jones*, 2012 WL 5993760 (Bankr. E.D. Va. 2012) – A secured party repossessed a debtor's motor vehicle prepetition. The secured creditor initially refused to return the vehicle after the petition was filed. When it did finally return the vehicle, the debtor's college textbooks and work uniforms were missing.

The secured party was liable for damages, including lost income, transportation expense, and attorney's fees, but not for tuition paid because there was inadequate proof that the loss of textbooks and temporary loss of the car were the proximate cause of debtor's withdrawal from college.

2. *Substantive Consolidation*

- *Thermo Credit, LLC v. Cordia Commc'ns Corp. (In re Cordia Commc'ns Corp.)*, 2012 Bankr. LEXIS 349 (Bankr. M.D. Fla. Feb. 2, 2012) – The court refused to consolidate entities on the grounds that they were sufficiently separate, there was insufficient allegation of creditor harm, and that it was improper to consolidate a debtor and non-debtor. The court cited precedent both ways on the non-debtor issue and issued a strongly worded opinion that consolidation of debtors and non-debtors is inappropriate. *See also In re Pearlman*, 462 B.R. 849 (Bankr. M.D. Fl. 2012), a decision by the same Judge including the same analysis and conclusion.

- *In re City Loft Hotel, LLC*, 465 B.R. 428 (Bankr. D. S.C. 2012) – The court refused to consolidate affiliates with distinct business purposes and creditors, following *Augie Restivo*.

- *In re It's Greek to Me, Inc.*, 2012 Bankr. LEXIS 1385 (Bankr. S.D.S.C. Mar. 7, 2012) – The court ordered substantive consolidation of entities whose affairs seemed hopelessly entangled where no creditor objected and creditors were deemed to treat entities as single economic unit.

- *760 S. Hill St., LLC v. Bank of America, N.A. (In re Meruelo Maddux Props., Inc.)*, 667 F.3d 1072 (9th Cir. 2012) – The court did not consolidate entities.

- *In re SW Boston Hotel Venture, LLC*, 460 B.R. 38 (Bankr. D. Mass. 2011) – The court approved the confirmation plan including

substantive consolidation on grounds that no creditors were harmed and that the only objecting creditor's claim was not reduced.

- *Hill v. Oria (In re Juliet Homes, LP)*, 2011 Bankr. LEXIS 5116 (Bankr. S.D. Tex. Dec. 28, 2011) – The court refused to dismiss a "reverse veil-piercing" claim under Texas law that would allow a parent corporation to collapse its subsidiaries into itself for purposes of recovering fraudulent transfers where it was sufficiently pled that the subsidiaries were "mere tools" of the parents in a Ponzi scheme. The court acknowledged that reverse veil piercing is a distinct concept from substantive consolidation in bankruptcy.

- *Kapila v. S&G Fin. Serv., LLC (In re S&G Fin. Serv. of S. Fla., Inc.)*, 451 B.R. 573 (Bankr. S.D. Fla. 2011) – The court concluded that it had authority to substantively consolidate a debtor with a nondebtor and that the requisites for substantive consolidation were sufficiently pled to survive summary judgment.

- *In re The Lodge at Big Sky, LLC*, 454 B.R. 138 (Bankr. D. Mont. 2011) – The court ordered substantive consolidation of a lodge owner and lodge manager, based on the *Augie Restivo/Bonham* test, because substantially all creditors believed the entities were a single economic unit and business functions were hopelessly intertwined.

- *In re AHF Dev., Ltd.*, 462 B.R. 186 (Bankr. N.D. Tex. Aug. 17, 2011) – The court refused substantive consolidation as an alternative to dismissing the Chapter 11 filing by a company with no outstanding operations. The court noted that substantive consolidation is an unusual remedy.

- *In re Pearlman*, 450 B.R. 219 (Bankr. M.D. Fla. 2011) – The court overrode the trustee's desire to limit substantive consolidation

to preserve "wrong payor" fraudulent transfer claims for unsecured creditors, calling the trustee's concerns "disingenuous." The financial affairs of debtors were "inextricably interwoven". The court noted there is no Eleventh Circuit precedent for "partial" substantive consolidation, but that the theory has limited support in other jurisdictions in cases that ordered substantive consolidation but preserved fraudulent transfers. *In re Bonham*, 229 F.3d 750 (9th Cir. 2000); *First Nat'l Bank of El Dorado v. Giller (In re Giller)*, 962 F.2d 796 (8th Cir. 1992).

3. *Claims*

- *In re 804 Congress, L.L.C.*, 2012 WL 1067566 (W.D. Tex. 2012) – The bankruptcy court lifted the stay to allow a secured party to foreclose on real property. The debtor's interest in the sale proceeds must be determined by reference to state law. Accordingly, the secured party's attorney's fees and the sale commissions of the trustee under the deed of trust were to be determined under state law, not pursuant to the Bankruptcy Code.

- *In re Wallett*, 2012 WL 4062657 (Bankr. D. Vt. 2012) – A creditor holding a fully secured claim is entitled to post-petition attorney's fees if such fees are authorized under its contract with the debtor. Because the loan agreement obligated the debtor to pay the creditor's attorney fees only in the event of default, and there was no default, the creditor was not entitled to post-petition attorney's fees incurred in reviewing the plan and preparing a proof of claim.

- *In re SW Boston Hotel Venture, LLC*, 479 B.R. 210 (1st Cir. BAP 2012) – An over-secured creditor is entitled to post-petition interest at the default rate unless equitable considerations compel a different result. There were no such equitable

considerations in this case because: (i) there was no creditor misconduct; (ii) the application of the default rate would not harm unsecured creditors, who were to be paid in full; (iii) the default rate was not a penalty; and (iv) application of the default rate would not impair the debtor's fresh start.

- *In re 785 Partners LLC*, 470 B.R. 126 (Bankr. S.D.N.Y. 2012) – An over-secured creditor is entitled to prepetition interest at the default rate and debtor's appeal for equitable relief has no place under New York Law. Post-petition interest is presumptively also at the contractual default rate, which the court may vary only if the secured creditor is guilty of misconduct, application of the rate would harm unsecured creditors or impair the debtor's fresh start, or the rate constitutes a penalty. Because the debtor was solvent, there was even more reluctance to alter the contract rate. The 5% increase in the interest rate due to default was not a penalty under New York law. However, a contractual term providing for an *additional* 5% premium on all payments that are more than five days late was not enforceable because the debtor's obligations would be based on the confirmed plan, not the original loan agreement and, in any event, an over-secured creditor cannot receive both default-rate interest and a late payment fee.

- *In re Omega Optical, Inc.*, 476 B.R. 157 (Bankr. E.D. Pa. 2012) – A secured party whose attorney filed an unsecured claim and subsequently received a Chapter 11 debtor's plan and disclosure statement classifying the claim as unsecured and providing for the secured party to terminate its financing statement and release its lien, was bound by the confirmation order and could not modify its claim to assert secured status.

- *In re Furrs Supermarkets, Inc.*, 2012 WL 3396146 (Bankr. D.N.M. 2012) – A supplier was not entitled to an administrative priority reclamation claim under Bankruptcy Code § 503(b)(9) because

the supplier's right to reclaim goods sold under U.C.C. § 2-702 was cut off by the debtor's inventory lenders, who qualified as good faith purchasers for value and whose claims exceeded the value of that inventory.

- *In re Johnson*, 2012 WL 1833890 (Bankr. D. Wyo. 2012) – Debtors purchased a business on credit and granted a security interest in the business assets to secure the debt, which the seller did not timely perfect. The debtors later obtained a bank loan secured by the same assets, which the bank did timely perfect. The debtors did not cause willful and malicious injury to the seller under Bankruptcy Code § 523(a)(6) because there was no evidence that the debtors intended the bank's security interest to prime the seller's security interest.

- *In re Rabinowitz*, 2012 WL 1072212 (Bankr. D.N.J. 2012) – A debtor sold a collateralized membership interest in an LLC, failed to notify the secured party of the sale, had the proceeds deposited into his attorney's trust fund account rather than one of his own deposit accounts, and then had the attorney make disbursements to insiders who were not shown to be actual creditors. The court held that the debtor had made transfers with the intent to hinder, delay, or defraud the secured party and thus, was not entitled to a discharge.

- *In re Franceschini*, 2012 WL 113337 (Bankr. S.D. Tex. 2012) – A creditor's claim against the owner of a car dealership pursuant to guaranty of the dealership's floor plan financing arrangement was nondischargeable under Bankruptcy Code § 523(a)(6) because the owner willfully and maliciously transferred over $1.6 million in proceeds of collateral to family members, affiliates, and other creditors after it became clear that the business would fail.

- *In re Martelle*, 2012 WL 1833906 (Bankr. E.D. Tenn. 2012) – A debtor received insurance proceeds for destruction of personal property collateral and used the funds to repair her home, rather than replace the collateral or repay the secured party. The court concluded that the debtor willfully and maliciously injured the secured party within the meaning of Bankruptcy Code § 523(a)(6).

- *Eaton v. Ford Motor Credit Co., LLC*, 2012 WL 3579644 (M.D. Tenn. 2012) – An owner/guarantor of an automobile dealership failed to remit to the dealership's floor plan financier the proceeds of vehicles sold despite demand therefor and despite a state court order restraining sale without the financier's consent and without remitting the sale proceeds to the financier. The obligation was nondischargeable under Bankruptcy Code § 523(a)(6).

- *In re Leonard*, 2012 WL 1565120 (Bankr. E.D. Tenn. 2012) – A guarantor/manager of an automobile dealership did not remit to the dealership's secured creditor the proceeds of vehicles sold. The debt was not nondischargeable under Bankruptcy Code § 523(a)(4) because inclusion of language of trust in the security agreement – without any requirement to segregate the proceeds – was insufficient to render the relationship a fiduciary one. However, the debt could be nondischargeable under Bankruptcy Code § 523(a)(6).

- *In re Hannan*, 477 B.R. 603 (Bankr. W.D. Pa. 2012) – A debtor who submitted false affidavit about what happened to an item of collateral in connection with adversary proceeding would be denied a discharge. Even if a discharge were granted, the claim of secured creditor would be nondischargeable under Bankruptcy Code § 523(a)(6) because the debtor, as president and majority owner of the borrower and as guarantor of the

secured loan, orchestrated the sale of collateral and deposit of proceeds into the account of a family member's business.

- *In re Nail*, 680 F.3d 1036 (8th Cir. 2012) – A state statute that refers to the debtor as a "trustee" of proceeds but imposes no trust-like duties such as segregation of the funds, does not create a fiduciary relationship. Thus the mortgagor's liability for a deficiency was not nondischargeable under Bankruptcy Code § 523(a)(4).

- *In re Bittar*, 2012 WL 1605160 (Bankr. D.N.J. 2012) – A debtor sold the collateralized dental equipment and used the proceeds to try to keep his business afloat. The debt was not nondischargeable under Bankruptcy Code § 523(a)(4) because the debtor was not a fiduciary of the secured party. The obligation was not nondischargeable under Bankruptcy Code § 523(a)(6) because the debtor did not act willfully because he: (i) was not an experienced businessman; (ii) was unrepresented when he signed the security agreement; (iii) did not initial the page containing language prohibiting sale of the collateral; and (iv) used all the proceeds to try to save the business and about half to pay the secured party.

- *In re Devries*, 2012 WL 528223 (Bankr. N.D. Iowa 2012) – A PMSI trust loan and motorcycle loan were nondischargeable under Bankruptcy Code § 523(a)(6) because the debtor concealed the location of the vehicles from the secured party, stripped the motorcycle and stored the parts removed in a separate location, and, the evidence suggests, similarly disassembled the truck and sold it for parts.

- *In re Casper*, 466 B.R. 786 (Bankr. M.D.N.C. 2012) – A credit union's claim against a debtor for failing to remit proceeds of ten repossessed vehicles that the credit union had consigned to debtor's business was nondischargeable under Bankruptcy

Code § 523(a)(2) as to the first two vehicles, but not as to the other vehicles consigned later because the credit union could not have justifiably relied on the debtor's representation of payment after the debtor failed to remit the proceeds of the first two vehicles.

- *In re Tayeh*, 2012 WL 162033 (Bankr. C.D. Ill. 2012) – A buyer's claim against a debtor/used car dealer for failing to comply with state title law by not submitting paperwork required to transfer clear title, which resulted in the debtor's secured lender repossessing and selling the car, was nondischargeable under Bankruptcy Code § 523(a)(2)(A).

- *In re Parra*, 483 B.R. 752 (Bankr. D.N.M. 2012) – The claim of a creditor who consigned 18 vehicles for sale on debtor's used car lot was nondischargeable under Bankruptcy Code § 523(a)(2) to the extent related to three vehicles for which the debtor provided title as a substitute for a consigned vehicle, but the substitute vehicle had already been sold. The claim was nondischargeable under Bankruptcy Code § 523(a)(6) to the extent related to four vehicles for which the debtor obtained a duplicate title, sold the vehicle, and did not pay the creditor.

- *In re Pagnini*, 2012 WL 5489032 (9th Cir. BAP 2012) – A credit union's claim that reasonably relied on debtor's misrepresentation and concealment about the condition of the collateral when it refinanced the loan was not nondischargeable under Bankruptcy Code § 523(a)(2) because the creditor's loss was not caused by the misrepresentation and concealment. There was no evidence that the amount the creditor received in connection with the refinancing was less than it would have collected had it enforced its security interest at that time.

- *In re KB Toys, Inc.*, 470 B.R. 331 (Bankr. D. Del. 2012) – The court considered whether the purchaser of trade claims held the

claims subject to the same rights and disabilities as the original holders of the claim, who sold them post-petition. At the time the trade claims were sold, the claims were subject to set offs based default judgments entered in favor of the trustee of the estate on the grounds that the original holders received preference payments from the debtor prior to its bankruptcy filing. Thus, after the claims were transferred to the buyer by the original holders, the trustee sought to disallow the buyer's claims against the estate in accordance with Bankruptcy Code § 502(d). That section allows the court to disallow any claim of an entity that is the transferee of a transfer avoidable under Section 547 of the Code, unless the entity or transferee returns such property to the estate. The buyer objected to the disallowance of its claims on the grounds that Section 502(d) of the Bankruptcy Code is limited to the disallowance of claims by the original claimant. The buyer argued that while the court can preclude the original claimant from participating in distributions from the debtor's estate, such disallowance cannot be applied to purchasers of the original holder's claim. The court held that Section 502(d) of the Code is an affirmative defense to a claim against a debtor's estate and that defense is not destroyed by the transfer of such claim. Similarly, the court was not persuaded by the buyer's argument that the estate still retained the ability to go after original claimants for recovery of the avoidable transfer. Nor was it persuaded that by ruling in favor of the estate, the court's decision would undermine the confidence of purchasers participating in the market for post-petition transfers of claims. The court noted that participants in this market are aware of the risks and uncertainties inherent in purchasing such claims (including the risk that the claim could be disallowed) and thus such purchasers are in a better position to negotiate proper indemnities covering such risk with the seller of the claim. In fact, the court noted, the buyer did

negotiate such indemnities in some, but not all of the purchase agreements it entered into with the original claimants.

4. *Bankruptcy Estate*

   - *In re South Side House, LLC*, 474 B.R. 391 (Bankr. E.D.N.Y. 2012) – Post-petition rents received by the debtor are property of the estate under New York law despite an assignment of rents clause in the mortgage that purported to be "absolute" because the assignment provided that the rents revert back to the debtor when the mortgage debt is satisfied. The post-petition payments made to the mortgagee are to be applied first to the mortgagee's unsecured claim, then to the post-petition interest, fees, costs, and charges allowed under Bankruptcy Code § 506(b), and finally to principal.

   - *In re Martinez*, 476 B.R. 627 (Bankr. D.N.M. 2012) – A mobile home for which secured party obtained writ of replevin prepetition but for which the secured party had not conducted a disposition or acceptance was property of the debtor's bankruptcy estate even though the replevin order, which had not been served or executed, stated that the debtor retained no interest in the mobile home.

   - *Wells Fargo Bank, N.A. v. Cherryland Mall Ltd. P'ship*, 295 Mich. App. 99 (Mich. Ct. App. 2011) – A borrower obtained a mortgage loan guaranteed by one of its principals. The underlying loan documents provided that the borrower's failure to maintain its SPE status in accordance with the terms of the underlying mortgage would trigger the loan becoming full recourse to the borrower and the guarantor. The mortgage loan was then packaged as part of a pool of CMBS loans sold to a trust. The borrower subsequently defaulted on the loan by failing to make a mortgage payment. The indenture trustee foreclosed on the trust's property and sought to recover on its

deficiency claim under the full recourse guaranty provided by the borrower and the guarantor. Because the recourse obligations were triggered upon the borrower's failure to maintain its SPE status in accordance with the mortgage, the court looked to the terms of the mortgage to determine what requirements, if any, the borrower had to maintain its SPE status. It noted that while the mortgage itself did not define what a "single purpose entity" is, it did include what the court considered to be SPE covenants, such as the requirement that the borrower remain solvent and pay its debts and liabilities from its assets as they become due. Thus, the court reasoned that in order to maintain its SPE status, the borrower had to remain solvent. The borrower argued that the intention of this covenant was to prevent owners of SPEs from removing all of the assets from the SPE, thus leaving it unable to pay its debts. According to the borrower, it was unable to make the payment due on its mortgage loan not because its parent had removed its assets, thus leaving it unable to pay its debts when due, but rather, because of a downturn in the housing market. However, the court was not persuaded by the borrower's argument, insisting instead on a literal interpretation of the contract. Although the court acknowledged that its holding may adversely impact the CMBS market, it reasoned that it was the job of the legislature, and not the courts, to address such public policy concerns.

Comment: In the wake of this case, the Michigan legislature recently passed the Non-Recourse Mortgage Loan Act which invalidates the holding in Cherryland by providing that a post-closing solvency covenant cannot be used, either directly or indirectly, as the basis for a recourse claim against a borrower or a guarantor or other surety on a nonrecourse loan.

5. *Secured Parties, Set Off, Leases*

   - *In re Heath*, 483 B.R. 708 (Bankr. E.D. Ark. 2012) – A chapter 12 debtor could not strip secured loans of their cross-collateralization through a plan confirmation.

   - *In re Lehman Bros, Inc.*, 458 B.R. 134 (Bankr. S.D.N.Y. Oct. 4, 2011) – The court refused to permit a post-bankruptcy *SemCrude*-style triangular setoff pursuant to which parties agreed to allow setoff against sums owed to affiliates. The feature failed in Bankruptcy due to the lack of mutuality required by Bankruptcy Code § 553. Further, citing *Swedbank*, 433 B.R. 101 (Bankr. S.D.N.Y. 2010), the court concluded that the safe harbors in Bankruptcy Code §§ 560 and 561 do not override the requirement of mutuality.

6. *Avoidance Actions*

   - *In re Mitchek*, 2012 WL 930249 (Bankr. D. Colo. 2012) – A bank that had perfected its security interest in vehicle in a preferential manner and later agreed to transfer title to the vehicle to the trustee in return for the right to retain prior payments. The court held that the bank breached that agreement by accepting full payment of the debt from a non-debtor because the promised assignment of the title and of the rights in the collateral "necessarily included any payments made pursuant to the security interest *after* the date of the agreement." (emphasis added).

   - *In re Cedar Funding, Inc.*, 2012 WL 1110023 (N.D. Cal. 2012) –A transfer of fractional interests in an originator's mortgage loans occurred for preference purposes when transfers were perfected. Because the transfers involved an interest in California real estate, the transfers required recording of the assignment in the real estate records.

Comment: This decision seems to disregard UCC § 9-203(g).

- *In re Patterson*, 2012 WL 1292642 (Bankr. N.D. Ga. 2012) – A trustee who was able to avoid a creditor's lien on real property because of a substantial delay in perfection, was entitled to a monetary judgment for the value of the property as of the date the trustee would have sold it had the creditor acquiesced in the sale, should such value be reliably determined.

- *In re Brooke Corp.*, 2012 WL 3066706 (Bankr. D. Kan. 2012) – A bankruptcy trustee abandoned its interest in a debtor's wholly owned subsidiary and allowed the secured party to conduct a strict foreclosure against the debtor's interest in the subsidiary. The trustee could later maintain a $8.6 million avoidance action against the subsidiary and its successor even though the trustee had asserted that the debtor's interest had no value to the estate and the successor later allegedly invested substantial sums to resurrect the subsidiary's business.

- *In re Mollison*, 463 B.R. 169 (Bankr. D. Mass. 2012) – Property encumbered by an unperfected security interest is removed from the estate and becomes free of the automatic stay 30 days after the first date set for the Bankruptcy Code § 341 meeting if the debtor does not file a proper statement of intent to surrender, reaffirm, or redeem. However, the trustee retains the power to avoid the security interest. While the avoided lien cannot be preserved for the benefit of the estate under Bankruptcy Code § 551 if the collateral itself is no longer property of the estate, the trustee can recover under Bankruptcy Code § 550 the value of the property transferred.

- *In re Quebecor World (USA) Inc.*, 480 B.R. 468 (S.D.N.Y. 2012) – The repurchase of privately placed notes for $376 million shortly before bankruptcy was a "settlement payment" because it was to a financial institution serving as trustee for the

noteholders, even though the financial intermediary did not take a beneficial interest in the notes during the course of the transaction and thus the transaction did not implicate the systemic risks that prompted Congress to enact Bankruptcy Code § 546(e). Because the transaction was structured as a repurchase, rather than redemption, of the notes, it was also insulated from avoidance by Bankruptcy Code § 546(e) as a "transfer . . . in connection with a securities contract."

- *In re QuVIS, Inc.*, 469 B.R. 353 (D. Kan. 2012) – A secured party that re-perfected its own security interest after a 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's managing director served 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 have a duty to inform the other creditors of the lapse. Indeed, the secured party had actually argued in court, albeit unsuccessfully, that the re-filings benefitted all the creditors, not merely those who re-filed.

- *Geltzer v. Mooney (In re MacMenamin's Grill Ltd.)*, 450 B.R. 414 (Bankr. S.D.N.Y. 2011) – After a failed LBO, the court rejected the argument that fraudulent transfer claims related to the LBO were precluded by the Bankruptcy Code § 546(e) safe harbor.

- *Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v. Am. United Life Ins. Co. (In re Quebecor World (USA) Inc.)*, 453 B.R. 201 (Bankr. S.D.N.Y. 2011) – Following *Enron Creditors Recovery Corp. v. Alfa*, 651 F.3d 329 (2d Cir. 2011), the court concluded that repayments made on notes during the preference period were "settlement payments" qualifying for safe harbor treatment under Bankruptcy Code § 546(e) and

transfers to or for the benefit of a financial institution in connection with a securities contract under Bankruptcy Code § 741(7).

- *MC Asset Recovery LLC v. Commerzbank A.G. (In re Mirant Corp.)*, 675 F.3d 530 (5th Cir. 2012) – A trustee has standing to pursue avoidance actions even after unsecured creditors are paid in full, if avoidance will benefit the estate. The court applied New York law, not Georgia law, to fraudulent transfer claim because New York law had broader coverage of guaranty claims.

- *In re LGI Energy Solutions, Inc.*, 482 B.R. 809 (8th Cir. BAP 2012) – Utility companies that provided services to customers who paid their bills through a payment processor were creditors of the payment processor because: (i) they were beneficiaries of a trust created by the agreements between the customers and the payment processor and became creditors when the payment processor violated the trust by using the funds provided without paying the utilities' invoices; and (ii) they were third-party beneficiaries of the agreements between the customers and the payment processor. As a result, the utilities had preference liability in the payment processor's bankruptcy. However, the utilities were entitled to a "new value" defense under Bankruptcy Code § 547(c)(4) for both the utility services they provided and the funds the customers provided to the payment processor after the payment processor's transfers to the utilities.

- *In re MBS Mgmt. Services, Inc.*, 690 F.3d 352 (5th Cir. 2012) – Payments made to reimburse a party for supplying electricity to apartment complexes were "forward contracts" under the preference provisions of Bankruptcy Code § 546(e). Court said a requirements contract with no specific quantity or delivery date could be a forward contract.

7. *Executory Contract*

   - *Sunbeam v. Chicago American Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012) – A debtor's rejection of an agreement as licensor does not eliminate the licensee's rights.

   - *In re Interstate Bakeries Corp.*, 690 F.3d 1069 (8th Cir. 2012) – A prepetition agreement by which a Chapter 11 debtor granted to a licensee a perpetual, royalty-free, exclusive license to its trademarks in a specified geographic area was an executory contract that the debtor could reject.

8. *Plan*

   - *In re Loop 76, LLC*, 465 B.R. 525 (9th Cir. BAP 2012) – The fact that an unsecured claim is supported by a third-party guaranty is a relevant consideration in determining whether claims are substantially similar.

   - *In re Reid Park Properties L.L.C.*, 2012 WL 2934001 (Bankr. D. Ariz. 2012) – An undersecured senior claim could not be put in same class as a wholly under-water subordinated claim "secured" by the same collateral.

   - *In re Coastal Broadcasting Systems, Inc.*, 2012 WL 2803745 (Bankr. D.N.J. 2012) – A clause in a subordination agreement authorizing the senior lender to vote the claims of the subordinated creditors was enforceable in bankruptcy. Because the senior creditor approved the plan and would be deemed to have voted the claims of subordinated creditors, the plan could be confirmed even though it extinguished the subordinated creditors' claims.

   - *In re Windmill Durango Office, LLC*, 451 B.R. 51 (9th Cir. BAP 2012) – A creditor that purchased a claim after the original claimant had voted in favor of the debtor's reorganization plan,

but before the ballot deadline, did not have cause under Rule 3018 to change the vote.

- *In re Bataa/Kierland, LLC*, 476 B.R. 558 (Bankr. D. Ariz. 2012) – Even if the debtor's purpose for incurring a small, prepetition secured debt was to create a class that would likely satisfy Bankruptcy Code § 1129(a)(10) and therefore render the plan confirmable, such a motive is not a basis for redesignating the claimant's vote.

- *In re 4th Street East Investors, Inc.*, 2012 WL 1745500 (Bankr. C.D. Cal. 2012) – Because the existence of a third-party guaranty is an insufficient basis to classify a secured party's deficiency claim separately from other unsecured claims, there was no reasonable possibility that the debtor could cram down a plan. Therefore, the secured party was entitled to relief from the stay.

- *In re Lichtin/Wade, LLC*, 2012 WL 6589794 (Bankr. E.D.N.C. 2012) – A consulting company that provided services to the debtor (one of its largest clients) and which purchased secured claims one day before votes on the debtor's plan were due, was a non-statutory insider and therefore ineligible to vote. The company's sole purpose was to help out the debtor's principal given that it purchased the claims at his request without ever reviewing any documentation and without exercising any independent business judgment.

- *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012) – In this recent 8-0 decision, the Supreme Court resolved that under the cramdown provisions of Bankruptcy Code § 1129(b), a debtor can confirm a Chapter 11 plan over the objection of a secured party in three circumstances: if (i) the secured claimholder retains its liens on the property and receives deferred cash payments satisfying this claim; (ii) the secured property is sold, free and clear of the claimant's liens,

under the procedure described in Bankruptcy Code § 363(k), which allows credit bidding; or (iii) the secured party receives the "indubitable equivalent" of its claim. The debtor in this case argued that the "or" between those three options allowed it to choose any of those three options. It chose number three: an asset sale, free and clear of the bank's liens, which would not allow the secured party to credit bid (as mandated by option two), but would instead (it argued) satisfy the "indubitable equivalent" requirement of option three.

The Court described the debtors' reading of Bankruptcy Code § 1129(b)(2)(A) as "hyperliteral and contrary to common sense." The court relied heavily on the rule of statutory construction dictating that specific language governs general language in holding that these three options are not universally available. Plans of a specific type must follow the rules outlined in whichever subsection of Bankruptcy Code § 1129(b)(2)(A) is relevant: (i) is the rule for plans under which the creditor's lien remains on the property, (ii) is the rule for plans under which the property is sold free and clear of the creditor's lien, and (iii) is a residual provision covering dispositions under all other plans . . . [t]hus, debtors may not sell their property free of liens under Bankruptcy Code § 1129(b)(2)(A) without allowing lienholders to credit-bid, as required by clause (ii).

In other words, option three—providing the creditor with the "indubitable equivalent" of its claim—simply does not apply when the debtor's proposed plan includes an asset sale free and clear of the secured creditor's lien. Option two controls for all free-and-clear sales of collateral.

9. Other

- *In re Lehigh Coal and Navigation Co.*, 2012 WL 27465 (Bankr. M.D. Pa. 2012) – Because a lienor was not adequately protected by

allowing sale free and clear with a lien to attach to the sale proceeds, given that a post-petition lender with superpriority was allowed to credit bid and thus there were no sale proceeds, the lien will remain on the property sold.

- *In re PBBPC, Inc.*, 467 B.R. 1 (Bankr. D. Mass. 2012) – A sale of assets under Bankruptcy Code § 363(f) free and clear of all claims and interests, including claims under an successor liability theory, meant that the buyer acquired the debtor's assets free of the debtor's experience rating and contribution rate to the state's unemployment compensation fund.

- *In re Grumman Olson Industries, Inc.*, 467 B.R. 694 (S.D.N.Y. 2012) – Although bankruptcy court's order approving a Bankruptcy Code § 363 sale expressly provided that the buyer of the debtor's assets took the assets free of successor liability, due process requires that future claimants – who do not suffer injury until after the bankruptcy case is closed – receive notice and an opportunity to participate in the proceedings before their rights are affected. Accordingly, the buyer's motion to dismiss the action brought by such a claimant was properly denied.

- *Pusser's (2001) Ltd. v. HMX, LLC*, 2012 WL 1068756 (N.D. Ill. 2012) – A bankruptcy court order authorizing the sale of the debtors' trademark free and clear of encumbrances precluded the prior owner from bringing an action to cancel the trademark due to abandonment, fraudulent renewal, and transfer in gross on the basis of the debtors' conduct prior to the sale.

- *In re Jundanian*, 2012 WL 1098544 (Bankr. D. Md. 2012) – A debtor's membership and distribution rights in a Maryland LLC became part of his bankruptcy estate but nothing in the Bankruptcy Code overrode the restrictions on transfer of the

membership rights. Thus, the trustee's sale to the debtor included only the distribution rights and the debtor did not re-acquire rights as member to participate in the management of the LLC.

- *In re Blixseth*, 484 B.R. 360 (9th Cir. BAP 2012) – For venue purposes, the debtor's principal assets – intangible interests in LLCs – were located in the jurisdiction of organization because that is where collection efforts must be pursued, even though for UCC purposes the assets would be located at the jurisdiction of the debtor's residence.

- *Paloian v. LaSalle Bank Nat'l Ass'n (In re Doctors Hospital of Hyde Park, Inc.)*, 463 B.R. 93 (Bankr. N.D. Ill. Dec. 2, 2011) – The Court examined the bankruptcy remoteness/separate legal existence of a financing SPV and attempted to determine whether assets sold to it were sold in a true sale. Finding insufficient evidence, the court denied motions for summary judgment and decided to proceed to trial. The court concludes that there should be a degree of "operational function and independence" for bankruptcy remote entities not seen in prior cases. On true sale, the court notes that at trial the court will have to determine whether the use of a contribution structure rather than a cash purchase price negatively impacts the true sale.

- *Butcher v. Dakota Fin. Corp. (In re Linda Rose Whitaker)*, 474 B.R. 687 (8th Cir. BAP 2012) – Native American tribes are protected from suit in bankruptcy by their sovereign immunity because Congress did not specifically abrogate the sovereign immunity of Native American tribes in Bankruptcy Code § 106. A captive finance subsidiary formed by the tribe was an arm of agency of the tribe also enjoying sovereign immunity.

B. Consumer Law

- *Mkhitaryan v. U.S. Bancorp*, 2012 WL 6204840 (D. Nev. 2012) – Although the enforcement of a security interest does not normally qualify as debt collection under the Fair Debt Collection Practices Act, an effort to repossess collateral in a manner that breaches the peace – and thus in a manner not authorized by law – is actionable under the FDPCA. Because the facts were in dispute about the nature of the debtor's protest to the repossession effort and the role police played upon arriving to the scene after being called by the debtor, summary judgment was inappropriate.

- *Burling v. Windsor Equity Group, Inc.*, 2012 WL 5330916 (C.D. Cal. 2012) – A debtor did not shown that a company that helps its clients locate collateral in which they have a security interest, and did so making phone calls to the debtor and the debtor's family, was a "debt collector" under the Fair Debt Collection Practices Act because enforcement of a security interest is not debt collection. However, the debtor was entitled to further discovery to determine if the company was otherwise engaged in debt collection activities.

C. Professional Liability

- *Clark v. Harmon*, 2012 WL 6675008 (Ohio Ct. App. 2012) – The trial court improperly granted summary judgment in a legal malpractice case in favor of a defendant who failed to: (i) inquire about getting security from the buyer of the clients' assets; (ii) inform the clients of the refusal to provide security; and (iii) inform the clients of the risk of accepting an unsecured note for a substantial portion of the purchase price.

- *In re MF Global Inc.*, 478 B.R. 611 (Bankr. S.D.N.Y. 2012) – An accounting firm's engagement letter with its client contained a clause which prohibited the client from assigning any rights or

claims "arising under this engagement letter" and declared any assignment in violation of this restriction as void. The court found that this clause did not restrict SIPC, which succeeded to the client's rights, from assigning a malpractice claim against the accounting firm because such claim arose in tort, not under the engagement letter.