2010 COMMERCIAL LAW DEVELOPMENTS

Steven O. Weise
PROSKAUER ROSE LLP
Los Angeles, California

Teresa Wilton Harmon
SIDLEY AUSTIN LLP
Chicago, Illinois

Lynn A. Soukup
PILLSBURY WINTHROP SHAW PITTMAN LLP
Washington, DC

1080/99999-590 Current/20743614v4

TABLE OF CONTENTS

Page

I. PERSONAL PROPERTY SECURED TRANSACTIONS*

A. *Scope of Article 9 and Existence of a Secured Transaction*

1. *General*

- *In re C&S Electric, Inc.*, 433 B.R. 782 (Bankr. D. Haw. 2010) – A general contractor agreed to pay a subcontractor and its supplier jointly. This did not create a security interest in favor of the supplier. Instead it was a payment mechanism that specified how the general contractor would perform its own obligation to ensure that all parties were paid. A secured party with a security interest in the subcontractor's accounts took its interest subject to the joint check agreement and therefore its interest did not attach to the amounts the general contractor owed to the supplier.

- *Randle v. AmeriCash Loans, LLC*, 932 N.E.2d 1200 (Ill. Ct. App. 2010) – A borrower signed an EFT authorization when taking out a loan. The authorization authorized the lender to debit borrower's checking account upon a default. This arrangement created a security interest in the borrower's checking account.

- *In re Carlos F. Escribano & Co. Inc.*, 433 B.R. 59 (Bankr. D.P.R. 2010) – A federal tax lien is not a security interest governed by Article 9. Therefore Article 9 does not provide the place for filing a notice of federal tax lien.

- *In re Stephens*, 2010 WL 4286186, 2010 U.S. Dist. LEXIS 1135722 (E.D. Mich. 2010) – An attorney's fee agreement purported to give the attorney "an attorney's lien on any asset owed or due

* 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.

to the Client." The agreement did not give the attorney a security interest on the client's rental income because the rental income was not earned as a result of the attorney's services.

2. *Consignments*

- *In re Music City RV, LLC*, 304 S.W.3d 806 (Tn. 2010) – A consumer consigned a vehicle to a dealer for purpose of sale to a third person. U.C.C. § 2-326's sale or return provisions did not apply because there was no "sale" to the consignee. Article 9's consignment rules did not apply because the vehicle was consumer goods immediately prior to delivery. U.C.C. § 9-102(b). Thus the transaction was a bailment governed by common law.

- *Rayfield Investment Co. v. Kreps*, 35 So. 3d 63 (Fla. Ct. App. 2010) – An owner of a painting consigned it to an art dealer. The owner/consignor did not file a financing statement to perfect its security interest. U.C.C. § 9-109. The dealer's inventory secured party had priority. See U.C.C. § 9-322. The inventory secured party knew that some of the dealer's inventory was consigned. The consignor presented no evidence that the dealer was generally known by its creditors to be substantially engaged in selling the goods of others.

- *Quality Leasing Co., Inc. v. Dealer Services Corp.*, 2010 Ind. App. Unpub. LEXIS 743 (Ind. Ct. App. 2010) – An owner consigned a car to an auto dealer. The owner did not perfect its security interest. Although the owner was listed as the owner on the certificate of title, the dealer held the vehicle as inventory and the only way for the owner to perfect was to file a financing statement. U.C.C. § 9-311(d).

- *In re WFG, LLC*, 2010 WL 4607614 (Bankr. E.D. Tenn. 2010) – A "consignment" exists under Article 9 if goods are delivered "for sale" by the consignee. This raised a factual question as to whether goods were delivered to the debtor for the purpose of

sale, which would be a consignment governed by Article 9 and would make the goods property of the debtor's bankruptcy estate, or as a bailment for display.

Comment: See also In re WFG, LLC, 2010 WL 4607660 (Bankr. E.D. Tenn. 2010) (same regarding goods provided by a different supplier).

3. *Real Property*

- *Green Tree Servicing, LLC v. 1997 Circle N Ranch Ltd.*, 325 S.W.3d 869 (Ct. App. Tex. 2010) – The owner of land on which mobile homes were situated had, pursuant to a non-U.C.C. statute, a possessory lien on the mobile homes. A secured party that repossessed and sold the mobile homes in place had no personal liability for the unpaid rent.

- *Southwest Bank of St. Louis v. Poulokefalos*, 931 N.E.2d 285 (Ill. Ct. App. 2010) – A secured party with a security interest in fixtures filed a financing statement in the state where the debtor was located. It did not record a fixture filing in the state where the fixtures were located. The secured party was subordinate to the landlord's lien under the common law because the security interest was unperfected and the landlord's lien was first in time.

  Comment: A filing with the Secretary of State in the location of the debtor should be sufficient to perfect a security interest in fixtures. A fixture filing is important for establishing priority vis-à-vis competing liens in the real property.

- *In re DBSI, Inc.*, 432 B.R. 126 (Bankr. D. Del. 2010) – A secured party that had filed financing statements did not have a perfected security interest in the debtor's rights as lessor under real property leases because those interests are excluded from Article 9. U.C.C. § 9-109(d)(11).

- *In re Arcadia Enterprises, Inc.*, 440 B.R. 1 (Bankr. D. Mass. 2010) – A developer's permits to develop a housing project ran with the land and were "real property." The lender to the developer did not have to file a financing statement to perfect its security interest in the permits.

- *In re Beaudoin*, 427 B.R. 31 (Bankr. D. Conn. 2010) – A fixture filing did not perfect a security interest in the debtor's breach of contract claim against a contractor working on the real property.

- *In re Swerwinski*, 2010 WL 3074389, 2010 Bankr. LEXIS 2601 (Bankr. N.D. Ohio 2010) – A cottage on leased land could be a chattel, a fixture, or part of the real estate.

4. *Leasing*

- *Cobra Capital, LLC v. Pomp's Services, Inc.*, 2010 U.S. Dist. LEXIS 15913 (N.D. Ill. 2010), 71 U.C.C. Rep. Serv. 2d 49 – Under the "economic realities" test, a lease does not have to provide expressly that the residual value stays with the lessor. That interest "comes with the territory" in the absence of other provisions or circumstances providing to the contrary.

- *In re UNI Imaging Holdings, LLC*, 423 B.R. 406 (Bankr. N.D.N.Y. 2010) – A 66-month lease of equipment with a $175,000 purchase option at the end would not be recharacterized as a secured transaction because the purchase price was more than 50% of the expected fair market value of the equipment at the end of the lease term and the cost of removing and shipping the machine back to the lessor was not more than $26,000.

- *Gibraltar Financial Corp. v. Prestige Equipment Corp.*, 925 N.E.2d 751 (Ind. Ct. App. 2010), *transfer granted by* 940 N.E.2d 828 (Ind. 2010) – A six-year lease of equipment with a useful life of 15-20 years was a true lease despite lessee's option at end of the fifth year to purchase the equipment for $78,500, and thereby save

$43,100 in later lease payments and $19,500 in the cost of returning the equipment.

- *In re Williamson*, 2010 Bankr. LEXIS 2853, 2010 WL 3369384 (Bankr. D. Neb. 2010) – A 57-month car lease that included an option to buy the car at the end of the lease term for $386 was a sale with a security interest because the lease was not terminable by the lessee and the option price was nominal.

- *In re Southeastern Materials, Inc.*, 433 B.R. 177 (Bankr. M.D.N.C. 2010) – An equipment lease was not subject to termination by the lessee and contained an option to purchase the equipment for $1 at the end of the lease term. The court characterized the transaction as a sale with a retained security interest. The lessor/secured party did not have PMSI superpriority because it perfected 23 days after the lessee/debtor received possession of the leased equipment – just outside the 20 day grace period allowed for PMSIs.

- *Frontier Leasing Corp. v. Krueger*, 791 N.W. 2d 429, 2010 WL 3894308 (Iowa Ct. App. 2010) – An equipment lease that gave the lessee the option to purchase the equipment at the end of the lease term for $1 was a secured transaction. The hell-or-high-water clause in the agreement did not prevent the lessee from raising a claim of unconscionability or a defense to contract formation.

- *Frontier Leasing Corp. v. Waterford Golf Associates LLC*, 2010 WL 4484390, 2010 Iowa App. LEXIS 1345 (Iowa Ct. App. 2010), 73 U.C.C. Rep. Serv. 2d 17 – An equipment lease that gave lessee the option to purchase the equipment at the end of the lease term for $1 was a secured transaction.

- *In re Kinds*, 2010 WL 4386929 (Bankr. N.D. Miss. 2010), 73 U.C.C. Rep. Serv. 2d 113 – A five-year lease of a mobile home that was terminable at will by the lessee was a true lease even though the lessee was listed as owner on the certificate of title.

That listing enabled the lessee to acquire insurance and facilitated the payment of personal property taxes.

- *American Bank of the North v. Jelinski*, 2010 WL 1753245, 2010 Minn. App. Unpub. LEXIS 408 (Minn. Ct. App. 2010) – An understanding between the financier who purchased equipment and the debtor who used it that once the debtor paid the purchase price, the equipment would belong to the debtor made the transaction a security interest, not a lease.

- *In re Double G Trucking of the Arklatex, Inc.*, 432 B.R. 789 (Bankr. W.D. Ark. 2010) – A TRAC lease provided that the leased vehicles were sold at end of the lease term and the lessee was to receive any proceeds in excess of a stated amount and the lessee would be liable to the lessor for any deficiency from that amount was a true lease because of non-uniform amendment to the relevant U.C.C..

- *In re HP Distribution, LLP*, 436 B.R. 679 (Bankr. D. Kan. 2010) – Five-year TRAC leases of refrigerated trailers with an 8-year useful life were true leases. The leased trailers were to be sold at end of lease term, after which the lessee would be liable to lessor for any deficiency from a specified amount and the lessee would be entitled to receive any surplus. The lessor retained a meaningful reversionary interest in the goods because the lessor had the credit risk of the lessee's inability to pay the deficiency.

- *In re Lash*, 2010 WL 5128610 (Bankr. M.D.N.C. 2010) 2010 WL 5141760, 2010 Bankr. LEXIS 4490, (Bankr. M.D.N.C. 2010), 73 U.C.C. Rep. Serv. 2d 292 – A forty-two month TRAC lease of a vehicle, after which the vehicle was to be sold and the lessee would be entitled to any surplus over a specified amount or liable to lessor for any deficiency, created a security interest, not a lease, because the lessor retained no meaningful reversionary interest in the truck.

5. *Sales*

   - *In re Belak*, 2010 WL 1839350, 2010 Bankr. LEXIS 1515 (Bankr. D. Conn. 2010) – A tenant in default under a lease entered into a "Collateral Agreement" with the landlord. The agreement provided that the tenant transferred to landlord the right to sell items of the tenant's personal property, required the landlord to give the tenant an accounting of the property sold, and provided the tenant with a right to redeem the property. The court held that the transaction was a "sale," and did not create a security device because the tenant had no right to remove the property during the term of the agreement and the tenant understood that he was transferring title to the property.

6. *Intellectual Property*

   - *Bank of North Carolina v. RCR Marketing, LLC*, 2010 WL 5020502, 2010 U.S. Dist. LEXIS 128013 (M.D.N.C. 2010) – A secured party with a security interest in trademarks was not entitled to a preliminary injunction against an alleged infringer. The alleged infringer thought it had purchased the trademarks from the debtor's subsidiary because the debtor had never used the trademarks, it only licensed them to the subsidiary, the alleged infringer was the only entity currently using the trademarks in commerce, and an outright prohibition on use would not protect either the ownership interest claimed in the trademarks or the goodwill of the trademarks in the eyes of the consuming public.

   - *Brown Bark II, L.P. v. Dixie Mills, LLC*, 732 F.Supp. 2d 1353 (N.D. Ga. 2010) – A seller retained a security interest in trademarks and associated goodwill. The seller later obtained against the buyer a judgment that gave the seller "full rights" to one of the trademarks. The seller was not liable to a subsequent secured party that purported to purchase the trademarks at a public sale after default. The debtor's business had ceased prior to the public sale and there was no goodwill - of which trademarks

are a part - left for the secured party to acquire at the public sale.

7. Tort Claims

- *In re Hall*, 2010 Bankr. LEXIS 1487 (Bankr. D. Kan. 2010) – A lawsuit concerning collateral consisting of equipment was settled. The court considered whether the settlement payments constituted proceeds of the collateral or proceeds of a commercial tort claim.

B. Security Agreement and Attachment of Security Interest

1. Security Agreement

- *In re Kaminsky*, 2010 WL 4026378 (Bankr. E.D.N.Y. 2010) – A creditor did not obtain an enforceable security interest based on an unsigned copy of brokerage agreement that did not identify the debtor by name.

- *In re Giaimo*, 440 B.R. 761 (6th Cir. BAP 2010) – A signed application for a certificate of title and the certificate itself both indicated the secured party's security interest in the vehicle. They were sufficient to satisfy the requirement of a written security agreement because "unlike simple financing statements, which are often filed in anticipation of a possible loan, . . . an application for a certificate of title is not completed unless there is an actual purchase or transfer of a motor vehicle."

- *In re Adirondack Timber Enterprise, Inc.*, 2010 WL 1741378, 2010 Bankr. LEXIS 1420 (Bankr. N.D.N.Y. 2010), 71 U.C.C. Rep. Serv. 2d 722 – A security agreement granted a security interest in collateral to secure all obligations owed to the seller of the collateral and its affiliates. The security agreement did not grant a security interest to the bank subsidiary of the seller. Even if the bank did have a security interest, that interest was not perfected by the manufacturer's filing.

- *Harvard Drug Group, L.L.C. v. Senior Respiratory Solutions, Inc.*, 2010 WL 148670, 2010 U.S. Dist. LEXIS 2640 (E.D. Mich. 2010) – A buyer entered into a security agreement in favor of seller in connection with a credit application. The security agreement was not extinguished by a subsequent prime vendor agreement that provided that it "canceled and superseded all earlier agreements, written or oral relating to the subject matter hereof." The vendor agreement did not address the security interest and thus the security interest did not relate to the subject matter of the prime vendor agreement.

- *Roswell Capital Partners LLC v. Alternative Construction Technologies*, 2010 WL 3452378 (S.D.N.Y. 2010) – A secured party converted the debtor's notes to equity and as a result extinguished the security interest. The security interest did not reattach when the lender exercised its right to re-convert the equity to debt.

- *In re Burival*, 2010 WL 2774830, 2010 Bankr. LEXIS 3738 (Bankr. D. Neb. 2010) – The filing of a financing statement did not create a security interest.

- *In re Massey*, 2010 WL 99266, 2010 Bankr. LEXIS 65 (Bankr. E.D. Okla. 2010) – A cross-collateralization clause had the effect of making the debtor's motor vehicle secure unrelated debts even though debtor had paid off the motor vehicle loan.

- *Fifth Third Bank v. Peoples Nat. Bank*, 929 N.E.2d 210 (Ind. Ct. App. 2010) – A depositary bank with a perfected security interest in a customer's deposit account did not waive that security interest by claiming that it held no deposit account when it answered interrogatories in connection with a writ of garnishment. Nor did depositary bank waive its security interest by failing properly to effect setoff upon service of the writ because the depositary bank's security interest had priority over the garnishment lien and the secured debt exceeded the balance in the deposit account.

- *Burke v. United American Acquisitions and Management, Inc.*, 2010 WL 3062222, 2010 Mich. App. LEXIS 1502 (Mich. Ct. App. 2010) – A secured party with a perfected security interest did not, by entering into a contract with debtor to manage and eventually purchase the debtor's assets, waive its rights to the debtor's subsequently generated receivables.

- *AEP Energy Services Gas Holding Co. v. Bank of America*, 626 F.3d 699 (2d Cir. 2010) – A secured party with a security interest in stored natural gas did not waive or subordinate its security interest by agreeing to allow the lessee of the storage facility to use the gas during the term of the lease, provided the debtor was not in default.

- *Horob v. Farm Credit Services of North Dakota ACA*, 777 N.W.2d 611 (N.D. 2010) – A security agreement provided that the security interest secured "all existing and future loans, advances, indebtedness and payment . . . obligations owed or owing to [the secured party]." The court held that this meant that the collateral also secured an unrelated real estate loan.

2. *Rights in the Collateral*

- *Assets Resolution Corp. v. CHE LLC*, 2010 WL 1345284, 2010 U.S. Dist. LEXIS 32798 (W.D. Ark. 2010), 72 U.C.C. Rep. Serv. 2d 606 – An individual member of an LLC signed a note and security agreement on behalf of the LLC. Because the member lacked authority under the LLC operating agreement to enter into the transaction, the member was personally liable, but did not bind the LLC.

- *Development Specialists, Inc. v. R.E. Loans, LLC*, 2010 WL 4055570, 2010 U.S. Dist. LEXIS 113384 (N.D. Cal. 2010) – An individual signed a security agreement for three separate entities. Extrinsic evidence indicated that two of the entities signed only as members of the first entity. All the invoices identified only the first entity as the debtor and the subsequent security

agreement did not mention the latter two parties in its text. As a result the security agreement was not signed by the other entities.

- *Miko Enterprises, Inc. v. Allegan Nursing Home, LLC*, 2010 WL 148659, 2010 U.S. Dist. LEXIS 2043 (W.D. Mich. 2010) – A secured party of a nursing home facility that was operated by a related entity did not have a security interest in the accounts of the operator because the operator was not a party to the security agreement and the owner of the facility did not own the accounts.

- *TYCO Ventures, L.L.C. v. Wiggins*, 32 So. 3d 1168 (La. Ct. App. 2010) – A debtor paid off a loan secured by collateral and then sold the collateral before purporting to grant another security interest to the original secured party. As a result, the debtor had no rights in the collateral at the time of the grant of the second security interest and the security interest did not attach to the collateral.

- *In re Snyder*, 436 B.R. 81 (Bankr. C.D. Ill. 2010) – A married couple presumptively shared ownership of crops grown by only the husband on their joint land. Only the husband signed the security agreement. As a result the secured party had a security interest in only the husband's interest (one half of the proceeds of the crops).

3. *Restrictions on Transfer*

- *In re Keisler*, 2010 WL 4627892, 2010 Bankr. LEXIS 3939 (Bankr. E.D. Tenn. 2010), 73 U.C.C. Rep. Serv. 2d 57 – A spouse did not co-sign the security agreements for several of the subordinated lenders. She still granted a security interest in her rights in the stock of a closely held corporation because she had agreed to do so and because she had signed a security agreement in favor of the lead subordinate lender, which had possession of the stock

certificate for the benefit of the entire group of subordinate lenders.

- *In re S & A Restaurant Corp.*, 2010 WL 3619779, 2010 Bankr. LEXIS 3223 (Bankr. E.D. Tex. 2010) – A secured party did not obtain a security interest in a liquor license because New Jersey law prohibits liens on liquor licenses.

- *PHL Variable Ins. Co. v. Sidney Nachowitz 2007 Irrevocable Trust*, 2010 WL 3893623 (D. Minn. 2010) – A secured party had a security interest in the debtor's unearned premiums. Because the insurer did not have to return to the policyholder unearned premiums for life insurance procured through fraud, the secured party was not entitled to the unearned premiums.

- *LI Equity Network, LLC v. Village in the Woods Owners Corp.*, 910 N.Y.S.2d 97 (N.Y. App. Div. 2010) – A buyer of coop shares at an Article 9 disposition agreed at the foreclosure that the sale was subject to the cooperative corporation's governing documents. The buyer was required to obtain approval from the cooperative corporation's board of directors prior to obtaining the shares and a proprietary lease of the unit.

- *In re Lake County Grapevine Nursery Operations*, 441 B.R. 653 (Bankr. N.D. Cal. 2010) – Although a security agreement gave the secured party the right to vote the pledged LLC membership interest, under California law the grant of a security interest in the membership rights was not sufficient to divest the member of the right to vote.

- *In re Tracy Broadcasting Corp.*, 438 B.R. 323 (Bankr. D. Colo. 2010) – A secured party had a security interest in the debtor's rights in an FCC license. Federal law provides that no broadcast license be "transferred, assigned or disposed of in any manner," without approval of the FCC. The court held that the license was not property to which a security interest could attach. While it may be possible to grant a security interest in

the right to future proceeds from an approved sale of a license, if, on the petition date, there is no contract for sale approved by the FCC, U.C.C. § 552(a) prevents the security interest from reaching any postpetition sale proceeds.

- *In re Johnson*, 439 B.R. 416 (Bankr. E.D. Mich. 2010) – A debtor's rights to receive disability payments pursuant to an employee welfare benefit plan were contract rights, not an interest in or under an insurance policy or a beneficial interest in a trust. As a result the transaction was subject to Article 9. Thus Article 9 invalidated the anti-alienation clause and permitted the security interest to attach.

- *Comment:* The court applied old Article 9 to interpreting the security agreement and related anti-assignment and scope issues, because security agreement was entered into before Revised Article 9 went into effect.

- *Texas Lottery Com'n v. First State Bank of DeQueen*, 325 S.W.2d 628 (Tex. 2010) – U.C.C. § 9-406(f) overrode a statute that prohibited the assignment of state lottery winnings, even though that statute was more recent and more specific because U.C.C. § 9-406(f) makes clear that it takes precedence over other law. Although Article 9 defers to consumer protection statutes (U.C.C. § 9-201(b)), the lottery act's anti-assignment provision is not a consumer protection statute because it is not limited to consumers. Thus, a lottery winner could assign his right to receive payments.

- *In re EDG Holdings, Inc.*, 438 B.R. 154 (Bankr. S.D. Ill. 2010) – A state statute restricted the method by which an owner of contaminated property may assign its right to partial reimbursement from a state clean-up fund. The statute did not restrict the subsequent assignment of accounts by a contractor that performed clean-up services, even though those accounts included the contractor's interest in the owner's right to reimbursement from the fund.

- *Becher v. Freeman-Waag*, 2010 WL 3545656, 2010 Minn. App. Unpub. LEXIS 971 (Minn. Ct. App. 2010) – A restriction against assignment in an LLC membership control agreement was not manifestly unreasonable and thus was enforceable under state LLC law. As a result, the creditor did not acquire a security interest in the LLC member's interest. The court did not discuss U.C.C. § 9-408.

- *Inliner Americas, Inc. v. Macomb Funding Group, LLC*, 2010 WL 2853886 (Tex. App. Ct. 2010) – A security agreement described the collateral to include now owned and hereafter acquired "causes of action" and "[a]ll products and proceeds" thereof. The description did not cover a later accruing legal malpractice claim against the debtor's attorneys because public policy prohibits the assignment of legal malpractice claims. The settlement proceeds of the malpractice claim were also not collateral because the security agreement listed them only as proceeds of the claim and not as original collateral.

- *In re American Cartage, Inc.*, 438 B.R. 1 (D. Mass. 2010) – A security agreement's after-acquired property clause cannot cover commercial tort claims that did not exist when the security agreement was entered into. The court also held that a debtor could not grant a security interest in a commercial tort claim as proceeds of other collateral because that would undermine the prohibition on after-acquired commercial tort claims and the requirement that commercial tort claims be described with particularity.

  Comment: It is not clear that the specific description rule should apply to CTC's as proceeds. U.C.C. §9-204(b) merely provides that a security interest "does not attach under a term constituting an after-acquired property clause to … a commercial tort claim." A proceeds grant is not an after-acquired property clause in its truest sense. See also U.C.C. §9-102, comment 5(g): "A security interest in a tort claim also may

exist under this Article if the claim is proceeds of other collateral."

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

- *Charlotte Development Partners, LLC v. Tricom Pictures & Productions, Inc.*, 71 U.C.C. Rep. Serv. 2d 182 (Dist. Ct. App. Fla., 2009) – A secured party had a security interest in, among other things, "accounts" and "general intangibles." The court held that the description did not describe the debtor's rights under a cash bond, which the court held was "money." As money, the only way to perfect the security interest was by possession. U.C.C. § 9-313.

  Comment: "Money" is actual currency (U.C.C. § 1-201(a)(24)) and the court should have characterized the rights under the cash bond as a general intangible.

- *In re Cha Hawaii*, 426 B.R. 828, 71 U.C.C. Rep. Serv. 2d 206 (Bankr. D. Hawaii 2010) – A security agreement described the collateral as "all personal property. . . , excluding Accounts . . . , including . . . all 'Contracts' . . ." Some rights could be in the categories of both of "Accounts" and "Contracts." The court held that the reference to "Contracts" did not limit the exclusion of "Accounts," rather in included whatever was within "Contracts" that was not also in "Accounts." U.C.C. § 9-108.

- *In re Las Vegas Monorail Company*, 429 B.R. 317 (Bankr. D. Nev. 2010) – A debtor granted a security interest in "contract rights" under certain agreements. The court interpreted the clause narrowly, holding that it did not include all of the debtor's payment rights.

- *FSL Acquisition Corp. v. Freeland Systems, LLC*, 686 F.Supp. 2d 921, 71 U.C.C. Rep. Serv. 2d 37 – A security agreement referred to a bill of sale for a description of the collateral. The court held that the bill of sale sufficiently described the software and other intangible collateral at issue.

- *Horob v. Farm Credit Services of North Dakota ACA*, 2010 N.D. 6 (N.D. 2010), 71 U.C.C. Rep. Serv. 2d 110 – A security agreement may provide that the collateral secures both present and future advances by the secured party to the debtor. U.C.C. § 9-204.

- *In re U.S. Insurance Group, LLC*, 429 B.R. 903 (E.D. Tenn. 2010) – A financing statement that described the collateral as accounts and "all records of any kind relating to" the accounts sufficiently indicated the debtor's records, also known as its book of business, which were general intangibles.

- *In re Burvial*, 2010 WL 4115493 (Bankr. D. Neb. 2010) – A financing statement that indicated the collateral as "a farm lease" on certain described tracts of land did not cover crops grown on those tracts.

- *Palmatier v. Wells Fargo Financial National Bank*, 2010 WL 2516577, 2010 U.S. Dist. LEXIS 58393 (N.D.N.Y. 2010), 72 U.C.C. Rep. Serv. 2d 236 – Sales order ticket that buyer signed and which described both the furniture purchased and the buyer's agreement to give creditor a purchase money security interest in the purchased goods, and which incorporated the terms of the credit card agreement that also purported to grant creditor a security interest, was sufficient as a security agreement.

- *Monticello Banking Co. v. Flener*, 2010 WL 5158989 (W.D. Ky. 2010) – A security agreement described the collateral as "all Debtor's . . . [deposit] accounts maintained at . . . [any] financial institution . . . , including, but not limited to, those deposit accounts styled and numbered as follows: . . . Certificate of Deposit # -9536 at Monticello Banking Company . . . [;] . . . Certificate of Deposit # -2581 at CDARS; . . . together with current [and future] deposits in the deposit account(s) . . . as well as all rights, title, interests and choses in actions associated with the deposit account(s)." The court held that this was insufficient to describe the debtor's interest in deposits managed through the Certificate of Deposit Account Registry Service because the debtor's rights were a security entitlement and the language did not mention "security

entitlements," "investment property," or describe the "underlying financial asset."

- *One Carter, LLC v. CapitalSource Finance, LLC*, 2010 WL 4112193, 2010 Cal. Unpub. LEXIS 8280 (Cal. Ct. App. 2010) – A security agreement included in a trust deed defined the collateral to include "intangible property and rights relating to the [real] property, . . . including ... development rights, permits and approvals, . . . and other similar land use permits, approvals or entitlements" and a reference to "general intangibles." This description was sufficient to cover actions brought by the grantors against a city seeking approval and permits for development.

- *LOL Finance Co. v. Paul Johnson & Sons Cattle Co., Inc.*, 2010 WL 5422621, 2010 U.S. Dist. LEXIS 136712 (D. Neb. 2010) – A security agreement described the collateral as cattle "placed . . . with" a cattle management company. The description was sufficient to cover cattle that the management company was managing at an independent feedlot.

- *FSL Acquisition Corp. v. Freeland Systems, LLC*, 686 F. Supp. 2d 921 (D. Minn. 2010), 71 U.C.C. Rep. Serv. 2d 37, 72 U.C.C. Rep. Serv. 2d 340 – A security agreement described the collateral as "(i) all Purchased Assets identified on the Bill of Sale [and] (ii) all renewals, substitutions, replacements, accessions, proceeds, and products of the Purchased Assets." The description was sufficient to cover software and customer lists because the bill of sale identified those items.

- *Mac Naughton v. Harmelech*, 2010 WL 3810846, 2010 U.S. Dist. LEXIS 99597 (D.N.J. 2010) – A security agreement described the collateral as "all of [the debtor's] right, title and interest in any and all real or personal property wherever located." The description was ineffective because the supergeneric language did not reasonably describe the collateral. U.C.C. § 9-108 (c).

- *In re Heilman*, 2010 WL 3909167 (Bankr. D.S.D. 2010) – A security agreement described the collateral as "all . . . personal property of every kind and nature whatsoever located on or about" the debtor's farm, along with all products and proceeds thereof. The court held that the description was sufficient to cover the debtor's cows. As a result, the security interest also covered the debtor's post-petition milk because the milk was a product of the cows.

- *In re Pizzano*, 439 B.R. 445 (Bank. W.D. Mich. 2010) – While law of the debtor's location governs perfection and the effect of perfection, the law chosen in the security agreement governs attachment. Because the parties' choice of law was limited to contractual issues, the law of the forum governed tort claims. The debtor's claim for conversion of a car resulting from repossession failed because the car was goods and the security agreement expressly covered "goods." That term is a type of collateral defined in Article 9, not an impermissible super-generic description. U.C.C. § 9-108(c). Greater specificity is required when describing consumer goods in a consumer transaction. Here, although the car was a consumer good, the transaction was not a consumer transaction.

- *United States v. Stuber*, 2010 WL 3430499, 2010 U.S. Dist. LEXIS 96910 (W.D. Wash. 2010) – A security agreement that described the collateral as equipment, inventory, accounts, and general intangibles was insufficient to cover deposit accounts. A deposit account agreement that gave the depositary bank a right of setoff might be a security agreement, but was inadequate to prevent forfeiture to the government because the depositor had conceded that the deposited funds were proceeds of criminal activity.

- *Yatooma v. Barker,* 2010 Mich. App. LEXIS 2530 (Mich. Ct. App. 2010) – Security agreement collateral grant that lacked "after-acquired" property language did not cover after-acquired property that was not fluctuating in nature. An after-acquired property reference in the financing statement did not cure the problem.

D. Perfection

1. Certificates of Title

- *In re Johnson*, 407 B.R. 364, 69 U.C.C. Rep. Serv. 2d 575 (Bankr.E.D.Ark. 2009), order reinstated by 2010 WL 308821 (Bankr.E.D.Ark. 2010) – A secured party perfected its security interest in a recreational vehicle by having its security interest noted on the certificate of title. U.C.C. § 9-311(a)(3). When the secured party assigned the secured loan, the assignee remained perfected although it did not have the notation changed to show it as the new secured party. U.C.C. § 9-310(c).

  Comment: The court distinguished the much-criticized decision in *Clark Contracting Services, Inc. v. Wells Fargo Equipment Finance*, 399 B.R. 789 (Bankr.W.D.Tex. 2008), which on similar facts had come to the contrary conclusion on the continuity of the perfection of the security interest.

- *In re Moye*, 2010 WL 3259386 (S.D. Tex. 2010) – A secured party's security interest in motor vehicles held as inventory was not perfected by possession of unmarked certificates to perfect its security interest of title for the vehicles. Because the vehicles were held as inventory, the secured party had to file a financing statement to perfect its security interest. Even if perfection could be obtained by complying with the certificate of title law, that law requires that the security interest be recorded on the certificate and possession of unmarked certificates did not suffice to perfect the security interest.

- *In re Johnson*, 422 B.R. 183 (Bankr. E.D. Ark. 2010) – A security interest in mobile home was perfected even though the security agreement described the vehicle as a "2004 R-Vision Condor 1351" and the certificate of title described it as a "2003 Ford F-5" because the vehicle identification numbers almost matched and the vehicle was actually a Vision Condor mounted by the home manufacturer onto a 2003 Ford Chassis. Thus the

security agreement accurately described the upper portion of the vehicle while the certificate of title accurately reflected the type of chassis used.

- *Johnson v. Branch Banking and Trust Co.*, 313 S.W.3d 557 (Ky. 2010) – The perfection of a security interest in a motor vehicle occurs only when the lien is noted on the certificate of title. The submission of the required paperwork and fee to the department of motor vehicles does not perfect the security interest.

- *In re Shepard*, 2010 WL 1257672 (Bankr. D.S.D. 2010) – A security interest in motor vehicles was perfected when the certificates were issued with the lien notation, not when the application for the certificates was filed.

- *In re Scott*, 427 B.R. 123, (Bankr. S.D. Ind. 2010), 71 U.C.C. Rep. Serv. 2d 314 – A security interest noted on a certificate of title for a vehicle subject to a security interest remained perfected after the secured party assigned the security interest to a securitization trust. U.C.C. § 9-311, Comment 4.

- *Citizens National Bank of Jessamine County v. Washington Mutual Bank*, 309 S.W.3d 792 (Ky. Ct. App. 2010), 72 U.C.C. Rep. Serv. 2d 20 – A security interest in a titled mobile home that was not affixed to realty was not perfected by recorded mortgages. A secured party that got its lien noted on the certificate of title had priority over an earlier secured party who had filed a lis pendens in connection with its action to determine priority.

- *In re Passa*, 436 B.R. 120 (Bankr. D.N.D. 2010) – A secured creditor that upon refinancing of a motor vehicle inadvertently signed the lien release on the certificate of title for the vehicle and returned the title certificate to the debtors was no longer perfected, even though the debtors never presented the certificate to the department of transportation and even though

the secured creditor subsequently obtained a duplicate copy of the certificate showing its security interest.

- *In re HSF Holding, Inc.*, 421 B.R. 716 (Bankr. D. Del. 2010) – A secured party's preferred ship mortgage in a documented vessel extended to a spare engine delivered with the vessel because the engine qualifies as an "appurtenance" of the vessel even though it was never used on the vessel and could have been used on a different vessel.

2. *Control*

- *National Consumer Co-op. Bank v. Morgan Stanley & Co., Inc.*, 2010 WL 3975847, 2010 U.S. Dist. LEXIS 107852 (M.D. Pa. 2010) – A securities intermediary agreed that it would comply "with all written instructions originated by Lender concerning the Collateral without further consent by the Owner." This agreement gave the secured party "control" of the securities account, even though the agreement did not expressly refer to an "entitlement order." An exculpatory clause provided that the securities intermediary "shall not be responsible for any decline in market value of the accounts or any actions [the debtor] takes which reduces the value of the accounts below" $1 million did not protect the securities intermediary from contract liability from allowing the debtor to withdraw assets from the account in violation of the letter agreement.

- *444 W. Ocean, LLC v. Simmax Energy (CA), LLC*, 2010 WL 310775, 2010 Cal. App. Unpub. LEXIS 643 (Cal. Ct. App. 2010) – A security interest in accounts was perfected by a financing statement. The proceeds of the accounts were deposited in debtor's deposit account. The security interest remained perfected. U.C.C. § 9-315.

- *Fulcrum Financial Inquiry, LLP v. NXTV, Inc.*, 2010 WL 3025802, 2010 Cal. App. Unpub. LEXIS 6148 (Cal. Ct. App. 2010) – A secured party purchased collateral, including debtor's deposit

account. The secured party later deposited the proceeds of other collateral into the deposit account. Because the secured party was the owner of the deposit account, the secured party did not have to obtain control of the deposit account. Consequently, a judgment creditor of the debtor could not levy on the deposit account.

- *In re Alexander*, 429 B.R. 876 (Bankr. W.D. Ky. 2010), *affirmed by Monticello Banking Co. v. Flener,* 2010 U.S. Dist. LEXIS 132300 (W.D. Ky. 2010) – A bank that loaned money to a depositor did not have a perfected security interest in electronic certificates of deposit issued in a "reciprocal transaction" because the CDs were issued by other banks and the lending bank did not have a control agreement with any of them.

- *Brown v. National City Bank*, 2010 WL 4683706 (Ohio App. Ct. 2010) – A secured party with a security interest in uncertificated CDs was perfected by control where the debtor had signed a document assigning to the secured party all of the debtor's "right, title and interest" in all deposits, making the secured party a customer of the issuer.

- *In re Perez*, 440 B.R. 634 (Bankr. D.N.J. 2010); 73 U.C.C. Rep. Serv. 2d 257 – A certificate of deposit issued by credit union and conspicuously labeled "non-negotiable -non-transferable" was a deposit account, not an instrument. Therefore the issuer's security interest in the CD was perfected by control. U.C.C. § 9-104(a).

- *Wiley v. Hicks*, 2010 WL 3829417 (W.D. Ark. 2010) – 2010 WL 4115146 (W.D. Ark. 2010) – A secured party that entered into undated control agreement with the debtor, which the bank acknowledged and agreed to in a separate writing, had acquired control over the deposit account and thus its security interest was perfected, even though the bank had entered into another control agreement. Accordingly, the secured party had priority over a later lien creditor.

3. *Possession*

- *In re Rose*, 2010 WL 1740635 (Bankr. D. Neb. 2010); 71 U.C.C. Rep. Serv. 2d 864 – A secured party which had all the keys to safe deposit boxes containing pledged coins. It thus had possession of the coins and thus a perfected security interest in the coins. U.C.C. § 9-313.

- *SEC v. Private Equity Management Group, LLC*, 2010 WL 114468 (C.D. Cal. 2010) – A security interest in certificated securities can be perfected by possession.

- *Rothrock v. Turner*, 2010 WL 2267226 (D. Me. 2010) – 435 B.R. 70 (D. Me. 2010) (on request for rehearing) – Although a secured party had perfected its security interest in shares of stock by possession of the stock certificate, the secured party's security interest became unperfected when the secured party delivered the certificate to the debtor's representative for presentation in connection with a merger redemption. The court did not discuss U.C.C. § 9-312(g).

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

- *In re Cedar Funding, Inc.*, 2010 WL 1346365 (Bankr. N.D. Cal. 2010) 2010 WL 1346402 (Bankr. N.D. Cal. 2010) – A transfer of fractional interests in an originator's mortgage notes occurred for preference purposes when the transfers were perfected. The court held that because the transfers involved an interest in real

estate, the transfer was not perfected until there was a recording of the assignment in the real estate records.

Comment: The court may have lost sight of the core principle that the mortgage follows the note under Article 9.

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

- *In re Lifestyle Home Furnishings*, LLC, 2010 Bankr. LEXIS 111 (Bankrtcy. D. Id. 2010) – When debtor changed its name from "Factory Direct, LLC" to "Lifestyle Home Furnishings, LLC" it rendered financing statement seriously misleading. As a result the secured party was not perfected as to collateral acquired more than four months after the name change, U.C.C. § 9-507.

- *In re EDM Corp.*, 431 B.R. 459 (8th Cir. BAP 2010) – A financing statement listing the debtor as "EDM Corporation d/b/a EDM Equipment" instead of its registered name, "EDM Corporation." The financing statement was ineffective because a search under the registered name using the filing office's standard search engine does not reveal the filing. U.C.C. § 9-506(c). A trade name may be added as an additional name, but not as part of the debtor's name.

- *In re Wing Foods, Inc.*, 2010 WL 148637, 2010 Bankr. LEXIS 114 (Bankr. D. Idaho 2010) – A financing statement identifying the debtor as "Wing Fine Food" instead of its registered name, "Wing Foods, Inc.," was ineffective because a search under the registered name using the filing officer standard search logic would not reveal the filing. U.C.C. § 9-503(a).

- *In re Larsen*, 2010 WL 909138 (Bankr. N.D. Iowa 2010), 72 U.C.C. Rep. Serv. 2d 187 – A financing statement identifying the debtor as "Mike D. Larsen" was ineffective to perfect because the debtor's legal name is "Michael D. Larsen" and a search under the legal name would not yield the filing. U.C.C. § 9-503(a).

- *In re Lohrey Enterprises, Inc.*, 2010 WL 147916, 2010 Bankr. LEXIS 130 (Bankr. N.D. Cal. 2010), 71 U.C.C. Rep. Serv. 2d 406 – Financing statement identifying the debtor as "Lohrey Investments LLC " was ineffective to perfect a security interest in collateral acquired by "Lohrey Enterprises, Inc.," a company owned by the same individual and to which the loaned funds were transferred and used to buy the collateral.

- *In re American Consolidated Transportation. Cos.*, 433 B.R. 242 (Bankr. N.D. Ill. 2010) – A financing statement that identified the secured party by its trade name was effective.

  Comment: Errors in secured party names are not as significant as errors in debtor names, because searches are not generally run against secured party names.

- *In re QuVIS, Inc.*, 2010 WL 2228246, 2010 Bankr. LEXIS 1830 (Bankr. D. Kan. 2010) – A financing statement filed on behalf of several noteholders lapsed. Some noteholders re-perfected their own security interests. Those filings did perfect the security interests of the other noteholders. The unperfected noteholders argued that the re-perfected ones were the representatives of the unperfected ones. U.C.C. § 9-511. Although Article 9 does not require a secured party's representative capacity be disclosed on the financing statement, the alleged representative must be able to demonstrate some source of its authority. Here there was no agreement authorizing one secured party to act as an agent or representative of all of the noteholders, despite language in the loan agreement providing that "Borrower authorizes each Lender to perform every act which such Lender considers necessary to protect and preserve the Collateral and Lenders' interest therein." While each noteholder had the debtor's authorization to file a financing statement, none had authorization to file for the others.

- *In re McGee,* 2010 Bankr. LEXIS 3251 (Bankr. N.D. Ind. 2010) – Secured party was perfected and financing statements were effective where financing statements were originally filed naming wrong secured party. Five months after closing, secured party status was assigned to the named secured party and at that point the security interest became perfected.

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

   - *In re Qualia Clinical Service, Inc. v. Lange*, 441 B.R. 325 (B.A.P. 8th Cir. 2011) (Bankr. D. Neb. 2010) – A secured party initially filed a financing statement in the state where the corporate debtor had its principal place of business. The secured party did not have a perfected security interest until it filed in the jurisdiction in which the debtor was incorporated.

6. *Termination and Lapse of Financing Statement*

   - *In re Reid*, 435 B.R. 810 (Bankr. D. Mass. 2010) – A security interest perfected by a filed financing statement did not become unperfected four months after an intrastate transfer of the collateral. U.C.C. § 9-507.

     Comment: If the transferee had been "located" in another state, the secured party would have had one year to file in the other state. U.C.C. § 9-316(a)(3).

   - *In re Supplies & Services Inc.*, 2010 WL 5072586 (D.P.R. 2010) – A secured party whose financing statement lapsed no longer had a perfected security interest.

   - *Yablonsky v. Shields*, 2010 WL 3219529 (Bankr. D.N.J. 2010) – A secured party that received an assignment of a security interest remained perfected when the financing statement filed by the assignor lapsed because the secured party had by then filed his own financing statement.

- *Roswell Capital Partners LLC v. Alternative Construction Technologies*, 2010 WL 3452378 (S.D.N.Y. 2010) – An unauthorized termination statement filed by the debtor with respect to the lender's financing statement was effective.

  Comment: The court's conclusion – which was dicta – is clearly wrong. U.C.C. §9-510 clearly states that a filed record is effective "only to the extent that it was filed by a person that may file it under Section 9-509." U.C.C. §9-509 provides that the secured party of record must authorize a termination statement absent satisfaction of specific procedural requirements for debtor filings which were not followed in Roswell. Perhaps the most troubling part of the court's decision was its assertion that secured parties should be responsible for monitoring their outstanding financing statements and, when necessary, re-filing those which had been terminated by the debtor (subject, of course, to a potential loss of priority).

E. Priority

1. Lien Creditors

- *U.S. ex rel. Solera Construction, Inc. v. J.A. Jones Construction Group, LLC*, 2010 WL 1269938, 2010 U.S. Dist. LEXIS 34065 (E.D.N.Y. 2010), 71 U.C.C. Rep. Serv. 2d 416 – A judgment creditor that did properly levy on collateral during the period when a secured party's financing statement had lapsed did not obtain priority over the security interest.

- *First Bank v. Unique Marble and Granite Corp.*, 938 N.E.2d 1154 (Ill. Ct. App. 2010) – An assignee for the benefit of creditors, although junior in priority to a perfected security interest, has a right to payment out of the collateral for the services provided and that right is not subject to U.C.C. priority rules, if the compensation is based at least in part on the benefits the secured party received.

- *In re Krummel*, 427 B.R. 711 (Bankr. W.D. Ark. 2010) – A federal tax lien was perfected as to the taxpayers' personal property by filing a notice in the county where the taxpayers resided. The tax lien remained perfected even though the taxpayers later moved to a different county, at least as to the personal property that the debtors owned before the move.

- *Capital Solutions, LLC v. Konica Minolta Business Solutions U.S.A., Inc.*, 2010 WL 446936 (D. Kan. 2010); 71 U.C.C. Rep. Serv. 2d 158 – A secured party with a perfected security interest in leased equipment had priority over an equipment lessee who purchased the equipment at the end of the lease term, even though the purchase was pursuant to leases entered into before the security interest attached to the equipment. Until the lessee exercised its purchase option, the lessor was the owner of the equipment. U.C.C. §§ 9-315(a) and 9-507(a).

2. *Buyers*

- *Deere & Co. v. New Holland Rochester, Inc.*, 935 N.E.2d 267 (Ind. Ct. App. 2010) – A secured party with a perfected security interest in equipment had priority over a buyer that acquired the equipment in trade, even though the buyer had been informed by the debtor and a third party bank that the creditor's lien had been paid.

- *In re Delco Oil*, 71 U.C.C. Rep. Serv. 2d 302 (11th Cir. 2010) – A debtor in a bankruptcy proceeding received proceeds of a secured party's collateral. The proceeds in the hands of the debtor (in its deposit account) remained subject to the secured party's security interest. The debtor transferred the funds to another creditor and that creditor took the funds free of the secured party's security interest. U.C.C. § 9-332. However, that transfer was unauthorized because it was a transfer of cash collateral. Bankruptcy Code § 363(c).

- *NXCESS Motor Cars, Inc. v. JPMorgan Chase Bank*, 317 S.W.3d 462 (Tex. Ct. App), superceding 2010 WL 547391 (2010) – A buyer purchased a car from the original owner and then forged a release of a security interest in the car. A buyer from the buyer took the car subject to the security interest even though the second buyer acted in good faith and obtained a clean certificate of title.

- *Hyduke's Valley Motors v. Lobel Financial Corp.*, 2010 WL 3769199 (Cal. App. Ct. 2010) – A buyer of conditional sales from a car dealer was liable to the supplier of the vehicles whom the dealer had not paid because the buyer could have ensured that the dealer had title to the vehicles and it was in the better position to avoid the loss.

- *In re Sunbelt Grain WKS, LLC*, 427 B.R. 896 (D. Kan. 2010) – A prepaying buyer of inventory was not a buyer in the ordinary course of business that would have taken free of a perfected security interest in the inventory because the buyer did not take possession of the goods. U.C.C. § 9-320(a), 1-201(b)(9).

- *In re Cumberland Molded Products, LLC*, 431 B.R. 718 (6th Cir. BAP 2010) – Because the bankruptcy trustee is not a "transferee" of estate assets, the trustee did not take free of the bank's perfected security interest in funds on deposit when the bank honored a check drawn on the deposit account and paid the funds to the trustee. Bank's action may have waived its setoff rights but did not waive its security interest.

3. *Statutory Liens*

- *Nickey Gregory Co., LLC v. AgriCap, LLC*, 597 F.3d 591 (4th Cir. 2010), *on remand at* 2010 U.S. Dist. LEXIS 34804 (D. Sc. 2010) – Factor who acquired interest in produce distributor's accounts did not take free of PACA claims of produce suppliers because the factor did not buy the accounts, thereby removing them from the PACA trust, the factor merely loaned money secured

by the accounts, and because the factor had notice of PACA claims. The factor had to disgorge not merely the profits it received, but all amounts received after the debtor stopped paying its suppliers, up to the amount necessary to satisfy the PACA claimants.

- *Onions Etc, Inc. v. Z & S Fresh, Inc.*, 2010 WL 2598392, 2010 U.S. Dist. LEXIS 64047 (E.D. Cal. 2010) – Produce buyer's broker that arranged resale was not a PACA trust beneficiary. PACA protects produce sellers, suppliers, and their agents, not the buyer's sell-side broker, and expanding PACA to protect such creditors would undermine PACA by dissipating the assets available for its intended beneficiaries.

- *In re Seizure Of $143,265.78*, 384 Fed. Appx. 471 (6th Cir. 2010) – Bank that received notice of forfeiture of funds in which it claimed a security interest lost the right to contest forfeiture by its failure to timely file a claim despite having sent an e-mail message and letter to an Assistant U.S. Attorney alleging it had a security interest and requesting notification of future proceedings.

- *United States v. Watson*, 2010 WL 2573478 (W.D. Mich. 2010) – Bank with security interest in customer's deposit account to secure multi-million dollar line of credit was not entitled to defense from criminal forfeiture as a bona fide purchaser for value because even though it was a purchaser for value under the U.C.C., its rights were governed by Article 9, which does not protect good faith purchasers for value.

- *Movsovitz & Sons of Florida, Inc. v. Doral Bank*, 2010 WL 1978958, 2010 U.S. Dist. LEXIS 48612 (D.P.R. 2010) – Summary judgment denied on whether a bank with a security interest in a certificate of deposit it had issued to produce buyer had to disgorge to the buyer's produce suppliers the funds received from liquidating the CD because the bank had not proven that the CD was acquired with non-PACA trust assets. However,

funds remaining in the produce buyer's deposit account were proceeds remaining from the bank's loan to the produce buyer and were therefore not subject to the PACA trust.

- *Richards v. Louisiana Citizens Property Insurance Corp.*, 623 F.3d 241 (5th Cir. 2010) – Under Louisiana law, an attorney's right pursuant to a contingent fee agreement to a percentage of the recovery in an action against property insurer had priority over the rights of the property mortgagee that was an additional loss-payee on the insurance policy.

- *Great Western Bank v. Willmar Poultry Co.*, 780 N.W.2d 437 (N.D. 2010) – Poults sold to debtor engaged in raising turkeys were "supplies" under state agricultural lien statute and therefore seller had a statutory lien on the proceeds received from the debtor's sale of the turkeys and this lien was superior to bank's previously perfected security interest in the debtor's poultry and accounts.

- *In re Crooked Creek Corp.*, 427 B.R. 500 (Bankr. N.D. Iowa 2010) – Feed supplier's agricultural lien in pigs that ate feed did not have priority over bank's earlier perfected security interest because the supplier did not make a certified request to the bank for financial information about the debtor, as required by the Iowa agricultural lien statute.

- *In re Coastal Plains Pork, LLC*, 438 B.R. 845 (Bankr. E.D.N.C. 2010) – Feed suppliers' agricultural lien in pigs that ate feed did not have priority over bank's earlier perfected security interest because the suppliers did not make a certified request to the bank for a financial memorandum about the debtor, or provide the bank with a confidentiality waiver from the debtor, as required by the Iowa agricultural lien statute.

- *Premier Community Bank v. Schuh*, 789 N.W.2d 388 (Wis. Ct. App. 2010) – Creditor that pastured livestock for related entity had a possessory lien for the unpaid pasturing charges and,

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

- *North Valley Bank v. McGloin, Davenport, Severson and Snow, P.C.*, 2010 WL 5013755, 2010 Colo. App. LEXIS 1831 (Colo. Ct. App. 2010) – Attorney's statutory lien on a judgment has priority over a previously perfected security interest in the account that gave rise to the judgment because Colorado's attorney's lien statute states that an attorney's lien is a "first lien" and the Colorado Commercial Code does not govern the priority dispute.

- *SEC v. Wealth Management, LLC*, 2010 WL 3701784 (E.D. Wis. 2010), *affirmed by* 628 F.3d 323 (7th Cir. 2010) – Pursuant to Wisconsin statute, a claim for unpaid wages by employees of debtor had priority over bank's perfected security interest in the debtor's assets.

- *In re Union City Contractors, Inc.*, 2010 WL 1226882 (Bankr. W.D.N.Y. 2010) – Progress payments paid to general contractor and deposited into deposit account maintained at creditor bank were not held in trust for surety that later paid laborers and materialmen, but were instead subject to first-priority security interest of the depositary bank and a second-priority security interest of lender with a security interest in the deposit account as proceeds of accounts.

4. *Subrogation*

- *Trevdan Building. Supply v. Toll Brothers, Inc.*, 996 A.2d 520 (Pa. Super. Ct. 2010) – Unpaid supplier to subcontractor had equitable rights to subcontractor's payment from general contractor that were superior to factor that had purchased

subcontractor's accounts because the subcontract authorized the contractor to directly pay the unpaid suppliers. No discussion of Article 9.

- *In re Bill Heard Enterprises, Inc.*, 423 B.R. 771 (Bankr. N.D. Al. 2010) – Secured party that settled priority dispute with another lender by allowing the other lender to retain 15% of the escrowed proceeds of the collateral was not entitled to be subrogated to the other lender's security interest in different collateral because the secured party did not advance money in agreeing to the settlement and because it acted as a volunteer.

- *KeyBank v. Mazer Corp.*, 935 N.E.2d 428 (Ohio Ct. App. 2010) – Printer's customer who paid vendor for paper that the vendor delivered to the printer for printing was a bailor of the paper and was entitled to have the paper returned despite claims to the paper by the printer's secured creditor and receiver.

5. *Equitable Claims*

- *Kingsburg Apple Packers Inc. v. Ballantine Produce Co.*, 2010 WL 2719828 (E.D. Cal. 2010) – Secured creditor who obtains the collateral through foreclosure is generally not subject to a restitution claim for the amount of the value of the collateral furnished to the debtor by an unsecured creditor. Absent unusual circumstances, the equitable remedy of restitution must defer to the rights given a secured creditor by the California Uniform Commercial Code.

- *General Motors, L.L.C. v. Comerica Bank*, 2010 WL 5174515, 2010 Mich. App. LEXIS 2459 (Mich. Ct. App. 2010) – Bank with a security interest in a deposit account it maintained for the debtor was liable to third party for unjust enrichment resulting from third party's mistaken wire transfer of two overpayments to the debtor's deposit account. Neither old nor revised Article 9 displaces the claim for restitution because the debtor acquired

no rights to the overpayments and therefore the bank had no security interest in them.

- *Bank of the West, Inc. v. Organic Grain & Milling, Inc.*, 2010 WL 995459 (D. Ariz. 2010) – Secured party had a valid cause of action in contract against account debtor who had contracted to purchase the debtor's crop output because the secured party and account debtor had reached agreement for the account debtor to pay after setting aside a specified sum for the seed supplier and harvester. The account debtor was not entitled to setoff its alleged damages resulting from the debtor's failure to properly irrigate because the secured party had no duty to provide the funds needed for irrigation and it was not an "assignee" under the debtor's output contract.

- *In re Circuit City Stores, Inc.*, 441 B.R. 496 (Bankr. E.D. Va. 2010) – Sellers' reclamation claims were extinguished by secured creditors' floating lien on the debtor's inventory and subsequent sale to buyers in the ordinary course of business. Even though secured creditors were paid in full, sellers had no reclamation claim to remaining proceeds of their goods because reclamation is an in rem right that under U.C.C. § 546(c) does not extend to proceeds.

6. *Set Off*

- *In re Lehman Brothers Holdings, Inc.*, 439 B.R. 811 (Bankr. S.D.N.Y. 2010) – Bank was not permitted to exercise setoff against $500 million deposit account that customer had opened and funded solely to provide security for intra-day credit in order to satisfy customer's unrelated obligations arising from derivatives transactions. The language of the security agreement made it clear that the security interest secured only intra-day credit, of which there was none, and the restricted nature of the deposit account made it a special deposit against which the bank did not have common-law setoff rights.

7. *Priority — Competing Security Interests*

   - *City Bank v. Compass Bank*, 717 F. Supp. 2d 599 (W.D. Tex. 2010) – Senior secured party had no claim for conversion against bank with a junior security interest for accepting a deposit in payment of collateralized account before the senior secured party revoked its consent to the debtor's collection and use of accounts. U.C.C. § 9-341 also protects the bank with respect to acceptance of the deposit, but perhaps not with respect to application of the deposited funds to the obligation owed to the bank.

   - *LOL Finance Co. v. Paul Johnson & Sons Cattle Co., Inc.*, 2010 WL 5422621, 2010 U.S. Dist. LEXIS 1367 (D. Neb. 2010) – Lender with perfected security interest in cattle placed by debtor at feedlot lost priority in cash proceeds of cattle that feedlot deposited into bank that had a security interest in the deposit account to secure the feedlot's debt. However, bank might be liable for aiding and abetting feedlot's conversion of collateral.

   - *Merrill Lynch Business Financial Services, Inc. v. Kupperman*, 2010 WL 2179181 (D.N.J. 2010) – Secured creditor of predecessor business had priority over secured creditor of successor with respect not merely to collateral transferred but also as to collateral acquired after the successor began operations because the security interest granted by the predecessor expressly covered after-acquired collateral. Secured creditor of successor could not be holder in due course of account collections because it was aware of the other security interest.

   - *Barcosh, Ltd. v. Dumas*, 2010 WL 3172984 (M.D. La. 2010) – Bank was not the first to file or perfect because it could not rely on the filing made by its predecessor. While perfection continues when a perfected security interest is assigned, in this case there was no outstanding loan between the debtor and the predecessor when the predecessor and bank merged.

- *American Bank of St. Paul v. Coating Specialties, Inc.*, 787 N.W.2d 202 (Minn. Ct. App. 2010) – Credit union that had contractually agreed to subordinate its security interest to bank's security interest securing two $25,000 notes and "all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions" thereof, remained subordinate in the proceeds of the collateral to the extent of $50,000 even though bank rolled the two notes into a $100,000 line of credit.

- *Angulo-Mestas v. Editorial Televisa International, S.A.*, 2010 WL 2835550 (D.P.R. 2010); 72 U.C.C. Rep. Serv. 2d 795 – Assignee of account had priority over prior lender with an unperfected security interest in the assignor's accounts. Secured party that filed to perfect security interest in accounts after assignee purchased the accounts was not entitled to the portion of the accounts accruing after it filed.

- *In re Snyder*, 436 B.R. 81 (Bankr. C.D. Ill. 2010) – Secured creditor with third priority that knew of claim owed to second priority secured creditor when it bought the debt owed to first priority secured creditor took the debt subject to the third priority creditor's marshaling rights. The transfer of the debts does not affect existing marshaling rights.

- *In re Wilson*, 2010 WL 5341917 (Bankr. D. Neb. 2010) – Creditor with a perfected security interest in debtor's action against home builder for negligent construction had priority over earlier mortgagee in the proceeds of a settlement of that claim to the extent the claim was for personal injury but mortgagee had priority to the extent that the claim was for property damage and represented a reduction in value of the mortgagee's collateral.

- *Mitec Partners, LLC v. U.S. Bank*, 605 F.3d 617 (8th Cir. 2010) – Individual stockholders who purchased secured loan to their corporation from a bank had no cause of action against bank for failing to disclose its subordination agreement with the SBA.

The stockholders failed to identify any specific misrepresentation made by the bank and could not have justifiably relied on any misrepresentation because the stockholders initiated the transaction, were sophisticated in business and financial matters, had access to the corporation's financial records which contained information about the subordination agreement, and the sale documents expressly disclaimed any representations by the bank and indicated that the stockholders had relied on their own investigation.

- *State Farm Bank, F.S.B. v. Manheim Automotive Financial Services, Inc.*, 2010 WL 3156008, 2010 U.S. Dist. LEXIS 80698 (N.D. Tex. 2010) – Secured creditor of used car buyers owed no duty to car dealer's inventory lender to demand that the dealer produce titles at the time of sale or otherwise help ensure that the inventory lender was paid off. Secured creditor was not unjustly enriched by paying the dealer rather than the warehouse lender because the secured creditor received no undue benefit by paying the purchase price of the cars.

8. *Purchase-Money Security Interests*

- *In re Naumann*, 2010 WL 2293477, 2010 Bankr. LEXIS 2056 (Bankr. S.D. Ill. 2010) – Renewal of PMSI consumer loan by increasing the interest rate, extending the maturity, and, most important, adding a new co-debtor constituted a novation and destroyed the purchase-money nature of the transaction.

- *In re Boston*, 2010 WL 5128960 (Bankr. D.S.C. 2010) – Modification of PMSI consumer loan by altering the interest rate, payment amount, payment date, and number of payments, but not loaning additional funds and not executing a new note or security agreement, did not destroy the purchase-money nature of the transaction.

- *In re Sports Pub., Inc.*, 2010 WL 750008 (C.D. Ill. 2010); 72 U.C.C. Rep. Serv. 2d 383 – PMSI inventory lender did not obtain

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

- *In re Leading Edge Pork, LLC*, 2010 WL 2926155 (Bankr. C.D. Ill. 2010); 72 U.C.C. Rep. Serv. 2d 866 – PMSI livestock lender did not obtain PMSI priority over bank by sending e-mail message that identified a representative of the debtor but not the debtor itself and which failed to state that the PMSI livestock lender has acquired or expects to acquire a PMSI. A subsequent letter informing bank of planned PMSI transactions in livestock was sufficient even though it erroneously mentioned subsection (b) of U.C.C. § 9-324 instead of subsection (d). However, a factual issue remained about whether the bank received the notification before the debtor received the livestock.

- *Bank of Lincoln County v. GE Commercial Distribution Finance Corp.*, 2010 WL 4392913 (E.D. Tenn. 2010); 73 U.C.C. Rep. Serv. 2d 93 – PMSI inventory lender did not obtain priority over prior lender with perfected security interest because the PMSI lender did not send notification of its plan to provide PMSI financing. The prior lender had a security interest in all inventory, not merely the items it financed, because its financing statement covered all inventory, there was no course of dealing to the contrary established by the unilateral act of the debtor in failing to remit the proceeds of non-financed inventory to the prior lender, and the prior lender did not waive its security interest by not repossessing the disputed items of collateral when it repossessed the items it had financed.

- *In re Roser*, 613 F.3d 1240 (10th Cir. 2010) – Lender with PMSI in car and which submitted application for notation of its security interest on the certificate of title 19 days after the purchase but one week after the debtor's bankruptcy petition was perfected

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

- *Howard v. AmeriCredit Fin. Services*, 597 F.3d 852 (7th Cir. 2010) – Negative equity in trade-in vehicle financed as part of the purchase of a new car is part of the purchase-money obligation and is therefore secured by a purchase-money security interest.

- *In re Westfall*, 599 F.3d 498 (6th Cir. 2010) – Negative equity in trade-in truck financed in connection with the purchase of a new truck is both part of the price of the new truck and value given to enable the debtor to purchase the new truck, and is therefore covered by a PMSI.

- *In re Penrod*, 611 F.3d 1158 (9th Cir. 2010) – Negative equity in trade in vehicle that was included in amount financed in connection with purchase of new vehicle was not part of the purchase-money obligation because it is antecedent debt.

9. *Proceeds*

- *In re Las Vegas Monorail Co.*, 429 B.R. 317 (Bankr. D. Nev. 2010) – Revenues generated from the operation of a monorail were not proceeds of the debtor's franchise agreement permitting it to operate the monorail. The security interest of the bond trustee in the debtor's "net revenue" subordinated it to operating expenses and left it with a security interest only in the funds deposited with the trustee, not in cash on hand held by the debtor's agent or funds previously diverted into a different deposit account. This security interest in net revenue is not proceeds of other collateral, and therefore to the extent arising postpetition, is cut off by Bankruptcy Code § 552(a).

- *McCourt v. Triplett*, 2010 WL 3422458 (Ark. App. Ct. 2010) – Secured party did not meet its burden in attempting to establish that deposit account contained identifiable proceeds of

collateralized accounts and inventory because its only evidence was testimony of the debtor's president that most of the deposits came from such sources. Accordingly, judgment creditor was entitled to all the funds.

- *Westfield Ins. Co. v. Cubbage*, 2010 WL 4683727 (N.D. W. Va. 2010) – Summary judgment denied on whether secured party of equipment lessor was entitled to proceeds of personal property insurance procured by lessee because it was unclear what portion of the destroyed property was leased and what portion was owned by the lessee.

- *Rent-N-Roll v. Highway 64 Car & Truck Sales*, 2010 WL 4629604 (Tenn. App. Ct. 2010); 73 U.C.C. Rep. Serv. 2d 27 – Lessor of large-size custom wheels and tires that were installed on car in which seller had a perfected security interest had priority over the seller under U.C.C. § 2A-310(2) because the lease was entered into before, although only shortly before, the wheels and tires were installed. However, the lessor had to compensate the seller for injury to the car done during both installation and removal, and this included restoring the car to its original wheel base.

F. Default and Foreclosure

1. Default

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

- *Grohman v. Kahlig*, 318 S.W.3d 882 (Tex. 2010) – Despite term in security agreement by which debtor promised not to "sell, transfer, lease, or otherwise dispose of the Collateral," the debtor did not breach security agreement by converting two

corporations, whose stock was pledged as collateral, into limited partnerships because the security agreement defined the collateral to include "all replacements, additions and substitutions" for the stock. These two clauses must be harmonized and, while the collateral changed form, it was not destroyed.

- *In re Bolin & Co., LLC v. Ogden*, 437 B.R. 731 (D. Conn. 2010) – Although promissory note defined default as only the failure to pay within five days of demand, security agreement defined default to include the creation of any encumbrance on the collateral and because the debtor had created such encumbrances by pawning collateral, the debtor was in default under the security agreement despite the absence of a demand for payment. The secured party was therefore permitted to repossess the collateral.

- *CornerWorld Corp. v. Timmer*, 2010 WL 3942804, 2010 WL 3942850 (W.D. Mich. 2010) (Special Master report) – Debtor's movement of collateralized equipment from Michigan to Texas may make repossession more inconvenient, but was not a default because the transaction documents said nothing about where the collateral was to be maintained and because the relocation made certain cost savings possible, it was not a "materially adverse event" under the debenture.

- *Allason v. Gailey*, 939 N.E.2d 206 (Ohio App. Ct. 2010) – Despite clauses in security agreement calling for secured party and debtor to be joint loss-payees on insurance contract, debtor was entitled to use insurance proceeds of the collateral to acquire replacement property because the security agreement lacked an acceleration clause and the secured party had not shown how this would impair her interest.

- *Scott v. Houston*, 2010 WL 680984 (Tenn. Ct. App. 2010) – Despite clause in security agreement providing that any waiver of default by seller does not impair the seller's right to declare a

later default, seller modified contract by expressly agreeing to accept and by accepting late payments without imposing late payment charges. Subsequent repossession after debtor had paid the principal debt in full therefore constituted conversion and, because it was done in retaliation for the debtor's cooperation with authorities conducting an unrelated criminal investigation of the seller, punitive damages were available.

- *Minor v. Chase Auto Fin. Corp.*, 2010 WL 2006401 (Ark. 2010); 72 U.C.C. Rep. Serv. 2d 610 – Clauses in security agreement prohibiting unwritten modifications and providing that no waiver occurs by accepting late payment were effective. Secured creditor could therefore repossess the collateral without giving prior notification of its intent to require strict compliance.

- *Platt v. Wachovia Dealer Services, Inc.*, 932 N.E.2d 255 (Ind. Ct. App. 2010) – Debtors had no right to have court modify the terms of the loan and security agreement to reduce the monthly payment so that it fell within their budget.

- *Holman Street Baptist Church v. Jefferson*, 317 S.W.3d 540 (Tex. Ct. App. 2010) – Expiration of the statute of limitations on an action to collect personally from the debtor does not bar the lender from foreclosing on collateral, in this case shares of stock, to satisfy the debt.

- *Terra Partners v. Rabo Agrifinance, Inc.*, 2010 WL 3270225 (N.D. Tex. 2010) – Secured party was not liable for conversion allegedly committed during repossession to entity that claimed to own some of the collateral repossessed because the secured party acknowledged the claimant's potential ownership rights, and made a reasonable request that the claimant identify its property so that it could be returned, but the claimant refused to do so.

2. *Repossession of Collateral*

   - *In re Reid*, 423 B.R. 726 (Bankr. E.D. Pa. 2010) – Under Article 9 of the Delaware U.C.C., automobile that secured creditor repossessed prepetition remained the property of the debtor until sold, and thus secured creditor violated the stay by refusing to return it to the debtor after she filed a bankruptcy petition.

   - *Merrill Lynch Com. Fin. Corp. v. American Standard Testing & Consulting Labs., Inc.*, 2010 WL 114280 (E.D.N.Y. 2010) – Secured creditor is entitled to a pre-judgment order of seizure of the collateral even though it was unable to set forth the value of the collateral. Secured creditor need not post a bond to get that order because the requirement of a bond was waived in the security agreement.

   - *GMAC v. Everett Chevrolet, Inc.*, 2010 WL 4010113 (Wash. Ct. App. 2010) – Secured creditor was entitled to prejudgment writ of replevin upon posting bond; trial court erred in deciding, at replevin hearing, the merits of the underlying contractual dispute by concluding that secured creditor had breached the contract by violating its duties of good faith and fair dealing.

   - *TFS Capital Solutions v. KO & Associates LLC*, 2010 WL 5151615 (E.D. La. 2010) – Member of LLC debtor who had been served with order of sequestration directed at LLC was in contempt for failing to comply with order by ether delivering the collateralized equipment to the marshal or informing the marshal where the equipment is located.

   - *Pharmacy Advantage, Inc. v. A & C Health Care Services, Inc.*, 2010 WL 3404826 (Cal. Ct. App. 2010) – Trial court did not abuse its discretion in its pre-judgment order appointing a receiver to manage the debtor's nursing facility and take control of enough funds to satisfy the plaintiff's claim because the debtor's accounts, in which plaintiff held a security interest, was a

dwindling pool of assets. However, trial court erred in allowing receiver to take control over accounts due from Medi-Cal, which by state law are exempt from legal process and are not assignable.

- *GE Commercial Distribution Finance Corp. v. Carter Bros. Mfg. Co.*, 2010 WL 3118276 (M.D. Ala. 2010) – Secured creditor was not entitled to order temporarily restraining debtors from selling the collateral because all of the threatened harms are readily compensable by monetary damages and therefore the secured creditor had not shown irreparable injury. For the same reasons, secured creditor was not entitled to writ of seizure without notice and a hearing even though it feared that the debtors would dispose of the collateral.

- *States Resources Corp. v. Yohe*, 2010 WL 2773335 (W.D. Mo. 2010) – Secured creditor was entitled to judgment on notes and guaranty due to debtors' default, but was not entitled to replevy the collateral because even though the creditor had a right to possession, there was no evidence that the debtors had actually deprived the creditor of any right over the collateral or that the debtors were exercising unauthorized control over the collateral.

- *Becker v. Longinaker*, 784 N.W.2d 202 (Iowa Ct. App. 2010) – Secured party that had waived right to a deficiency when foreclosing mortgage committed conversion when it later repossessed horses that the debtor had also used to collateralize the debt.

- *General Electric Capital Corp. v. Delaware Machinery & Tool Co., Inc.*, 2010 WL 1687910 (S.D. Ind. 2010) – Lessor, whose interest may or may not be a security interest, that, before receivership action commenced, obtained replevin order requiring debtor to deliver equipment in 30 days, was entitled to possession over the receiver. Court stayed order to determine relative priority of lessor and secured party.

- *Williams v. Republic Recovery Services, Inc.*, 2010 WL 2195519 (N.D. Ill. 2010) – Because a secured party may repossess collateral without judicial process only if it does so without breaching the peace, a breach of the peace negates the secured party's right to take possession. That in turn makes the action a violation of the Fair Debt Collection Practices Act, which prohibits "[t]aking or threatening to take any nonjudicial action to effect dispossession . . . if . . . there is no present right to possession of the property claimed."

- *Siwka v. Smart Recovery Service, LLC*, 2010 WL 3719902 (E.D. Mich. 2010) 2010 WL 4791370 (E.D. Mich. 2010) – Secured party could not be liable for conversion due to its repossession of car because the debtor was in default and thus the secured party had a right to possession. However, material facts were in dispute about whether the creditor would be liable for breach of the peace due to the repossession agent's use of a police officer to conduct the repossession. Police officers could be liable, but the city could not be because there was no evidence that the police acted pursuant to official policy.

- *Siwka v. Smart Recovery Service, LLC*, 2010 WL 3719897 (E.D. Mich. 2010) – Repossession agent did not, for the purposes of a USCA § 1983 claim, act under color of state law when conducting repossession given that the debtor did not learn that the agent was a police officer until later in court following the repossession events.

- *Ford Motor Credit Co. v. Ryan*, 2010 WL 3783156 (Ohio Ct. App. 2010) – Because repossession is authorized only if it can be effected without a breach of the peace, a breach of the piece negates the creditor's right to possession and can give rise to damages for conversion. Repossession agent did not breach the peace in repossessing three cars even though they were located in the debtors' parking lot, driveway, and carport because the secured party has a limited privilege to trespass on the debtor's property to repossess collateral and this privilege extends to the

secured party's agents. A breach of the peace may have occurred in a fourth repossession, during which the debtor went out to the carport and confronted the repossession agent hooking the car to a tow truck. The debtor told the agent to stop, unhook the car and to leave the premises. The debtor then reached down to unhook the car, and the agent grabbed his hands, pushed him, and began screaming. The secured creditor was also liable for conversion of personal property in the cars when repossessed but not returned.

- *Brown v. City of Philadelphia*, 2010 WL 4484630 (E.D. Pa. 2010) – Debtor's negligence and conversion actions against secured party arising out of conduct during repossession were covered by the parties' arbitration agreement, which applies to "any claim, dispute or controversy between you and us that in any way arises from or relates to the Loan Agreement."

- *SFG Commercial Aircraft Leasing, Inc. v. N59CC, LLC*, 2010 WL 883764 (N.D. Ind. 2010) – A secured party could proceed to enforce a secured obligation, even though the secured party had repossessed the collateral and not yet sold the collateral. The secured party was not required to make an election of remedies and could reject an offer for the collateral. U.C.C. § 9-601.

- *General Electric Capital Corp. v. John Carlo, Inc.*, 2010 WL 3937313 (E.D. Mich. 2010) – Secured party was entitled to judgment on the debt even though it had not yet disposed of the collateral.

- *In re King*, 2010 WL 4290527 (Bankr. S.D.N.Y. 2010) – Secured party had no duty to repossess and dispose of the collateral, and therefore had a valid claim for the full amount of the debt despite its decision, consciously or not, to go after the collateral.

- *First United Bank & Trust Co. v. Penny*, 242 P.3d 593 (Okla. Ct. App. 2010) – Secured party in control of collateralized stock has a duty to preserve the stock, but not its value, and hence was

not liable in negligence for failing to monitor the price of the stock after the debtor's default or in ignoring the stock's decline in value, particularly since the debtor did not request that the stock be sold and indeed did request that the secured party not sell the stock while Debtor tried to become current on his obligation.

- *In re Ballard*, 2010 WL 4501891 (Bankr. M.D. Ga. 2010) – Lender that took possession of car to secure the loan was not protected by the state pawnbroker act because the loan agreement provided no grace period for payment, and thus the lender had a security interest in the car, not complete title, when the debtor filed his bankruptcy petition. Lender's refusal to release the car to the debtor violated the automatic stay.

3. *Notice of Foreclosure Sale*

- *Colonial Pacific Leasing Corp. v. Elite S-WMo., Inc.*, 2010 WL 3119448 (W.D. Mo. 2010) – Notification of disposition that erroneously stated that collateralized vehicles would be sold at a public auction on September 10, 2009, when in fact the vehicles were sold at private dealer-only auctions on September 17, 2009, and October 15, 2009, was nevertheless sufficient in part because the debtor had bought and sold vehicles through the auction company, and was aware that it conducts private, dealer-only auctions. The sale was commercially reasonable because the auction company was the largest in the country, regularly frequented by hundreds of dealers, the debtor had itself delivered the vehicles to the auction company for sale before the secured party took control, and the five-month delay before the sale was caused by the debtor's own obstructions.

- *In re Walter B. Scott & Sons, Inc.*, 436 B.R. 582 (Bankr. D. Idaho 2010) – Term in security agreement providing that disposition would be commercially reasonable if notice was provided to the debtor ten days in advance and notice was published in a newspaper of general circulation at least ten days before a

public sale was manifestly unreasonable and therefore unenforceable because it dealt only with notification and advertisement, not with the other aspects of the sale. Summary judgment denied on the commercial reasonableness of the disposition because the Debtor raised with expert testimony a factual dispute about the commercial reasonableness of how the auction was publicized, the condition of the equipment when it was auctioned, and the manner in which the auction itself was conducted.

- *Textron Financial Corp. v. Metro Lincoln-Mercury, Inc.*, 2010 WL 4736262 (E.D. Tenn. 2010) – Notification of disposition sent by certified mail, return receipt requested, and returned "unclaimed" was effective because it was "sent." U.C.C. § 9-611(b).

4. *Commercial Reasonableness of Foreclosure Sale*

- *Commercial Credit Group, Inc. v. Falcon Equipment, LLC of Jax*, 2010 U.S. Dist. LEXIS 1385 (W.D.N.C. Jan. 8, 2010) – Siding with secured creditor in a series of challenges by debtor; court upholds security interest, rejecting challenges to secured party's successful bid at public sale of collateral because purchase was commercially reasonable and upholds contractual choice of law where there is a reasonable basis to choose the state.

- *Cabrera v. Nationwide Southeast, LLC*, 700 S.E.2d 626 (Ga. Ct. App. 2010) – Summary judgment on secured party's deficiency claim was improper because a factual issue remained about whether secured party had complied with non-uniform statutory requirement that secured party notify the debtor of its intent to pursue a deficiency claim, the debtor's rights of redemption, and the debtor's right to demand a public sale of the motor vehicle.

- *Regions Bank v. Trailer Source*, 2010 WL 2074590 (Tenn. Ct. App. 2010) – Senior secured creditor's control over and approval of

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

- *USA Financial Services, LLC v. Young's Funeral Home, Inc.*, 2010 WL 3002063 (Del. Ct. Comm. Pleas 2010) – Secured creditor's sale of hearse approximately one year after repossession occurred was not commercially reasonable, particularly since vehicles are depreciating assets and the factors contributing to the delay were within the creditor's control. Moreover, the notice of public sale provided by the creditor was deficient because it failed to provide the time or full address of the public sale, failed to inform the debtors that they were entitled to an accounting of the unpaid indebtedness, and did not accurately state the intended disposition because the vehicle was not immediately taken to auction, but first was placed for private sale at a used car lot for nearly a year. Because the creditor offered no proof as to what a commercially reasonable disposition would have yielded, the court presumed that a proper sale would have yielded the amount of the secured obligation.

- *Regal Finance Company, Ltd. v. Tex Star Motors, Inc.*, 2010 WL 3277132 (Tex. 2010) – Although U.C.C. § 9-627(b)(3) provides that a disposition of collateral is commercially reasonable if it conforms to reasonable commercial practices among dealers in the type of property, this is a safe harbor, not a requirement of

commercial reasonableness. A secured party need not produce evidence of dealer practices to prove that a disposition was commercially reasonable. Testimony of the creditor's sales agent provided sufficient evidence to uphold the jury determination that the creditor acted in a commercially reasonable manner in selling 906 motor vehicles through private sales to wholesalers.

- *Hopkins v. Kansas Teachers Community Credit Union*, 265 F.R.D. 483 (W.D. Mo. 2010) – Class of 140 members, all of whose car loans were included in a securitization, would be certified for an action against the secured party for its servicer's alleged failure to provide adequate notification of a sale of repossessed cars. The class would not be certified for the members' conversion claims because the members reside in different states where different statutes of limitations apply.

- *State ex rel. Cordray v. Estate of Roberts*, 935 N.E.2d 450 (Ohio Ct. App. 2010) – Material facts were in dispute, barring summary judgment, on whether a secured party breached the terms of the security agreement by failing to dispose of the collateralized inventory of chemicals in a timely fashion after taking possession, thereby allowing the chemicals to turn into hazardous waste and making it responsible in part for the debtor's environmental cleanup liability.

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

- *Grayson v. Union Federal Sav. & Loan Ass'n of Crawfordsville*, 928 N.E.2d 652 (Ind. App. Ct. 2010) – A secured creditor who fails to comply with Article 9 when disposing of collateral can be liable to a junior secured party under U.C.C. § 9-625, but a junior secured party cannot put the secured creditor's compliance at issue (so as to put the burden of proof on the secured creditor) under U.C.C. § 9-626. Because the deficiency owed to the disposing creditor exceeded the value of the

collateral, the junior secured party had no damages for any failure to conduct a commercially reasonable disposition.

- *Commercial Credit Group, Inc. v. Falcon Equipment, LLC of Jax*, 2010 WL 144101 (W.D.N.C. 2010); 70 U.C.C. Rep. Serv. 2d 839 – Secured creditor's failure to provide evidence of the value of the collateral purchased at the sale did not create presumption that the sale was commercially unreasonable. Neither creation of note nor creation of guaranty somehow discharged previously perfected security interest in the collateral.

- *Versey v. Citizens Trust Bank*, 702 S.E.2d 479 (Ga. App. Ct. 2010); 72 U.C.C. Rep. Serv. 2d 1154 – Secured creditor submitted two appraisals of the car disposed of, but neither appraisal contained sworn opinion testimony of a witness who stated the basis for the opinion or who opined that the appraised value of the car is its "fair and reasonable" value in that particular market at the time of either the repossession or of the sale. Because, based on pre-revision case law, the secured party must prove the value of the collateral at the time of repossession to show entitlement to a deficiency, summary judgment for the creditor was improper.

- *Textron Financial Corp. v. Metro Lincoln-Mercury, Inc.*, 2010 WL 4736262 (E.D. Tenn. 2010) – Secured party was not entitled to summary judgment on its claim for deficiency because, though the debtors had put commercial reasonableness at issue, the secured party provided no specific information about the collateral sold, the date or place of the sales, the process by which the sales were conducted, the number or dollar amount of bids received, or whether the sales were made in conformity with reasonable commercial practices among dealers in such property.

- *Aviation Finance Group, LLC v. Duc Housing Partners, Inc.*, 2010 WL 1576841 (D. Idaho 2010); 72 U.C.C. Rep. Serv. 2d 583 – Material question of fact existed as to whether secured party

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

- *Wells Fargo Business Credit v. Environamics Corp.*, 934 N.E.2d 283 (Mass. App. Ct. 2010) – Material question of fact existed as to whether secured party disposed of business assets in a commercially reasonable manner. Creditor's only evidence was the affidavit of its vice president who conducted the sale, and creditor provided no background of the affiant. The guarantors presented expert evidence suggesting that there were numerous other avenues consistent with industry practice that could have yielded a higher price, and submitted an affidavit from an employee of the debtor describing how the assets could be sold piecemeal for more money.

- *Financial Federal Credit Inc. v. Hartmann*, 2010 WL 4918980 (S.D. Tex. 2010) – Affidavit of secured party's vice president, with 23 years of experience in equipment financing, supported summary judgment on action for a deficiency; affidavit stated that the public sales of the equipment were conducted in accordance with industry standards and were commercially reasonable in all respects, including method, manner, time, place and terms. Moreover, the debtors failed to present competent evidence demonstrating procedural irregularities occurred.

- *Arizona Business Bank v. Leveton*, 2010 WL 1998149 (Ariz. App. Ct. 2010) – Commercial reasonableness of disposition is not part of creditor's prima facie case for a deficiency judgment and was not at issue because guarantor failed to raise it in his pleadings. Moreover, allegations that the value of the collateral was higher

than the sale price and that the creditor delayed before conducting the sale were insufficient to overcome evidence that the creditor sold the collateral to the highest bidder at a public sale conducted by an established auctioneer.

- *Macquarie Bank Ltd. v. Knickel*, 723 F. Supp. 2d 1161 (D.N.D. 2010) – Summary judgment denied because there was a factual dispute as to whether bank tortiously disclosed confidential and propriety information about the debtor. Although the bank had a security interest in all of the debtor's confidential data, and thus could have transferred the data as part of a disposition, the sheriff's sale did not include general intangibles and thus the bank did not foreclose on them.

- *Perceptron, Inc. v. Silicon Video, Inc.*, 2010 WL 3463098 (N.D.N.Y. 2010) – Compliance with the processes for foreclosing on collateral does not necessarily insulate the buyer from successor liability.

- *Ulbrich v. Groth*, 2010 WL 4722267 (Conn. Super. Ct. 2010) – Secured party could be liable for negligence to buyer for failing to determine and disclose that some of the personal property support summary judgment on action for a deficiency sold at foreclosure sale did not belong to the debtor. Neither the economic loss doctrine nor the warranties provided at sale displaced the common-law cause of action for breach of the duty to exercise reasonable care to properly identify the property being sold.

G. Collection

- *Allied Capital Partners, LP v. Proceed Technical Resources, Inc.*, 313 S.W.3d 460 (Tex. App. Ct. 2010) – Even if the factor materially breached agreement with debtor by refusing to purchase accounts, debtor was not entitled to enjoin the factor from contacting the account debtors or collecting on accounts that the factor had previously purchased. A material breach

discharges future performance but does not relieve the other party of obligations that arose before the breach, and thus, factor did not forfeit its security interest in the purchased accounts, nor was the debtor relieved of its warranty obligations on those accounts.

- *Ta Chong Bank Ltd. v. Hitachi High Technologies America, Inc.*, 610 F.3d 1063 (9th Cir. 2010) – After creditor's unperfected security interest in accounts was avoided, he could not maintain an action against account debtor who had paid the debtor before the petition was filed but after receiving instructions to pay the creditor directly.

- *Platinum Funding Services, LLC v. Magellan Midstream Partners, LP*, 2010 WL 2383786 (Conn. Super. Ct. 2010) – Account debtor that paid debtor after being instructed by certified mail to pay the debtor's factor had not discharged the account and still had to pay the factor. Account debtor was not entitled to setoff or mitigation for checks sent, which the debtor had endorsed over to the factor, allegedly providing the factor with notice that the account debtor was still paying the debtor.

- *Wells Fargo Bank v. Kal-Rich, Inc.*, 2010 WL 1740603 (Mass. App. Ct. 2010) – Secured party had standing to collect accounts owed to entity that had purchased substantially all the assets of the original debtor from junior lienor.

- *MG Herring Group Inc. v. John Vratsinas Commercial Builders, Inc.*, 2010 WL 1979393 (N.D. Tex. 2010) – Bank claiming a security interest in contractor's accounts could not intervene in action between the contractor and its customers because the parties had already reached a settlement and the Bank's delay in seeking to intervene would prejudice the customers.

- *Sweet Ones, Inc. v. Mercantile Bank of Michigan*, 2010 WL 1658205 (W.D. Mich. 2010) – Debtor lacked standing to raise the PACA rights of its suppliers when trying to prevent secured lender

from exercising setoff against the debtor's bank account or collecting from account debtors.

- *Summit Financial Resources, LP v. Kathy's General Store, Inc.*, 2010 WL 1816685 (D. Kan. 2010); 71 U.C.C. Rep. Serv. 2d. 500 – Account financier had no cause of action against customer of debtor who continued to prepay the debtor after receiving notice to pay the account financier directly. Because the transactions involved prepayment, and thus the customer never owed a monetary obligation, no accounts were created.

- *The Sportsman's Guide Inc. v. Havana National Bank*, 2010 WL 2663098 (C.D. Ill. 2010) – Account debtor who brought interpleader action to determine who it should pay was entitled to reimbursement of its costs and reasonable attorneys' fees.

- *In re Noble Int'l, Ltd.*, 424 B.R. 760 (E.D. Mich. 2010) -- Creditor had right to determine whether cash collateral was applied to an obligation of the debtor secured by other collateral or a different obligation of the debtor for which there was no other collateral. Because the cash collateral was applied toward the latter obligation, the debtor failed to provide adequate protection.

- *First Mid-Illinois Bank v. Parker*, 933 N.E.2d 1215 (Ill. App. 2010) – Evaluates procedural steps for enforcing lien on distributions from LLC.

H. Retention of collateral

- *In re CBGB Holdings, LLC*, 439 B.R. 551 (Bankr. S.D.N.Y. 2010) – Secured party conducted an effective strict foreclosure by entering agreement with debtor, after default, providing that if debtor did not pay the secured obligation within the next three months, the secured creditor could, without further notice, "possess and retain" the collateral pursuant to U.C.C. § 9-620. The debtor's further consent after the end of the three-month period was not necessary.

- *Corsair Special Situations Fund, LP v. Engineered Framing Sys., Inc.*, 694 F. Supp. 2d 449 (D. Md. 2010) – Patent security agreement provided that the creditor's interest would "become an absolute assignment" after debtor defaulted; thus, the security interest became an absolute assignment of the patent upon default.

- *Blakely v. Tri-County Financial Group, Inc.*, 2010 WL 1286856 (N.D. Ill. 2010) – Although secured party may have obtained a windfall by accepting the debtor's interest in a 20-year revenue stream to satisfy a deficiency judgment, the debtor and debtor's counsel supported summary judgment on action for a deficiency, and therefore the acceptance was effective.

- *R.S. Silver Enterprises Co., Inc. v. Pascarella*, 2010 WL 3259869 (Conn. Super. Ct. 2010) – Secured party had not taken ownership of participation interest through a strict foreclosure because the creditor had not sent a proper proposal to do so. The communication sent was conditional because it referred to consequences if payment were not made. It identified the debtor, a corporation, simply as "Bob." It identified the collateral simply as "the Riversedge project." It made no mention of cancelling or satisfying the $200,000 note. And, it was not authenticated.

- *Wyatt v. Capital One Auto Financing*, 2010 WL 323124 (Tex. App. Ct. 2010); 71 U.C.C. Rep. Serv. 2d 8 – Even though installment loan contract provided that changes must be in a writing signed by both parties and incorrectly identified the seller's assignee, the seller validly assigned the right to payment to a finance company. The finance company provided reasonable proof of the assignment even though the contract assignment form was not completely filled out because it was authenticated by the seller and identified the debtor's purchase contract. Although the seller later provided a slightly different assignment form to the debtor, both forms identified the debtor's purchase contract and the assignee. Moreover, the seller repeatedly advised the

debtor of the assignment and returned checks the debtor had sent to the seller. Accordingly, the debtor was in default by not paying the assignee.

- *Larota-Florez v. Goldman Sachs Mortgage Co.*, 2010 719 F. Supp. 636 (E.D. Va. 2010) – MERS and mortgage servicer could enforce mortgages consistent with transaction documents because a mortgage follows the note. A mortgage holder can recover on the mortgage even if it has already recovered on credit enhancement or CDS.

- *In re Bryant Manor, LLC*, 422 B.R. 278 (Bankr. D. Kan. 2010) – Post-petition rents from mortgaged apartment building were property of the debtor's estate even though a court-appointed receiver took control of the property pre-petition. However, turnover would not be required merely to allow the debtor's management company to resume operation of the property, particularly since the debtor had no equity in the property.

- *American Sterling Bank v. Johnny Management LV, Inc.*, 245 P.3d 535 (Nev. 2010) – A lender whose loan proceeds were used to pay off a prior secured debt could be equitably subrogated to the former lender's lien position, so long as no intervening lienholder is materially prejudiced. The increase in the interest rate does not create material prejudice since subrogation is limited to the amount that would be owing on the paid off note, calculated with its interest rate. However, the new note's much accelerated maturity date - six months instead of 12% years - did materially prejudice the junior lienor.

III. GUARANTIES AND INTERCREDITOR AGREEMENTS

A. *Existence and Formation*

- *In re Colonial BancGroup, Inc.*, 436 B.R. 713 (Bankr. M.D. Ala. 2010) – Bank holding company agreed with the FDIC to "take appropriate steps to ensure that the Bank complies" with a cease and desist order and to use "its financial and managerial resources to assist" the bank. However, this did not make the holding company a guarantor of the bank's obligations to maintain specified capital ratios, impose liability on the holding company in the event the bank failed to reach required ratios, or require the holding company to pledge assets to secure a capital deficiency. Consequently, the FDIC had no security interest in, or setoff rights with respect to, bank holding company's deposit accounts.

- *Cape Haze Investments, Ltd. v. Eilers*, 2009 WL 454662 (W.D. Wash. 2009) – A guarantor of secured debt was not discharged when the secured party let perfection of its security interest lapse. Nothing in the guaranty agreement required the secured party to go after the collateral before pursuing the guarantor and, in any event, the secured party did foreclose on the collateral.

- *Jetstream of Houston, Inc. v. Aqua Pro Inc.*, 2010 WL 669458 (N.D. Ill. 2010) – Forum selection clause in promissory notes did not bind guarantors because the guaranty agreement promised "full and prompt payment of the liabilities," not performance of all contractual obligations of the debtor, and by including the same choice of law as the notes but omitting the venue and jurisdiction provisions, the parties distinguished the enforcement procedure under the notes from the enforcement procedure under the guaranty. Nevertheless, because they guaranteed notes made in Illinois, to be interpreted under Illinois law, and to be litigated in Illinois, the guarantors subjected themselves to jurisdiction and venue in Illinois.

- *FDIC v. Great American Ins. Co.*, No. 607 F.3d 28 (2d Cir. 2010) – Defendant was entitled to rescind a fidelity bond because of plaintiff's misrepresentations in its insurance application; grounds for rescission were clearly stated on the bond, specifying that "any misrepresentation, omission, concealment of any incorrect statement of a material fact, in the application or otherwise, shall be grounds for the rescission of this bond."

- *State ex rel. Wagner v. Amwest Surety Ins. Co.*, 790 N.W.2d 866 (Neb. 2010); 73 U.C.C. Rep. Serv. 2d 5 – Surety of bonds secured by income from equipment leases had a duty to perfect the security interest within a reasonable time, and that time passed shortly after the closing and long before the surety was replaced (about eighteen months after the closing). Creditor's signed waiver of surety's future performance did not waive breach that had already occurred by failing to perfect security interests.

B. Scope

- *Citizens State Bank-Midwest v. Symington*, 2010 WL 2026678 (N.D. 2010) – Even though father's guaranty unambiguously indicated that it covered "all obligations" of son's corporation, the parole evidence rule allows evidence of fraud or mistake and thus the father could admit evidence that he signed the guaranty after the lender's agent assured him that he was guarantying one $20,000 purchase loan.

- *Freestone Capital Partners LP v. MKA Real Estate Opportunity Fund I, LLC*, 230 P.3d 625 (Wash. App. Ct. 2010) – Choice-of-law clause in notes was not relevant to action on subjoined guaranties that lacked such a clause. Instead, the governing law was to be determined pursuant to *Restatement (Second) of Conflicts of Law* §§ 188 and 194. Although there was no attorneys' fee clause in the guaranties, there was such a clause in the guarantied promissory notes and therefore, the guarantors were liable for fees incurred in

both attempting to collect from the guarantors and from the borrowers.

- *Regions Bank v. Weber*, 53 So. 3d 1284 (La. App. Ct. 2010) – Even though guaranty agreement contained no arbitration clause, creditor had to arbitrate action against guarantor where the guaranteed promissory note did contain an arbitration clause.

- *Trustee Services, Inc. v. R.C. Koonts & Sons Masonry, Inc.*, 688 S.E.2d 737 (N.C. App. Ct. 2010); 72 U.C.C. Rep. Serv. 2d 159 – Future advances clause in promissory note secured by deed of trust did not encompass obligation later incurred by maker under guaranty because the clause covered "future advances to grantor," not advances made to others or all obligations of the grantor.

- *Terracino v. Gordon & Hiller*, 1 A.3d 97 (Conn. App. Ct. 2010) – Co-guarantors had no malpractice claim against their attorneys for failing to discover that third co-guarantor at one time held the note because this would not have limited their liability to an unrelated party. Although the enforcing note holder was not a holder in due course, the guaranty agreements expressly provided that each guarantor was liable for the full debt and the co-guarantors' right of contribution from the intermediate note holder did not limit the rights of the entity that enforced the guaranties.

- *Lestorti v. DeLeo*, 4 A.3d 269 (Conn. 2010) – Guarantor had right to contribution from co-guarantor even though creditor failed to serve the co-guarantor. The right of contribution is based on the theory that co-guarantors enter an implied contract with each other, to which the creditor is not a party. However, a guarantor has a right to contribution only if the he pays more than his allocable share of the debt, and if the he settles with the creditor by paying less than his share, the he is not entitled to contribution.

C. Discharge

- *VCS Properties, LLC v. Viking Steel, LLC*, 2010 WL 4927731 (Ohio App. Ct. 2010) – Surety that paid creditor in full had no breach of contract claim against co-surety because liability on the principal obligation had been discharged and the surety did not plead a claim for contribution.

- *JP Morgan Chase v. Bethel*, 2010 WL 2595171 (Ohio App. Ct. 2010) - Where term "indebtedness" ambiguously covered debt evidenced by both note and guaranties, guarantors with limited liability were not necessarily discharged when lender swept funds from deposit accounts serving as collateral.

- *Bank Mutual v. S.J. Boyer Const., Inc.*, 785 N.W.2d 462 (Wis. 2010) – State anti-deficiency statute that insulates "every party who is personally liable for the debt secured by the mortgage" from liability for a deficiency does not insulate guarantors because a guarantor's liability arises not from the debt itself, but from a separate contract.

- *Beeler v. Martin*, 306 S.W.3d 108 (Mo. App. Ct. 2010) – Couple who provided collateral for loan to son's corporation had no claim for indemnity against son and another shareholder after the creditor foreclosed on the collateral, even though the son and other shareholder had guaranteed the debt. The couple did, however, have a claim for unjust enrichment to the extent the son and other shareholder received assets in excess of liabilities when the corporation was dissolved.

- *Ringneck, Inc. v. Buck*, 2010 WL 3927863 (M.D. Fla. 2010) – Guarantor's obligation survived where a secured loan was sold to entity controlled by two of the other guarantors and not paid off in a refinancing.

- *In re Laughlin*, 602 F.3d 417 (5th Cir. 2010) – Federal bankruptcy courts defer to state law to determine when debtor has an interest in property and when a transfer occurs; concluding under Louisiana law, renunciation of inheritance is not fraudulent transfer.

- *In re Lockwood Auto Group, Inc.*, 428 B.R. 629 (Bankr. W.D. Pa. 2010) – Bank loaned $200,000 to principal shareholder, who contributed the funds to corporation to purchase CD from, and then pledged the CD to, the lender. Because the only apparent purpose was to create the fraudulent illusion that the corporation had additional capital, bank was not entitled to summary judgment on basis that it acted in good faith. Even though the bank may have lacked actual knowledge that the corporation was perpetrating a fraud on its creditors, bank should have known the transaction was suspicious under a reasonable person standard and failed to conduct a diligent investigation.

- *In re Old CarCo LLC*, 435 B.R. 169 (Bankr. S.D.N.Y. 2010) – All components of the financial restructuring of entities comprising automobile manufacturer must be considered as part of one integrated transaction. Specifically, equity investment providing funds to insolvent manufacturer could not be separated from spin-off of a subsidiary that may not have provided reasonably equivalent value, because the express purpose of the spin-off was to facilitate the equity investment, despite the fact that the spin-off occurred the day before the equity investment was executed.

  Paloian v. LaSalle Bank, 619 F.3d 688 (7th Cir. 2010) – Trustee of securitized note, not the beneficial owners of the trust, was the initial transferee of allegedly fraudulent payments on the note. Sale of accounts to related entity did not seem a true sale as putative buyer operated like a department of the seller: it did not

have an office, phone number, checking account, or stationery; all of its letters were written on the seller's stationery; it did not prepare financial statements or file tax returns; and it did not pay for the receivables but instead took a small cut of collections to cover its costs of operation. Finally, lower court erred in determining that the debtor was insolvent by: (i) enumerating the debtor's contingent obligations based on the amount later paid rather than their projected obligations when insolvency was to be determined; (ii) failing to add the debtor's contingent right of reimbursement or contribution; and (iii) reflecting the lower price a taxpaying entity would pay for the tax-exempt debtor in the discounted cash flow analysis, as such price has no relationship to the value of the asset side of the debtor's balance sheet.

- *In re CNB Int'l, Inc.*, 440 B.R. 31 (W.D.N.Y. 2010) – Secured lender, not seller of assets, was initial transferee of $26 million paid by buyer because the prearranged plan called for distribution of the funds to the secured lender; as such, the seller was a mere conduit that never exercised dominion and control over the funds.

- *Cardinale v. Miller*, 2010 WL 1952423 (Cal. App. Ct. 2010) – Judgment creditor stated cause of action against brokers for conspiracy to effect fraudulent transfers, even though the brokers were not transferees and lacked dominion and control over the parties to the fraudulent transfers.

- *Moffatt & Nichol, Inc. v. B.E.A. Int'l Corp., Inc.*, 48 So. 3d 896 (Fla. App. Ct. 2010) – Judgment creditor lacked standing to bring fraudulent transfer claim against transferee who purchased debtor's assets from the assignee in an "assignment for the benefit of creditors" because the assignee possessed exclusive authority to pursue fraudulent transfers and other choses in action for the benefit of all creditors.

- *Gordon v. Dadante*, 2010 WL 148131 (N.D. Ohio 2010) – Receiver for failed Ponzi scheme should distribute available assets to

investor/claimants pro rata, without factoring in profits previously distributed to some investor/claimants.

V. LENDER AND BORROWER LIABILITY

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

- *US Bank v. Greenpoint Mortgage Funding, Inc.*, 907 N.Y.S.2d 441 (N.Y. Super. Ct. 2010) – Evaluating reps/warranties and repurchase provisions in mortgage securitization sale agreement.

- *Wachovia Bank v. Encap Golf Holdings, LLC*, 690 F. Supp. 2d 311 (S.D.N.Y. 2010); 72 U.C.C. Rep. Serv. 2d 352 – Evaluating creditor rights under various indentures.

- *In re Bolin & Co., LLC*, 437 B.R. 731 (D. Conn. 2010); 72 U.C.C. Rep. Serv. 2d 1096 – Although the secured party was authorized to repossess the collateralized jewelry, it had no right to inform the debtor's suppliers that the debtor had improperly pawned consigned jewelry or to return some jewelry to the consignors, and thus was liable for tortious interference with business relations.

- *Taylor v. Knoxville Trucks, Inc.*, 2010 WL 3951505 (D.S.C. 2010) – Secured creditor was not liable to debtor in either tort or contract for loaning more than the value of the collateral or for failing to make sure that the collateral was insured for the full amount of the debt, because lender had no legal or contractual duty to the debtor with respect to either of these acts.

- *Velocity Press, Inc. v. Key Bank*, 2010 WL 5300903 (D. Utah 2010) – Debtor had cause of action for breach by repudiation against lender for its actions in demanding and obtaining additional collateral.

- *Clark v. Morinda Properties Escala Lodges, LC*, 2010 WL 2025583 (D. Utah 2010) – Condominium purchaser had no cause of action against secured creditor where deposit had become non-refundable and was seized by developer's secured creditor after

developer's default. The condominium purchaser's only cause of action was against the developer.

- *Denny Hecker's Cadillac-Pontiac-GMC, Inc. v. GMAC Inc.*, 2010 WL 3399163 (D. Minn. 2010) – Dealership's inventory lender who refused to allow the title documentation to be transferred at the time a vehicle was sold unless it received all proceeds from the sale, including amounts for taxes, licensing fees and lien payoffs on trade in vehicles may have acted wrongfully. However, dealership had no standing to bring an action for the harm, which was suffered by the state or third parties.

- *Interpharm, Inc. v. Wells Fargo Bank*, 2010 WL 1257300 (S.D.N.Y. 2010) – Debtor that had executed several settlement agreements with its secured lender agreeing to "waive, release and discharge any and all claims or causes of action, if any, of every kind and nature whatsoever" it may have against the secured lender was bound by those releases despite the debtor's claims of economic duress. There was no duress because the secured lender had made no wrongful threat that deprived the debtor of its free will. The secured lender may have insisted on onerous terms after the debtor defaulted under the loan agreement, but such insistence was not wrongful where the secured lender did not cause the default. However, none of the settlement agreements purported to release future claims, and thus the debtor did have two claims for breach arising after the last settlement agreement.

- *Citizens Bank of Pennsylvania v. Executive Car Buying Services, Inc.*, 2010 WL 4687922 (D.N.J. 2010) – Debtors and guarantors that had executed forbearance agreement with secured lender agreeing to "fully and unconditionally release[] . . . any and all claims, liabilities, demands, obligations, damages, losses, actions and causes of action whatsoever which the Obligor may now have or claim to have against the Lender" were bound by that release. Debtors and guarantors failed to plausibly allege economic duress given that they each signed the forbearance agreement and its

amendments - all of which contained the release - four times over eight months during which they were free to consult with legal counsel, and failed to contest the release's validity until the creditor sought to collect.

- *Moretran Financial Services, LLC v. State*, 905 N.Y.S.2d 707 (N.Y. App. Ct. 2010) – State was not liable for damages resulting from its issuance of clean certificate of title for collateralized vehicle, even though certificate from other state showed creditor's lien, because no notice of lien was submitted with the application, as required by state regulations. The creditor mistakenly relied on the debtor to submit the notice of lien.

- *In re Greene*, 2010 WL 3724782 (Bankr. D. Ariz. 2010) – Dealership that began processing the title application to perfect unrelated individual's security interest in car was liable to individual for its failure to do so in a timely manner, if that failure resulted in avoidance of the security interest in the car buyer's bankruptcy.

- *PNC Bank v. Pence*, 2010 WL 3947516 (S.D. Ind. 2010) – Officer of debtor, who could be personally liable for debtor's fraud that he authorized or directed, may have liability for reporting accounts receivable as "bona fide," a fact that increased the debtor's borrowing base. Jury must determine whether "bona fide" means a higher collection rate than the disputed accounts, or merely in existence.

- *Bear Mountain Orchards, Inc. v. Mich-Kim, Inc.*, 623 F.3d 163 (3d Cir. 2010) – Individual who held an officer title and was a 50% shareholder of wholesale produce dealer whose assets were in a PACA trust was not personally liable for dissipation of trust assets. Individual worked only a few hours per week performing basic clerk-level operations, not managerial tasks, and personal liability attaches only to individuals who actively control or manage the PACA assets held in trust.

- *In re YellowStone Mountain Club,* 2010 Bankr. LEXIS 2702 (Bankr. D. Mt. 2010) – Transfers to founder of Yellowstone Mountain Club were fraudulent transfers.

- *In re Parmalat Securities Litigation ,* 2010 U.S. Dist. LEXIS 13778 (S.D.N.Y. 2010) – Bank which structured a structured-finance style equity financing owed a fiduciary duty to the Cayman SPEs it created, but was not liable for fraud or breach of that duty because the brain dead SPEs did not have directors who acted on the Bank's advice.

B. Obligations Under Corporate Laws

- *In re McDermott*, 434 B.R. 271 (Bankr. N.D.N.Y. 2010) – Even if the directors of an insolvent corporation owe fiduciary duties to the corporation's creditors, a breach of that duty is insufficient to make an obligation nondischargeable under U.C.C. § 523(a)(4). Moreover, the use of the proceeds of a collateralized account to pay an unsecured creditor whose debt the director had guaranteed would not qualify as fraud or defalcation even if a fiduciary duty existed.

- *In re Fedders North America, Inc.*, 422 B.R. 5 (Bankr. D. Del. 2010) – Even if the inside directors of the borrower were grossly negligent in failing to obtain a credible financial assessment of the borrower's ability to comply with the terms of a new loan, no cause of action was stated against the lenders for aiding and abetting the directors' breach of fiduciary duty. The loan was an asset-based transaction for which the borrower's continued solvency was not the principal factor and the loan documents required various certifications and representations collectively indicating that the lenders had no reason to know the directors failed to conduct the required due diligence.

- *Sanford v. Waugh & Co., Inc.*, 328 S.W.3d 836 (Tenn. 2010) – Creditor of insolvent corporation may assert only a derivative

cause of action against corporate directors for breach of fiduciary duty.

- *CML V, LLC v. Bax*, 6 A.3d 238 (Del. 2010) – While creditors of an insolvent corporation have standing to maintain derivative claims against directors for breaches of fiduciary duties, the language of the LLC Act bars creditors of an insolvent LLC from bringing these actions.

C. Borrower Liability

- *United States v. Bowling*, 619 F.3d 1175 (10th Cir. 2010) – Debtor defrauded bank by selling collateralized cattle under relatives' names and not remitting the sale proceeds to the bank, even though bank did not enforce terms in security agreement requiring its consent to sale of collateral and sale proceeds made jointly payable to the debtor and bank. Bank's security interest cannot be waived by actions of its officers.

- *United States v. Kalfas*, 2010 WL 5441686 (N.D. Fla. 2010) – Even if collateralized equipment had sufficient value to fully secure loans from two different banks, borrower was guilty of bank fraud for pledging the equipment as security for the second loan without telling the second bank of the pledge to the first bank loan two weeks earlier.

- *Highland Crusader Offshore Partners, L.P. v. Lifecare Holdings, Inc.*, 377 Fed. Appx. 422 (5th Cir. 2010) – Lender did not have claim against debtor who, during effort to obtain consent to amendment to credit facility: (i) offered a 75 basis-point fee to most consenting lenders but secretly offering a 125 basis-point fee to two minor lenders; and (ii) after obtaining the consent of a sufficient number of lenders, decided to pay all consenting lenders the higher fee. The debtor had no duty to disclose the higher fee because the warranties in the credit agreement covered facts as of the date it was signed. The debtor did not violate the duty of good faith

because the lender was not deprived of anything for which it had bargained. There was no cognizable claim for fraud or misrepresentation because the lender was aware that the debtor may have made higher offers when the debtor refused to confirm or deny that fact.

-

D. Disputes Among Creditors and Intercreditor Issuer

- *In re Erickson Retirement Communities, LLC*, 425 B.R. 309 (Bankr. N.D. Tex. 2010) – Creditor who had expressly agreed in subordination agreement not to "exercise any rights or remedies or take any action or proceeding to collect or enforce any of the subordination obligations [without] the prior written consent of the agent" could not request appointment of examiner.

- *In re Boston Generating, LLC*, 40 B.R. 302 (Bankr. S.D.N.Y. 2010) – Second lien creditors could object to proposed disposition of collateral even though the intercreditor agreement expressly gave the first lien creditors the "exclusive right to enforce rights . . . and make determinations regarding . . . dispositions." The agreement also indicated that the second lien lenders retained the right to file objections as unsecured creditors, and it did not clearly waive the second lien creditors' right to object.

- *JPMorgan Chase Bank v. KB Home*, 2010 WL 1994787 (D. Nev. 2010) – Credit facility agent that brought action against the debtors and guarantors on behalf of the lenders had to comply with discovery request seeking documents from all lenders in the facility, even those who acquired interests in the secondary market after the loan documents were executed.

- *Bank Midwest v. Hypo Real Estate Capital Corp.*, 2010 WL 4449366 (S.D.N.Y. 2010) – Minority lender in pre-petition credit facility had breach of contract action against lender acting as administrative

agent for providing, without minority lender's consent, court-approved DIP financing that primed the pre-petition facility.

- *First Choice Bank v. Riverview Muir Doran, LLC*, 2010 WL 2161778 (Minn. App. Ct. 2010) – Intercreditor agreement providing that, after default on the senior loan, the junior lender "will not accept any payments under or pursuant to the Subordinate Loan Documents . . . without Senior Lender's prior written consent" covered payments from guarantors and an entity related to the debtor.

- *Grice Engineering, Inc. v. Innovations Engineering, Inc.*, 791 N.W.2d 405 (Wis. App. Ct. 2010) – Stock pledge agreement signed by guarantors in connection with corporation's purchase of the assets of a target company was covered by standstill clause in subordination agreement between bank and target company and thus guarantors could not enforce the stock pledge agreement. The subordination agreement was not unconscionable even though the standstill clause prevented action until the revolving debt to the bank was paid in full, an event that might never happen.

- *In re Fontainebleau Las Vegas Contract Litigation*, 716 F. Supp. 2d 1237 (S.D. Fla. 2010) – Lenders who funded their portion of borrower's draw request under credit facility had no standing to sue other lenders who refused to fund because the funding lenders were not intended beneficiaries of the contractual promise to lend.

- *Sunflower Bank v. FDIC*, 2010 WL 3913597 (D. Kan. Sept. 30, 2010) – Participation agreement that provided for *pro rata* allocation of all collections, including the proceeds of any setoff, required that setoff be allocated among the participants *pro rata*. Because the seller/servicer effecting setoff was insolvent, the participant buyer had a claim for only its allocable portion of the setoff amount.

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

A. Scope

1. General

- *In re Music City RV, LLC*, 304 S.W.3d 806 (Tenn. 2010); 71 U.C.C. Rep. Serv. 2d 957 – All true consignments have been removed from Article 2. Thus, if a consignment-like transaction is excluded from Article 9, such as a consignment of property held as consumer goods by the consignor prior to consignment, then the U.C.C. does not apply and the goods are not available to the creditors of the consignee.

- *In re Erving Industries, Inc.*, 432 B.R. 354 (Bankr. D. Mass. 2010) – Sale of electricity by competitive seller who was not responsible for delivery to the buyer was a sale of goods within the meaning of Article 2 of the U.C.C. and, therefore, under Bankruptcy Code § 503(b)(9). Predominant purpose test for evaluating hybrid transactions involving goods and services is not applicable to Bankruptcy Code § 503(b)(9).

- *GFI Wisconsin, Inc. v. Reedsburg Utility Commission*, 440 B.R. 791 (D. Wis. 2010); 73 U.C.C. Rep. Serv. 2d 38 – Electricity that debtor received from utilities within 20 days before the petition date was a "good" for which utilities were entitled to assert administrative expense claim, even though movement was so fast as to be simultaneous with its consumption; goods do not have to be reclaimable for the seller to assert administrative expense claim for its value.

2. Software and Other Intangibles

- *American Litho, Inc. v. Imation Corp.*, 2010 WL 681298 (D. Minn. 2010); 71 U.C.C.. Rep. Serv. 2d 104– A license of rights under a

patent was not a "transaction in goods" so U.C.C. Article 2 did not apply. U.C.C. § 2-102.

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

1. General

- *Textron Financial Corp. v. RV Sales of Broward, Inc.*, 2010 WL 4892859 (11th Cir. 2010) – Secured inventory lender was entitled to interest from date of invoices as the invoices provided, not date it paid the manufacturer; the agreement bound the debtor to the invoice if the debtor did not object within ten days, and the debtor never objected.

2. Battle of the Forms

C. Warranties and Products Liability

1. Warranties

- *Skodras v. Gulf Stream Coach*, 2010 WL 145370 (N.D. Ind. 2010); 71 U.C.C. Rep. Serv. 2d 1– A buyer of goods could revoke acceptance against a remote manufacturer under U.C.C. § 2-608 because the buyer was not in privity with the manufacturer.

- *Wojcik v. Borough of Manville*, 2010 WL 322893 (N.J. App. Ct. 2010); 71 U.C.C. Rep. Serv. 2d 19 – A seller's statement that goods were the "best" did not create an express warranty.

- *Smith v. Coleman Co.*, 2010 WL 447325 (M.D. Ala. 2010); 71 U.C.C. Rep. Serv. 2d 131 – When a rope was used for a purpose in contravention of a warning label, there was no use within the "ordinary purpose" of the goods and thus, no breach of warranty. U.C.C. § 2-314(2)(c). Further, the person injured was not the buyer of the goods, so she could not have relied on the seller to select the goods and create a warranty of fitness for a particular purpose. U.C.C. § 2-315.

- *Kinetic Co. v. Medtronic, Inc.*, 672 F. Supp. 2d 993 (D. Minn. 2009); 71 U.C.C. Rep. Serv. 2d 292 – An employer that reimbursed its employees for the purchase and installation of medical devices had standing to bring express and implied warranty claims.

2. *Limitation of Liability*

   - *Midwest Hatchery & Poultry Farms, Inc. v. Doorenbos Poultry, Inc.*, 783 N.W.2d 56 (Iowa App. Ct. 2010); 71 U.C.C. Rep. Serv. 2d 245 – Although a buyer of goods (chickens) had "accepted" them despite their non-conformity (too small), the buyer could still bring a damages action based on the non-conformity. U.C.C. §§ 2-607 and 2-714. The seller's exclusive remedy of repair or replacement failed since it was impractical to take back the chickens. U.C.C. § 2-719.

3. *"Economic Loss" Doctrine*

   - *Arcand v. Brother Int'l Corp.*, 673 F. Supp. 2d 282 (D.N.J. 2009); 71 U.C.C. Rep. Serv. 2d 278 – The economic loss doctrine prevented a buyer of goods who had suffered only economic loss from bringing a conversion action based on the purchase of defective goods.

   - *Travelers Indem. Co. v. Dammann & Co., Inc.*, 594 F.3d 238 (3d Cir. 2010); 72 U.C.C. Rep. Serv. 2d 137– Persons in the chain of distribution of goods have only contract remedies under the U.C.C. when the goods are defective. The "economic loss" doctrine prevents these persons from bringing a tort claim.

D. Performance, Breach and Damages

E. Personal Property Leasing

- *Lyon Financial Servs, Inc. v. Shyam L. Dahiya, M.D., Inc.*, 2010 WL 113146 (D. Minn. 2010); 71 U.C.C. Rep. Serv. 2d 257 – A lease was a "finance lease" under U.C.C. Article 2A and the hell or high water clause was enforceable. U.C.C. § 2A-103.

VII. COMMERCIAL PAPER AND ELECTRONIC FUNDS TRANSFERS

A. Negotiable Instruments and Holder in Due Course

- *A.W.I., LLC v. Grimal*, 2009 WL 4723144 (Ky. App. Ct. 2009); 71 U.C.C. Rep. Serv. 2d 240 – A note saying it was payable "on demand," but also containing scheduled payments, a maturity date, and an acceleration clause could be interpreted as a note not payable on demand. U.C.C. § 3-108.

- *Jeanmarie v. Peoples*, 34 So. 3d 945 (La. App. Ct. 2010); 71 U.C.C. Rep. Serv. 2d 269 – An individual who signed a check was not personally liable where the printed wording on the check unambiguously indicated that the person was signing in a representative capacity. U.C.C. § 3-402.

- *Lester Construction, LLC v. People's United Bank*, 2009 WL 5698131 (Conn. Super. Ct. 2009); 71 U.C.C. Rep. Serv. 2d 58 – A payee may not bring a conversion action based on a check unless the payee has received possession directly or through an agent. The existence of agency is determined by other state law. U.C.C. § 3-420, Comment 1.

- *SEC v. One Equity Corp.*, 2009 WL 13150479 (S.D. Ohio 2009); 71 U.C.C. Rep. Serv. 2d 61– As between a transferor and a transferee, delivery of unendorsed shares effects a transfer of ownership. However, an endorsement would be necessary (among other things) for the transferee to be a protected purchaser and cut off third-party adverse claims. U.C.C. § 8-304.

- *O Bar Cattle Co. v. Owyhee Feeders, Inc.*, 2010 WL 678970 (D. Idaho 2010); 71 U.C.C. Rep. Serv. 2d 68 – A check that indicated it was paid "less market" (referring to a dispute between the maker and the payee) did not constitute a "conspicuous statement to the effect that the instrument was tendered as full satisfaction of the

claim." U.C.C. § 3-311. Thus, there was insufficient evidence of an accord and satisfaction at that stage of the proceedings.

- *Milton M. Cooke Co. v. First Bank & Trust*, 290 S.W.3d 297 (Tex. App. Ct. 2009); 71 U.C.C. Rep. Serv. 2d 115– The accord and satisfaction rules of U.C.C. § 3-311 did not apply where there was no claim in existence at the time the payment-in-full check was tendered.

- *Bank of America v. Prestige Imports, Inc.*, 917 N.E.2d 207 (Mass. App. Ct. 2009); 71 U.C.C. Rep. Serv. 2d 135 – A bank's failure to act reasonably or with commercial reasonableness in handling an item does not, alone, constitute "bad faith" resulting in consequential damages. U.C.C. § 4-103(e).

- *HSBC Bank USA v. Calpine Corp.*, 2010 WL 3835200 (S.D.N.Y. 2010) – Because the debtor's bankruptcy filing rendered the no-call provision in the notes unenforceable, the noteholders had no claim for repaying the notes. While the notes could have provided for payment of a premium in the event of payment pursuant to acceleration, some of the notes at issue had no such clause and the remainder of the notes had a repayment premium clause that did not apply.

- *Traders Bank v. Dils*, 704 S.E.2d 691 (W. Va. 2010) – Maker of a promissory note may assert fraud in the inducement defense against payee when detrimentally relying on the payee's oral promise, made with no intention to fulfill, to revive line of credit, even though a third party was the beneficiary of the promise.

- *Moody National RI Atlanta H, LLC v. RLJ III Finance Atlanta, LLC*, 2010 WL 163296 (N.D. Ga. 2010) – Mortgagee did not agree to loan modification by accepting some late payments or because the loan servicer failed to bill for the proper amount of default interest. Moreover, a discussion letter signed by the parties expressly indicated that the loan documents remained in full force unless

and until amended by a written agreement executed by the parties, which was not done. As a result, mortgagee could use the mortgagor's failure to pay default interest as a basis for foreclosing.

B. Electronic Funds Transfer

- *In Winter Storm Shipping, Ltd. V. Thai Petrochemical Industry Public Co. Ltd.,* 310 F.3d 262 (2d Cir. 2002) – The court allowed the attachment of a funds transfer not yet owed to the beneficiary. The Second Circuit overruled *Winter Storm in Shipping Corp. of Indiana v. Jaldhi,* 585 F.3d 58 (2d Cir. 2009). In *Hawknet*, the court held that *Shipping Corp. of* India applies to all decisions till open on direct review.

- *Export-Import Bank of U.S. v. Asia Pulp & Paper Co., Ltd.*, 609 F.3d 111 (2d Cir. 2010); 72 U.C.C. Rep. Serv. 2d 310 – Electronic fund transfers being processed by an intermediary bank are not property subject to garnishment under the Federal Debt Collection Procedures Act for debts owed to either the originator or the beneficiary because neither party has a "substantial interest" in the fund transfer.

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

A. Letters of Credit

-

B. Investment Securities

- *The Scher Law Firm v. DB Partners I LLC*, 911 N.Y.S.2d 696 (N.Y. Sup. Ct. 2010) – Under U.C.C. § 8-502, a party who acquires a security entitlement and gives value without notice of adverse claims takes the security entitlement free of such claim. Where a secured party with a perfected security interest in a debtor's securities account had to turn over funds allegedly fraudulently transferred, the court found inconclusive evidence as to the secured party's independent knowledge and was unwilling to impute knowledge of an affiliate to the secured party.

- *Jeng-Cheng Ho v. Shih-Ming Hsieh*, 105 Cal. Rep. 3d 17 (Cal. App. Ct. 2010); 71 U.C.C. Rep. Serv. 2d 761– Creditor can only levy against security certificate by taking possession of certificate or putting the certificate in possession of court.

IX. CONTRACTS

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

- *Bank of New York v. First Millennium, Inc.*, 607 F.3d 905 (2d Cir. 2010) – A provision in promissory notes that the issuer's obligation to make payments was "absolute and unconditional" trumped the limited recourse provision in the indenture. As a result, the Court concluded that noteholders had recourse to amounts in the issuer trust allocable to the transferor's interest. In addition, the Court determined, as a matter of contract interpretation, that the principal on the notes was not reduced by charge-offs of underlying subprime credit card receivables.

  Comment: The decision is a crucial reminder that when drafting agreements, attorneys must strive for consistency and clarity across transaction documents. It also highlights challenges that may arise when the Trust Indenture Act – which by some accounts was the source of the "absolute and unconditional" language – applies to nonrecourse transactions. Finally, it shows a court struggling to interpret detailed structured finance documents and reaching a perhaps unanticipated conclusion.

B. *Adhesion Contracts, Unconscionable Agreements, Good Faith and Other Public Policy Limits, Interference with Contract*

- *Brookfield Asset Management, Inc. v. AIG Financial Products Corp.*, 2010 WL 3910590 (S.D.N.Y. 2010) – Clause in interest rate swap agreements that provided for automatic termination on either party's insolvency was not unconscionable.

- *Ex parte Carter*, 2010 WL 5396581 (Ala. 2010) – Jury waiver in loan agreement was binding on the parties to the agreement but did not apply to claims by borrowers against individual bank employees, particularly given that a separate indemnification clause expressly listed officers, directors, and attorneys.

C. *Choice of Law*

- *Textron Financial Corp. v. Ship & Sail, Inc.*, 2010 WL 1912653 (D.R.I. 2010) – Clauses in commercial security agreement and guaranties selecting Rhode Island (the creditor's locale) as a permissible place to litigate and consenting to jurisdiction and venue were presumptively valid. Although none of the activity occurred in Rhode Island and all of the witnesses were located in Texas, the consent to jurisdiction was not unreasonable given that sophisticated parties willingly signed the agreements. Venue was also proper in Rhode Island.

D. *Arbitration*

- *Fensterstock v. Education Finance Partners*, 611 F.3d 124 (2d Cir. 2010) – Arbitration clause in student loan note that contained waiver of class action was unconscionable under California law.

- *Sawyers v. Herrin-Gear Chevrolet Co., Inc.*, 26 So. 3d 1026 (Miss. 2010) – Arbitration clause in consumer contract that contained exception for seller to replevy the collateral was enforceable.

- *U.S. ex rel. Gillette Air Conditioning Co., Inc. v. Satterfield & Pontikes Construction, Inc.*, 2010 WL 5067683 (W.D. Tex. 2010) – Arbitration clause that required subcontractor to arbitrate at the election of contractor was enforceable because mutuality of obligation to arbitrate is not required and one-sided clause is not unconscionable.

X. OTHER LAWS AFFECTING COMMERCIAL TRANSACTIONS

A. Bankruptcy Code

1. Automatic Stay

- *In re Anderson*, 2010 WL 3941638 (Bankr. N.D. Ga. 2010) – Secured party did not violate the automatic stay by repossessing collateral owned by corporation after guarantor filed for bankruptcy protection; debtor's guaranty did not establish a legal interest in the collateral that would make the collateral property of the estate.

- *In re 201 Forest Street, LLC*, 422 B.R. 888 (1st Cir. B.A.P. 2010) – Even if automatic stay did not enjoin mortgagee from recording affidavit to extend duration of mortgage, mortgagee's time period for recording such an affidavit was tolled by Bankruptcy Code § 108(c). The issue is not whether the mortgagee was prevented from taking action to extend the relevant enforcement period, but whether the mortgagee was prohibited from taking action to enforce its rights.

- *In re Mathson Industries, Inc.*, 423 B.R. 643 (E.D. Mich. 2010) – Manufacturer that sold goods to debtor prepetition without perfecting its security interest violated the stay by telling potential buyers of the goods that the he would not service them (an attempt to suppress bidding so that he could recover the goods cheaply). Bankruptcy Court issued an injunction requiring the manufacturer to service the goods, adding that merely refusing to service the goods for such reason, even without communicating that to potential bidders, would also violate the stay.

- *In re Brittain*, 435 B.R. 318 (Bankr. D.S.C. 2010) – Automatic stay did not prevent secured creditor from repossessing collateral owned by non-debtor LLC owned by the individual debtors.

Even though the individual debtors had guaranteed the secured obligation, and therefore may later have a right to redeem the collateral, the debtors had not listed such a right in their schedules, indicated an intent to redeem on their Statement of Affairs, or provided for redemption in their plan. Additionally, the secured creditor had not repossessed the collateral.

- *In re Young*, 439 B.R. 211 (Bankr. M.D. Fla. 2010) – Bank did not act to obtain possession of or exercise control over property of the estate (in violation of the stay) by placing administrative freeze on deposit account that debtor claimed as exempt; a deposit account is merely the bank's promise to pay the depositor. The Chapter 7 debtor had no standing, prior to expiration of time to object to claimed exemption, to maintain action for violation of the stay.

2. *Substantive Consolidation*

- *In re Introgen Therapeutics, Inc.*, 429 B.R. 570 (Bankr. W.D. Tex. 2010) – Validating substantive consolidation of two entities; reviewing national precedent and noting that no firm test has been established within the Fifth Circuit.

- *In re Garden Ridge Corp.*, 386 Fed. Appx. 41 (3d Cir. 2010) – Substantive consolidation order, where debtors retained all legal and equitable defenses as immediately prior to the petition date, did not create mutuality required for ex-employee to set off one debtor's obligation for severance pay and relocation expenses against his own obligations on promissory note.

- *In re England Motor Co.*, 426 B.R. 178 (Bankr. D. Miss. 2010) – Substantive consolidation of bankruptcy cases of three related entities did not allow bank to set off its obligations on a deposit account of two subsidiaries against loan debt of parent because

even if substantive consolidation rendered the debts mutual, it did so post-petition. However, where one subsidiary guaranteed the debt of the parent, the bank's debt on that subsidiary's deposit account was mutual and thus gave the bank setoff rights.

- *In re Cyberco Holdings, Inc.*, 431 B.R. 404 (Bankr. W.D. Mich. 2010) – Secured party lacked standing to seek substantive consolidation in order to reduce its exposure to avoidance claims.

3. *Claims*

- *Grede v. Bank of New York Mellon*, 441 B.R. 864 (N.D. Ill. 2010) – Bank's claim against financial intermediary that had pledged securities was not subject to equitable subordination, even though bank may have had reason to know that the intermediary was improperly collateralizing client assets. Equitable subordination requires more than negligence; it requires willful engagement in inequitable conduct.

4. *Bankruptcy Estate*

- *In re Ran*, 607 F.3d 1017 (5th Cir. 2010) – Court concluded that an Israeli proceeding could not be considered a "main" proceeding under Chapter 15; recognition as a main proceeding requires that the debtor carry out non-transitory activity in a location.

- *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010) – Canadian proceedings to restructure failed Canadian ABCP facilities were foreign main proceedings under the Bankruptcy Code and principles of comity. The opinion includes an interesting review of the causes and resulting restructuring strategy for Canadian ABCPs after the market failed in 2007.

- *In re Exide Technologies*, 607 F.3d 957 (3d Cir. 2010) – Agreement was not executory where one party had no unperformed material obligations that would excuse other party from performance.

- *Bank of America v. Colonial Bank*, 604 F.3d 1239 (11th Cir. 2010) – Collateral for an asset-based commercial paper program was held by a custodian under an arrangement with the program's trustee. The custodian failed and the FDIC was appointed its receiver. The court rejected trustee's argument that because the assets were being held in a custodial capacity, they were not part of the custodian's receivership estate and that the courts had jurisdiction over their disposition. Rather, the trustee's claim with respect to the collateral had to be adjudicated through the FDIC's receivership process.

- *In re First Protection, Inc.*, 440 B.R. 821 (9th Cir. B.A.P. 2010) – All of the debtors' rights and interest in single-member LLC (including management rights) are property of the estate under Bankruptcy Code § 541(a)(1); Bankruptcy Code § 541(c) overrides the anti-assignment restrictions in both the LLC's operating agreement and the Arizona LLC Act. The debtors' interest is not an executory contract under Bankruptcy Code § 365 because that section is designed to protect third parties, and there is no third party in a single-member LLC.

- *In re 1518 West Chicago Ave.*, LLC, 427 B.R. 439 (Bankr. N.D. Ill. 2010) – Debtor's pre-petition rents collected by court-appointed receiver remained property of the debtor, subject to the mortgagee's perfected interest. Factual question remained about whether mortgagee assigned its interest in those collected rents when it sold the loan.

- *In re AE Liquidation, Inc.*, 426 B.R. 511 (Bankr. D. Del. 2010) – Debtors' customers alleged sufficient facts that their deposits toward the purchase of aircraft should be deemed to be held in

constructive trust, despite the absence of language of trust in the agreements and the fact that each $100,000 deposit of provided the customer with a $125,000 credit.

- *In re Qualia Clinical Service, Inc.*, 441 B.R. 325 (B.A.P. 8th Cir. 2011) – Receivables Purchase Agreement was a disguised financing, not a true sale, where there was full recourse to seller for uncollected receivables.

5. *Secured Parties, Set Off, Leases*

- *In re YL West 87th Holdings I LLC*, 423 B.R. 421 (Bankr. S.D.N.Y. 2010) – Bankruptcy plan was not confirmable because the equity holder in single member/single asset real estate SPE had no equity value; decision focuses on court's valuation analysis of a partially completed Manhattan condo project.

- *In re Texas Commercial Energy*, 607 F.3d 153 (5th Cir. 2010) – Plaintiff sued defendant for improperly drawing down a line of credit following plaintiff's Chapter 11 confirmation. Court ruled that defendant's actions in drawing on line of credit following confirmation were appropriate because plaintiff changed the payment terms and amounts due to defendant following confirmation, thus assuming a new debt obligation not covered by the reorganization.

- *In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010) – Secured lenders do not have an absolute right to credit bid in a Bankruptcy Code § 1129(b)(2)(A) (cram down) asset sale. The Court concluded that under Bankruptcy Code § 1129(b)(2)(A)(ii), standing alone, a plan is fair and equitable if secured creditors are provided with the "indubitable equivalent" of their secured claim. Judge Thomas Ambro issued a strong dissent; rehearing en banc was denied.

- *In re Bryant Manor, LLC*, 422 B.R. 278 (Bankr. D. Kan. 2010) – Post-petition rents are property of the debtor's bankruptcy estate.

- *In re Circuit City Stores, Inc.*, 432 B.R. 225 (Bankr. E.D. Va. 2010) – Suppliers who delivered consigned goods to the debtor more than 20 days before the petition did not have a Bankruptcy Code § 503(b)(9) administrative claim for the goods the debtor sold within that 20-day period because the goods were "received," within the meaning of the Code, when the debtor acquired physical possession.

- *In re Circuit City Stores, Inc.*, 441 B.R. 496 (Bankr. E.D. Va. 2010) – Sellers' reclamation claims were extinguished by secured creditors' floating lien on the debtor's inventory and subsequent sale to buyers in the ordinary course of business. Even though secured creditors were paid in full, sellers had no reclamation claim to remaining proceeds of their goods because reclamation is an in rem right that ,under Bankruptcy Code § 546(c) ,does not extend to proceeds.

- *In re Pollilo*, 2010 WL 235125 (Bankr. E.D. Pa. 2010) – Secured party did not violate discharge injunction by failing promptly to return the certificate of title covering collateral after secured obligation was paid in full under the plan. The court lacked jurisdiction over whether the secured party's inaction breached a contractual stipulation or state law.

- *In re Big3D, Inc.*, 438 B.R. 214 (9th Cir. B.A.P. 2010) – Court could deny adequate protection to a secured creditor for post-petition diminution in the value of collateral before the creditor filed such request, even where the creditor had an order for possession of collateral pre-petition. The issue remains one in which bankruptcy courts have discretion to order adequate protection retroactive to when the secured creditor would have effected its state law remedies had bankruptcy not intervened.

6. Avoidance Actions

- *In re Taylor*, 599 F.3d 880 (9th Cir. 2010) – A creditor whose security interest is avoidable as a preference can be liable for either the actual transferred property (the security interest) or the value of the transferred property. The bankruptcy court did not err in awarding the value of the security interest where the value of the security had diminished by depreciation and post-petition payments. However, the court did err in forcing the creditor to pay the full amount of the initial loan. At most the creditor was liable for the value of its security interest and, where there was no evidence of the value of the collateral at the time of transfer, the bankruptcy court should have simply avoided the interest.

- *In re Trout*, 609 F.3d 1106 (10th Cir. 2010) – Because an avoided preferential lien is automatically preserved for the benefit of the estate, the trustee is not also entitled to a money judgment for the value of the transferred property. Although a money judgment is appropriate in some circumstances - such as when the collateral has been sold or the lien has been paid off - lien avoidance and a money judgment are generally mutually exclusive remedies.

- *In re NetBank, Inc.*, 424 B.R. 568 (Bankr. M.D. Fla. 2010) – Former CEO of debtor was not an insider for the purposes of the longer preference period. Although the former CEO still held his position when he entered into the agreement providing for a $2.9 million payment on the effective date of his resignation, the actual transfer occurred after he resigned.

- *Wells Fargo Home Mortgage, Inc. v. Lindquist*, 592 F.3d 838 (8th Cir. 2010) – Trustee had a valid preference claim against initial transferee of unrecorded mortgage, even though the original mortgagee subsequently transferred the mortgage and related

loan to another entity, and the original mortgagee was liable for the value of the mortgage.

- *In re Commissary Operations, Inc.*, 421 B.R. 873 (Bankr. M.D. Tenn. 2010) – Supplier was entitled to invoke new value defense for value of goods provided after receiving preferential payment, despite being also entitled to an administrative priority claim for those goods under Bankruptcy Code § 503(b)(9).

- *In re Deuel*, 594 F.3d 1073 (9th Cir. 2010) – Trustee may avoid unrecorded deed of trust. Creditor under unrecorded deed of trust cannot be subrogated to rights of previous lender whose deed of trust was paid off because: (i) the previous lender no longer has a lien, (ii) equitable subrogation is not permitted when it would prejudice other parties and the trustee has the status of a bona fide purchaser for value; and (iii) state law gives priority to bona fide purchasers over an equitable subrogation claimant.

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

- *In re Lehman Bros. Holdings, Inc.*, 433 B.R. 101 (Bankr. S.D.N.Y. 2010) – Despite swap participant's contract with debtor giving it the right to setoff deposited funds against the debtor's obligations, participant was not permitted to setoff the debtor's post-petition deposits against the debtor's pre-petition obligations because of a lack of mutuality, and nothing in Bankruptcy Code § 560 or Bankruptcy Code § 561 altered this limitation. Accordingly, swap participant's administrative freeze violated the automatic stay.

7. *Executory Contract*

   - *In re Exide Technologies, Inc.*, 607 F.3d 957 (3d Cir. 2010) – Exclusive trademark license that debtor granted in connection with sale of its business was not an executory contract which the debtor in possession could reject because the buyer had substantially performed its obligations such that any future breach would not be material. The buyer had fully paid the purchase price; the use restriction was a condition subsequent, not a material obligation; the buyer's indemnity obligation expired three years after the purchase; and the buyer's further assurances obligation was not material because the debtor had identified no remaining required cooperation.

8. *Plan*

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

B. *Consumer Law*

- *Montgomery v. Ford Motor Credit Co.*, 2010 WL 2431894 (Tex. App. Ct. Jun. 17, 2010) – Debtor's causes of action against secured party for deceptive trade practices and conversion accrued when the secured party repossessed the collateral, not when it later disposed of the collateral, and thus were barred by the applicable statute of limitations.

- *Mid-Century Ins. Co. v. Vinci Inv. Co., Inc.*, 2010 WL 673267 (Cal. App. Ct. 2010) – Insurance policy that indemnified auto dealer from any negligent act, error or omission in failing to comply with truth in lending laws was not limited to any damages awarded under such laws or to claims brought by consumers. Thus, the policy covered the dealer's liability to a finance company upon

failure to repurchase chattel paper created in transactions that violated truth in lending laws.

- *Alexander v. Blackhawk Recovery and Investigation, LLC.*, 731 F. Supp. 674 (E.D. Mich. 2010) – Repossession agency that is not itself the creditor is a "debt collector" under the Fair Debt Collection Practices Act to the extent that it repossesses or threatens to repossess collateral without a present right to possession. Thus, the agency can be liable under the FDCPA for a breach of the peace in repossessing the collateral.

- *Ferrington v. McAfee, Inc.*, 2010 WL 3910169 (N.D. Cal. 2010) – Online purchasers of software had cause of action against seller for deceptive practices where advertisement that appeared in pop-up window after completed sale urged customers to "try it now" and, without disclosure, signed customers up for subscription service offered by another company and automatically billed the customers' credit card.

C. Professional Liability

- *Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors, Inc., Mortgage Pass-Through Certificates, Series 1999-C-1 v. Love Funding Corporation*, 591 F.3d 116 (2d Cir. 2010) – The acquisition of litigation rights under a mortgage purchase agreement does not constitute illegal champerty.

- *High Valley Concrete, L.L.C. v. Sargent*, 234 P.3d 747 (Idaho 2010) – Judgment creditor lacked standing to challenge the security interest of the judgment debtor's attorneys as being void as a violation of the Rules of Professional Conduct.

- *Raicevic v. Lopez*, 2010 WL 3248335 (Cal. App. Ct. 2010) – Attorneys who, at debtors' request, drafted security agreement to replace existing mortgage owed no duty to debtor's creditors. Therefore, the attorneys could not be liable to the creditors for professional

negligence in failing to describe the collateral properly. However, the attorneys could be liable to the creditors for misrepresentation.