2011 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

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  Comment: California has a non-uniform version of U.C.C. § 9-109 and only excludes "any loan made by an insurance company pursuant to the provisions of a policy or contract issued by it and upon the sole security of the policy or contract."

- *Wells Fargo Equipment Finance, Inc. v. State Farm Fire and Casualty Co.*, 2011 WL 1326954 (E.D. Va. 2011) – Insurance policy on collateralized vehicles that included standard mortgagee clause made the insurer liable to a secured creditor named as the loss payee even though the damages may resulted from the debtor/insured's arson.

2. *Insurance*

- *Massachusetts Mutual Life Insurance Co. v. Sanders*, 787 F. Supp. 2d 628 (S.D. Tex. 2011) – An assignment for security of a life

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* 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.

insurance policy needs to be authenticated only by the owner of the policy, not by the named beneficiary or the secured party.

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

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

- *In re Johnson,* 439 B.R. 416 (Bankr. E.D. Mich. 2010) – Concluding that disability benefits under an employer's long term disability plan were collateral because (a) they were accounts or general intangibles, (b) they were not interests in or under an insurance policy, and (c) were not beneficial interests in a trust. The court rejected argument that an anti-assignment provision in trust spend thrift clause rendered grant unenforceable and concluded that NY trust law did not invalidate the security interest.

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- *Waite v. Cage*, 2011 WL 2118803, 2011 U.S. Dist. LEXIS 57324 (S.D. Tex. 2011) – A putative buyer of chattel paper consisting of retail installment contracts for vehicles did not acquire any interest in the chattel paper because the buyer was not licensed to hold retail installment sales contracts as required by Texas law.

- *Lopes v. Fafama Auto Sales*, 2011 WL 6258818 (Mass. Ct. App. 2011) – The fact that a car dealer was not licensed as a sales finance company did not invalidate the dealer's security interest a car sold by the dealer nor make the dealer's repossession unlawful. The lack of a license only subjected the dealer to the specified statutory penalties.

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

4. *Consignments*

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

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

5. *Real Property*

- *In re Starks,* 2011 Bankr. LEXIS 268 (Bankr. E.D. Ky. 2011) – Mobile homes were personal property, and not fixtures or interests in real estate, under the Kentucky version of the UCC.

- *In re Brooks*, 452 B.R. 809 (Bankr. D. Kan. 2011) – A secured party had a security interest in a debtor's mobile home by obtaining a mortgage on real estate and the related fixtures.

- *21st Mortgage Corp. v. Stovall*, 2011 WL 3307516 Tex. Ct. App. 2011) – A manufactured home attached to leased land could be real estate or a fixture, depending on the facts.

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

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

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

- *In re Ocean Place Development, LLC*, 447 B.R. 726 (Bankr. D.N.J. 2011) – Despite language in assignment agreement to the contrary, a hotel's room revenues were accounts or payment intangibles, not real property rents, and thus Article 9 governed an assignment of the rent.

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

- *Epstein v. Coastal Timber Co., Inc.,* 711 S.E.2d 912, 75 U.C.C. Rep. Serv. 2d (Callaghan) 85 (S.C. 2011) – UCC § 2-107(2) of the South Carolina UCC provides that timber subject to a contract of sale is goods; it follows that a security interest in timber subject to a contract of sale is governed by Article 9. Here, a party with a mortgage on land that existed prior to any sale contract for the timber asserted its mortgage was sufficient to perfect its interest. The court agreed.

- *In re Adkins*, 444 B.R. 374 (Bkrtcy. N.D. Oh. 2011) – A secured party lost its purchase money security interest in windows when they were installed in a building. UCC § 9-334 allows personal property security interest in fixtures, but states that "[a] security interest does not exist under this chapter in ordinary building materials incorporated into an improvement in land".

6. *Leasing*

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

- *Aniebue v. Jaguar Credit Corp.*, 708 S.E.2d 4 (Ga. Ct. App. 2011) – A four-year lease of a new Jaguar with an option to purchase at the end for $19,684 was a true lease. Therefore Article 9's requirement of notification before disposition by the lessor did not apply. The lessees who defaulted were thus, pursuant to the terms of the lease, required to pay the difference between the Adjusted Capitalized Cost and the resale proceeds, plus costs.

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

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

- *In re HB Logistics, LLC*, 2011 WL 4625198 (Bankr. N.D. Ala. 2011) – TRAC leases of trucks were true leases due to Alabama and Texas statutes providing that "a transaction does not create a sale or security interest merely because the transaction provides that the rental price is permitted or required to be adjusted . . . by reference to the amount realized upon sale or other disposition of the motor vehicle." TRAC leases governed by Minnesota law are also true leases due to a substantially similar Minnesota statute. TRAC leases governed by Mississippi law, which does not have such a statute, were also true leases based on the economic realities and the fact that the lessor was guaranteed to receive 25% of the sale price when the vehicles were sold.

- *In re Turner*, 2011 WL 2490600 (W.D. Mo. 2011) – A putative lease of automobile was a true lease because the lessee could terminate at any time without charge.

- *Gibraltar Financial Corp. v. Prestige Equipment Corp.*, 949 N.E.2d 314 (Ind. 2011) – A six-year lease of punch press recently purchased by the lessee gave the lessee options to buy the punch press in year five and at the end of the lease term. None of the bright-line tests applied. The court wanted further evidence about the expectations of the parties at the time they entered into the transaction, including to factors such as the expected value of the punch press on the option dates and whether the only economically sensible course for the lessee would have been to exercise the option.

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

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

- *C and J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65 (Iowa 2011) – A non-cancellable equipment lease that contained $1 purchase

option was a sale with a retained security interest. Nevertheless, a "hell or high water," clause was enforceable and therefore the debtor/lessee's claims and defenses against the supplier were generally unavailable against the secured party/lessor, except those that relate to contract formation, such as fraud in the inducement.

- *Frontier Leasing Corp. v. Waterford Golf Assocs., L.L.C.,* 791 N.W.2d 710, 73 U.C.C. Rep. Serv. 2d 17 (Iowa Ct. App. 2010) – Determining transaction was a disguised secured financing and not a lease where the "lease" could not be canceled and there was a nominal purchase option; transaction involved lease of a beverage cart to an operator of a golf course.

7. *Sales*

- *In re Aleris International, Inc.,* 2011 Bankr. LEXIS 346 (Bankr. D. Del. 2011) – A seller sold goods to a buyer and purported to retain title. Under UCC § 2-401, title passed to buyer at delivery and seller retained only a security interest in the goods. The security interest was unperfected because the seller had not filed a financing statement.

- *In re Brooke Capital Corp.*, 2011 WL 204278 (Bankr. D. Kan. 2011) – A secured party had a security interest in a debtor's certificated security, which was initially perfected by filing and later by control. The debtor had earlier granted a security interest in the same certificate to the debtor's subsidiary and perfected that security interest by control. The subsidiary had sold participations in the secured obligations and had agreed to repurchase the participations. The court could not on summary judgment determine if the participations were loans to the subsidiary rather than a partial sale of the subsidiary's security interest. The subsidiary's alleged agreement to subordinate its rights was unclear and it was not evident that the subsidiary had actual or apparent authority to bind the participants.

- *Filer, Inc. v. Staples, Inc.*, 766 F. Supp. 2d 314 (D. Mass. 2011) – An assignment of rights under single contract was for the purpose of collection and in satisfaction of a pre-existing indebtedness. Thus Article 9 did not apply. UCC § 9-109. Therefore, the anti-assignment override rule of UCC § 9-406(d) did not invalidate the contractual restriction on assignment without the account debtor's consent. Consequently, the assignee was not a proper party to maintain an action on the contract.

- *Textron Financial Corp. v. Weeres Industries Corp.*, 2011 WL 2682901 (D. Minn. 2011) – An inventory secured party's claim against a manufacturer for breach of the manufacturer's agreement to repurchase repossessed inventory of its dealers was not governed by Article 9. Therefore the secured party had no duty to the manufacturer to sell the inventory in a commercially reasonable manner. The secured party's general contract law duty to mitigate damages was waived in the repurchase agreement. In any event, that duty would not require the secured party to refinance the inventory with another dealer or permit the manufacturer to make interest payments to cure the defaulting dealer's defaults.

- *In re Qualia Clinical Serv., Inc.*, 441 B.R. 325 (B.A.P. 8th Cir. 2011) – A receivables purchase arrangement was disguised financing, not true sale, because recourse rested with the seller. The court further concluded that the "purchaser's" security interest was voidable as a preference because it filed a corrective financing statement in the proper jurisdiction of organization within the preference period.

- *Palmdale Hills Property, LLC v. Lehman Commercial Paper, Inc. (*In re *Palmdale Hills Property, LLC)*, 457 B.R. 29 (B.A.P. 9th Cir. 2011) – The court held that loan repurchase transactions documented under master repurchase agreements are true sales, not secured transactions, based on the unambiguous intent of the parties as

stated in the master repurchase agreement. The court cited decisions in *American Home*, 388 B.R. 69 (Bankr. D. Del. 2008) and *Granite Partners*, 17 F.Supp. 2d 275 (S.D.N.Y. 1998), in support of its conclusion. The court relied on statements in the master repurchase agreement that the parties intend the transaction to be a loan, the use of "Buyer" and "Seller", and the use of other purchase-related terms.

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

8. *Intellectual Property*

   - *See In re Terrestar Networks, Inc.*, 2011 W.L. 3654543 (Bkrtcy. S.D.N.Y. 2011) and *Tracy Broadcasting* discussed in I.B.3 below.

9. *Tort Claims*

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

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

commercial tort claims and the former employee/owner did not have the right to have the claims dismissed.

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

B. Security Agreement and Attachment of Security Interest

1. Security Agreement

- *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.

- *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 – A buyer signed a sales order ticket that described both the furniture purchased and the buyer's agreement to give the seller a purchase money security interest in the purchased goods and incorporated the terms of the credit card agreement, which granted the seller a security interest. The document was sufficient as a security agreement.

- *Davis Forestry Prods., Inc. v. Downeast Power Co., LLC,* 2011 ME 10 (Me. 2011) – UCC § 9-203's attachment requirements for deposit accounts should be read in the disjunctive. Pursuant to UCC § 9-203(2)(c)(i)'s general rule, a written security agreement is sufficient to create a security interest even in a deposit account, even where control is not achieved and the deposit account-specific attachment rule in UCC § 9-203(2)(c)(iv) is not satisfied. The court also held that a secured party without control cannot exercise self-help remedies by selling rights to a deposit account, in which the secured party had a security interest under UCC § 9-610.

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

perfected by possession, it was senior to the rights of a judicial lien creditor that had attempted to garnish the funds.

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

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

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

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

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

- *United States v. 1997 International 9000 Semi Truck VIN: 1HSRUAER8VH409632*, 412 Fed. Appx. 118 (10th Cir. 2011) –

Despite the existence of an authenticated security agreement, the brother of a convicted drug trafficker failed to prove that he (the brother) had a valid security interest in the trafficker's truck sufficient to prevent forfeiture. The note had several irregularities, the trafficker never made any payments over the eighteen months between the alleged issuance of the note and the trafficker's arrest, and the brother never testified that he was unaware of the trafficker's illegal conduct.

- *Monlezun v. Lyon Interests, Inc.*, 2011 WL 5172331 (La. Ct. App. 2011) – A resolution of a corporation's board of directors authorized the president to grant a security interest in corporate equipment as collateral for a third-party loan to the president and his wife. The resolution expressly indicated that it would remain in force until the secured party received notification of its revocation. The president was thus authorized to grant a security interest in the collateral for a second loan after he had paid off the first loan.

- *Zaremba Group, LLC v. FDIC*, 2011 WL 721308 (E.D. Mich. 2011) – The husband of the managing member of an LLC had no apparent authority to grant a security interest in certificates of deposit owned by the LLC. Apparent authority must arise from acts of the principal, not the agent. The LLC had not done anything other than make the initial deposit shortly after the husband said it would occur. The LLC did not ratify the purported grant when it signed a resolution ratifying all transactions purportedly done on the LLC's behalf because the LLC had no knowledge of the husband's actions at the time of the resolution and the loan purportedly secured by the CDs was not for the LLC's benefit. The LLC had a valid contract claim against the bank for failure to honor the CDs, but not a claim for conversion, unjust enrichment, or wrongful detainer.

- *In re Jojo's 10 Restaurant, LLC*, 455 B.R. 321 (Bankr. D. Mass. 2011) – An asset purchase agreement provided that the buyer's

obligation "*shall be secured* by a standard form UCC Security Agreement" (emphasis added) and a filed financing statement described the collateral. The asset purchase agreement did not have granting language and the financing statement was not signed by the debtor. Thus no authenticated security agreement existed. Although the debtor did purport to pledge a liquor license, Massachusetts law gives limited property rights in a liquor license and a security interest is effective only if it has been approved by the licensing authority. The licensing authority had not given approval. As a consequence, the debtor had no property rights in the license and no security interest attached to it.

- *Roswell Capital Partners LLC v. Beshara*, 436 F. App'x. 34 (2d Cir. 2011) (unpublished) – The conversion of debt to equity terminated any security interest related to the debt. Even if the equity were to be converted back to debt, the holder would not be entitled to jump ahead of intervening secured creditors in terms of priority.

  Comment: The decision does not mention the earlier, troubling District Court opinion regarding debtor-authorized UCC termination statements. It does, however, support the conclusion that the termination statement conclusion was pure dicta.

- *In re Giaimo,* 2010 Bankr. LEXIS 4726 (B.A.P. 6th Cir. 2010) – Applying composite document rule, the court holds that under Ohio law an application for a certificate of title and a certificate of title with the notation that the purported secured party was lienholder was sufficient under UCC § 9-203 for the attachment of a security interest.

2. *Rights in the Collateral*

   - *In re Keisler*, 2010 WL 4627892, 2010 Bankr. LEXIS 3939, 73 U.C.C. Rep. Serv. 2d 57 (Bankr. E.D. Tenn. 2010) – A spouse did

not co-sign a security agreement in favor of several lenders that were part of a group. 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 lender, which had possession of the stock certificate for the benefit of the entire group of subordinate lenders.

- *Farm Credit of Northwest Florida, ACA v. Easom Peanut Co.*, 2011 WL 5222757, 2011 WL 4057786 (Ga. Ct. App. 2011) – A buyer's contracts to purchase peanuts provided that the sellers retained all beneficial interest and title until the peanuts were delivered to the debtor and the related warehouse receipts were delivered to the debtor. Delivery of the peanuts to a third party processor at the debtor's direction gave the debtor sufficient rights in the peanuts for its secured party's security interest to attach. The seller's reservation of title despite delivery to the processor was limited to an unperfected security interest.

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

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

- *In re A&S Livestock, Inc.*, 449 B.R. 525 (Bankr. W.D. Ky. 2011) – A secured party had no security interest in cattle that borrower vaccinated and fed pursuant to contract with the entity that owned the cattle.

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

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

- *In re Ward*, 2011 WL 2680295 (Bankr. N.D. Ga. 2011) – A credit union with a security interest in customer's account could enforce that security interest by setoff even though the account contained exempt social security benefits because setoff is not a judicial or other legal process and thus does not violate 42 U.S.C. § 407(a). Moreover, in this case the customer received an advance on the social security benefits from another creditor and thus treating the funds as exempt would effectively allow the debtor double benefits.

- *Hubbard v. HomeBank of Arkansas*, 2011 WL 824325 (Ark. Ct. App. 2011) – A seller of cattle who orally agreed with the buyer that the seller would retain title until payment did not deprive the buyer of rights in the cattle or prevent the buyer from granting a security interest in the cattle. Because that security interest was perfected, the secured party had a perfected security interest in the proceeds of the cattle that the seller received after the buyer defaulted and the seller sold the collateral at auction.

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

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

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

- *Zurita v. SVH-1 Partners, Ltd.*, 2011 WL 6118573 (Tex. Ct. App. 2011) – A landlord acquired a security interest in equipment used by an individual tenant even though the equipment was

purchased by an LLC because the tenant wholly owned the LLC and therefore had the power to transfer rights in the equipment. Although the security agreement referred to property "owned or hereafter acquired" by the tenant, that language did not limit the scope of the security interest.

3. *Restrictions on Transfer*

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

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

   - *In re McKenzie*, 2011 WL 2118689 (Bankr. E.D. Tenn. 2011) – 2011 WL 6140516 (Bankr. E.D. Tenn. 2011) (subsequent decision) – An LLC operating agreement required the prior written consent of the LLC's Board of Governors for a security interest to attach to a member's interest. A debtor could grant a security interest in wholly-owned LLCs regardless of restrictions in the member agreement because consent to the pledge is presumed in that circumstance. While UCC § 9-408 does override restrictions on the transfer of an interest in general intangibles, such as partnership interests and some LLC interests, by failing to submit the operating agreements, the

secure d party failed to prove that the LLC interests were general intangibles and not securities.

- *In re Garrison*, 2011 WL 5593025 (Bankr. W.D. Ark. 2011) – Restrictions on transfer of corporate stock are governed by the law of the state of incorporation. A statement on the reverse side of a stock certificate for shares in a closely-held corporation stating that the shares "may not be offered, sold, transferred, pledged or hypothecated in the absence of an effective registration statement for the shares under the [Securities Act of 1933] and under any applicable state securities laws, or an opinion of counsel to the corporation that such registration is not required as to such sale or offer" was ineffective to prevent the shareholders from granting a security interest in the shares because it prevents only a public offering and the shareholder's pledge was an exempted transfer. However a shareholders agreement prohibited the shareholders from transferring or encumbering any stock without the written consent of all the shareholders, even though not noted on the stock certificate, was effective to prevent the creation of a security interest once the secured had knowledge of the restriction.

- *In re Westbay*, 2011 WL 2708469 (Bankr. C.D. Ill. 2011) – An LLC agreement required the written consent of all members for a member to use its membership interest as collateral. That requirement was impliedly waived because all the members knew of and benefitted from the transaction, which was in exchange for a loan of working capital to the LLC.

- *Meecorp Capital Markets, LLC v. PSC of Two Harbors, LLC*, 2011 WL 1119191 (D. Minn. 2011) – 2011 WL 6151487 (D. Minn. 2011) (subsequent decision) – A security interest did not attach LLC interests because LLC agreements required unanimous consent of all members to the creation of a security interest by a member in its interest. A member could not grant a security interest in his LLC interest because there was no evidence that

written notice was provided to all members, as required by the member agreement. The member also did not grant a security interest in his general partnership interests because the member agreements prohibited transfer of governance interests without the unanimous, written consent of all other members and the resolutions of the partnership's Boards of Governors consenting to the pledge were insufficient to satisfy this requirement.

- *In re Tracey Broadcasting Corp.*, 2011 WL 3861612 (D. Colo. 2011) – Federal law provides that no broadcast license can be "transferred, assigned or disposed of in any manner" without approval of the FCC. The court held that an FCC license is not property to which a security interest may attach. While it may be possible to grant a security interest in the right to future proceeds from an approved sale of a license, if, on the date of the debtor's bankruptcy petition, there is no contract for sale approved by the FCC Bankruptcy Code, § 552(a) prevents the security interest from attaching to any postpetition sale proceeds.

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

- *U.S. v. Corry Communications*, 2011 WL 4572012 (W.D. Pa. 2011) – No lien can attach to an active broadcast license. The lien can attach only to the proceeds of the license. A federal tax lien on a broadcaster's assets extended only to the sale proceeds of the license, not to the license itself. Thus the government could not execute on the license now owned by the buyer.

- *Concorde Equity II, LLC v. Bretz*, 2011 WL 5056295 (Cal. Ct. App. 2011) – State law prohibited the granting of a security interest in

a liquor license. The secured party's security interest could and did attach to the proceeds of the a liquor license sold by a court-appointed receiver.

- *Texas Lottery Comm'n v. First State Bank of DeQueen,* 325 S.W.3d 628 (Tex. 2010) – Upholding lower court's ruling that Article 9's rules negating statutory anti-assignment provisions supersede the anti-assignment clauses found in the Texas Lottery Act.

- *In re First Prot., Inc.*, 440 B.R. 821 (B.A.P. 9th Cir. 2010) – Noneconomic rights — such as voting rights of LLC members — were property of member's bankruptcy estate; § 541(c)(1)(A) of the Bankruptcy Code overrode contract and state law anti-assignment restrictions.

- *Meecorp Capital Marks, LLC v. PSC of Two Harbors, LLC*, Civil No. 09-2067, 2011 U.S. Dist. LEXIS 142576 (D. Minn. Dec. 12, 2011) – The court held several LLC pledges invalid because the pledgors failed to satisfy technical notice and unanimous consent provisions in the governing documents and member control documents of the pledged entities. The court did not discuss whether any of these provisions might have been invalid restrictions on assignment under the UCC.

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

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

- *Stewardship Credit Arbitrage Fund LLC v. Charles Zucker Culture Pearl Corp.*, 929 N.Y.S.2d 203 (N.Y. Super. Ct. 2011) – An assignee of a secured party's "rights under the Credit Agreement, Security Agreement, and each document and instrument related to" those agreements included an assignment of a secured party's claim

against an appraiser for fraud, negligent misrepresentation, breach of contract, professional malpractice, and violation of a state statute that imposes civil liability on appraisers of jewelry, art, and objects containing precious stones or metals. The appraisals, which were required as a condition to funding the loans, were "related to" the loan documents.

- *In re Dumlao*, 2011 WL 4501402 (9th Cir. BAP 2011) – A consumer's car loan agreement with a secured party provided that the collateral secured "any other amounts or loans, including any credit card loan, you owe us for any reason now or in the future." The language was effective under UCC § 2-204 to secure a credit-card obligation.

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

- *In re Zaochney*, 2011 WL 6148727 (Bankr. D. Alaska 2011) – A car loan and line-of-credit agreement contained dragnet clauses. Those provisions were enforceable to cause a car to secure the line-of-credit obligation because Article 9 rejects the requirement that the loans have a related purpose.

- *In re Renshaw*, 447 B.R. 453 (Bankr. W.D. Pa. 2011) – A cross-collateralization clause a secured party's 1995 line of credit to a consumer that provided all collateral for the line-of-credit debt would also secure "all other loans you have with us." The term was effective to cover debt on previously issued credit card. Revised Article 9 rejects the relatedness rule, which had

previously been the law in Pennsylvania. Article 9 applies to transactions entered into before it took effect.

- *In re Hobart*, 452 B.R. 789 (Bankr. D. Id. 2011) – A security agreement provided that "[a]ll collateral securing one loan will secure all your other obligations . . . , including all existing and future loan obligations." The language was sufficient to make each financed vehicle secure the debt for each of the other vehicles.

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

- *In re McGregor*, 449 B.R. 468 (Bankr. D.S.C. 2011) – A debtor's obligations on both a credit card and a truck loan were cross-collateralized by language in a security agreement.

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

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

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

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

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

- *In re Inofin, Inc.*, 455 B.R. 19 (Bankr. D. Mass. 2011) – An original security agreement and financing statement described the collateral to be "motor vehicle installments sales contracts purchased by Debtor with the proceeds of loans from Secured Party and assigned and delivered to Secured Party." The collateral did not include chattel paper not financed by the

secured party. A subsequent loan agreement provided that "[a]s security . . . , Borrower shall assign and deliver to Lender, . . . Installment Contracts" removed the requirement that the secured party provide the financing for collateralized chattel paper, but the secured party gave no value for that additional collateral.

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

- *In re Taylor*, 2011 WL 841511 (Bankr. E.D. Ky. 2011) – A security agreement described the collateral as "155 head of mixed breed cows and calves" without specifying which particular cattle. In the absence of any other reasonable approach, the court held that it covered the last 155 cattle sold by the debtor and the proceeds of that cattle.

- *In re McKenzie*, 2011 WL 2118689 (Bankr. E.D. Tenn. 2011) – Slight errors in the names of the LLCs in which the debtor had pledged membership interests were immaterial because it was possible to determine the interests pledged by looking at the names of the entities in which the debtor had an interest. However, pledge of membership interest in "Exit 20, LLC" was inadequate because the debtor had a membership interest in

two entities whose names began with "Exit LLC" – Exit 20 Properties, LLC and Exit 20 Development, LLC – and it was not objectively possible to ascertain which interest had been pledged.

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

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

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

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

- *Yatooma v. Barker*, 2010 Mich. App. LEXIS 2530 (Mich. Ct. App. 2010) – A security agreement collateral grant that lacked "after-acquired property" language did not cover after-acquired property that was not fluctuating in nature. The court rejected the argument that an after-acquired property reference in financing statement cured the problem.

- *In re Pizzano,* 439 B.R. 445 (Bankr. W.D. Mich. 2010) – A security interest granted in "goods" covered the debtor's Corvette in a non-consumer transaction. Goods are a "type of" collateral under UCC § 9-108 even though goods can be divided into sub-categories like inventory or equipment.

- *Bank of Lincoln County v. GE Commercial Distrib. Fin. Corp.,* 2010 WL 4392913 (E.D. Tenn. 2010) – A security interest in "all" inventory covered used horse trailers in spite of secured party's unilateral course of dealing that treated only new horse trailers as collateral.

- *Monticello Banking Co. v. Flener*, 11-5054 (6th Cir. 2011) (unpublished) – This erroneous decision concluded that UCC § 9-108(4)(a) requires the use of the phrases "securities entitlement", "securities account" or "investment property", or a description of the underlying securities in the account, in order to create or perfect a security interest in such collateral.

Comment: The court misreads what was intended to be a safe harbor provision as a universal filing requirement.

D. Perfection

1. Certificates of Title

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

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

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

- *In re Willis*, 2011 WL 1168408 (Bankr. E.D. Tex. 2011) – A secured party that did not file a financing statement with respect to its security interest in an annuity to secure an indebtedness was not perfected by a letter sent to issuer of the policy instructing the issuer to pay the secured party because the issuer did not acknowledge that it held the annuity for the

bank's benefit. There was no evidence or even any of the factual allegations necessary to establish that the assignment was a insignificant portion of the debtor's payment intangibles, and thus automatically perfected under UCC § 9-309(2).

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

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

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

- *In re Moye*, 437 Fed. Appx. 338 (5th Cir. 2011) – A secured party's purchase-money security interest in motor vehicles held as inventory was not perfected by possession of unmarked certificates of title. Perfection required the filing a financing statement. Subsequent decision at 2011 WL 4808124 (Bankr. S.D. Tex. 2011). UCC § 9-311(d).

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

- *In re Barbee*, 2011 WL 6141648 (6th Cir. 2011) – A secured party held a security interest in a titled manufactured home that was affixed to realty. No affidavit of conversion to real property was filed. The secured party was not perfected by recorded mortgages because the home remained personal property. Notation of the security interest on the certificate of title was required to perfect.

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

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

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

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

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

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

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

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

- *In re Rice*, 2011 WL 6016229 (6th Cir. BAP 2011) – Because the assignee of perfected security interest in motor vehicle covered by a certificate of title did not have to get its interest noted on the certificate to have a perfected interest, the assignee had standing to seek relief from the bankruptcy automatic stay.

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

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

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

2. *Control*

- *Full Throttle Films, Inc. v. National Mobile Television, Inc.*, 180 Cal.App.4th 1438, 103 Cal.Rptr.3d 560 (Cal. Ct. App. 2009, modified Feb. 8, 2010) – In this case the court gets it only half right. The court correctly analyzed the U.C.C. § 9-104 requirements for perfection by control of a deposit account. The court noted that the secured party was not the depositary bank and not the customer with respect to the account, so didn't have control by that means. The control agreement identified specific deposit accounts and the court held that the secured party was not perfected as to a deposit account not referenced in the control agreement (no evidence that the deposit account in issue was related to any of the specified accounts identified in the agreement). The court then starts analyzing the U.C.C. § 9-304 location of the depositary bank to determine whether a

financing statement filed in Delaware was sufficient to perfect a security interest in the deposit account (when under U.C.C. §§ 9-301 to 9-307 where a financing statement should be filed is determined by the location of the debtor, subject to three narrow exceptions for real estate related collateral) and fails to observe that a filing would only be effective if the funds in the deposit account were proceeds of other collateral (the only exception to the general rule that control is required for perfection of a security interest in a deposit account).

- *Smith v. Powder Mountain, LLC,* 2011 U.S. Dist. LEXIS 64650 (S.D. Fl. 2011) – An "agreement" is required for control over a securities account pursuant to UCC § 8-106(d)(2). While that agreement may be less than a formal written contract, there must be evidence of some meeting of the minds. Evidence of a general willingness of the securities intermediary to acquiesce to the secured party's entitlement orders, or evidence of past acquiescence, is insufficient to show an "agreement" for control.

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

- *Fifth Third Bank v. Lincoln Financial Securities Corp.*, 2011 WL 3476862 (6th Cir. 2011) – A securities intermediary breached a control agreement with the entitlement holder's secured party by either: (i) misrepresenting the value of the customer's account by including in the stated value securities purchased with funds from a check that was later dishonored; or (ii) reversing trades after the check was dishonored despite clauses in control agreement by which the securities intermediary

promised not to execute sell orders without the secured party's consent and "waive[d] and release[d] all liens, encumbrances, claims and rights of setoff it may have." The control agreement was not rendered unenforceable for lack of consideration or mutuality or mistake.

- *In re Perez,* 440 B.R. 634 (Bankr. D.N.J. 2010) – A non-negotiable non-transferable CD was a deposit account. A security interest in a deposit account must be perfected by control even where the CD was certificated. The secured party credit union held the funds represented by the CD, it was perfected by control; National Credit Union Act's floating lien in all member accounts in favor of credit union also created a perfected security interest in the account because it preempted state law including the UCC.

3. *Possession*

   - *LNV Corp. v. Madison Real Estate LLC,* 2010 WL 5126043 (N.Y. Sup. Ct. Dec. 6, 2010) – An assignee of a mortgage that could not show that the note had also been assigned to it could not foreclose – the note does not follow the mortgage.

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

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

   - *Trane Co. v. CGI Mechanical, Inc.*, 2010 WL 2998516 (D. S.C. 2010) – A notice of federal tax lien listing the taxpayer by its former

name was sufficient to give an IRS tax lien priority over a subsequent judgment lien.

Comment: The case goes further than the Sixth Circuit's 2005 decision in *Spearing Tool*, which indicated that the IRS was not subject to the standards established by Article 9 for UCC filings.

- *United States of America v. Thomas*, 2011 U.S. Dist. LEXIS 2017, 2011 WL 9569 (E.D. Cal. 2011) – 26 U.S.C. §7402 provides for the voiding of a sham UCC financing statement filed by a taxpayer against an IRS employee. Section 7402 grants district courts the authority to issue orders necessary for enforcement of internal revenue laws, including voiding common law liens claimed by taxpayers on the property of government officials. A financing statement filed by a taxpayer against an IRS employee was declared null and void and the taxpayer was enjoined from filing further financing statements.

- *United States v. Merritt*, 2011 WL 9736 2011 WL 5026074 (E.D. Cal. 2011) – A financing statement filed by a taxpayer against an IRS employee was declared null and void and the taxpayer was enjoined from filing further financing statements.

- *United States v. Castle*, 2011 WL 1585832 (E.D. Cal. 2011) – Financing statements filed by taxpayers against an IRS employee were declared null and void and the taxpayers were enjoined from filing further financing statements.

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

- *United States v. Baker*, 2011 WL 1322262 (S.D. Ind. 2011) – A financing statement filed by a prison inmate against a

sentencing judge was declared invalid and the inmate was enjoined from filing further financing statements.

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

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

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

- *In re Camtech Precision Manufacturing, Inc.*, 443 B.R. 190 (Bankr. S.D. Fla. 2011) – A filed financing statements listing additional debtors on separate paper exhibits but which did not indicate in the additional debtors box of the financing statement to look beyond the first page or use the official addendum (form UCC1Ad) to indicate additional debtors was inadequate to perfect security interests granted by additional debtors. The filings were not indexed by or discoverable under the names of the additional debtors.

Comment: Had the additional debtor information been submitted using an approved standard form or had there been a direction in the additional debtor box on the first page to look at the exhibits for additional debtor information, the result here would be different.

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

- *In re Borges*, 2011 WL 4101096 (Bankr. D.N.M. 2011) – The security agreements authenticated by the debtor secured all present and future debts owed by the debtor to both the secured party and the secured party's affiliates. Because only the secured party was listed on the financing statement, the affiliates' security interests were unperfected.

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

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

- *Official Comm. of Unsecured Creditors v. Regions Bank (*In re *Carntech Precision Manufacturing, Inc.)*, 443 B.R. 190 (Bankr. S.D.

Fla. 2011) – A secured party was unperfected with respect to additional debtors whose names were listed only on blank pages attached to a Form UCC-1, not on actual UCC forms for additional debtors. Such filings were seriously misleading. The filing offices did not index the filings under the additional debtor names. The court rejected an estoppel argument based on testimony the filing offices said in advance they would accept the forms and a UCC § 9-517 argument that the filings were valid but misindexed. The secured party could have protected itself by using an approved form and by running post-filing lien searches against each debtor name to confirm proper indexing.

- *Miller v. State Bank of Arthur (*In re *Miller)*, No. 10-92570, 2012 Bankr. LEXIS 70 (Bankr. C.D. Ill. Jan 6, 2012) – A financing statement filed against "Bennie A. Miller" was not valid, even though that was the name on debtor's driver's license, social security card, house deed, tax returns, credit card and bill of sale. Mr. Miller's legal name was "Ben Miller", the name on his Indiana birth certificate and there was no evidence that it had been changed. Because a search against "Ben Miller" did not reveal the financing statement in the name "Bennie A. Miller", the financing statement was seriously misleading and failed to perfect the relevant security interest.

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

- *In re Twin City Hospital,* 2011 Bankr. LEXIS 1501 (Bkrtcy. N.D. Oh. 2011) – A properly filed financing statement that was improperly indexed by the filing office and therefore undiscoverable by subsequent searchers was nonetheless effective to perfect the secured party's security interest. UCC §9-517.

- *Nebraska v. Amwest Sur. Ins. Co.*, 790 N.W.2d 866 (Neb. 2010) – A person who promised to perfect a security interest, but who failed to do so within 18 months breached its obligation. The

court noted that the failure to perfect the security interest "creates a ticking time bomb."

- *Hancock Bank of Louisiana v. Advocate Fin., LLC,* 2011 U.S. Dist. LEXIS 2845 (M.D. La. 2011) – A secured party was authorized pursuant to a security agreement to file a new UCC-1 to re-perfect a security interest after the initial UCC-1 lapsed.

- *In re Qualia Clinical Service, Inc.*, 441 B.R. 325 (8th Cir. BAP), *aff'd*, 652 F.3d 933 (8th Cir. 2011) – A secured party was not perfected until one month before the debtor's bankruptcy, when the secured party filed a financing statement in Nevada where the debtor was incorporated. The secured party's earlier filing in Nebraska, where the debtor's principal place of business was located, was ineffective. As a result, the secured party's security interest was an avoidable preference.

- *In re Supplies & Services, Inc.*, 2011 WL 5967199 (1st Cir. BAP 2011) – A security agreement had a choice-of-law clause providing that it was governed by North Carolina law. North Carolina makes financing statements effective for five years. However, perfection was governed by the law of the debtor's location, Puerto Rico, which makes financing statements effective for ten years. Accordingly, the secured party's filing had not lapsed seven years after it was filed.

- *Hancock Bank of Louisiana v. Advocate Fin., LLC,* 2011 U.S. Dist. LEXIS 2845 (M.D. La. 2011) – A secured party was authorized pursuant to a security agreement to file a new UCC-1 to re-perfect a security interest after the initial financing statement lapsed. The court also upholds guarantor waivers.

- *In re Twin City Hospital*, 2011 Bankr. LEXIS 1501 (Bkrtcy. N.D. Oh. 2011) – A properly filed financing statement that was improperly indexed by the filing office and therefore undiscoverable by subsequent searchers was still effective. UCC § 9-517.

6. *Termination and Lapse of Financing Statement*

   - *The AEG Liquidation Trust on behalf of American Equities Group, Inc. v. Toobro NY LLC,* 932 N.Y.S.2d 759, 2011 NY Slip Op. 511564 (S. Ct. NY. 2011) – The court declined to follow the decision in *Roswell Capital.* The court held that a UCC termination statement not authorized by the secured party was ineffective.

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

   - *In re Negus-Sons, Inc.*, 2011 WL 2470478 (Bankr. D. Neb. 2011), *aff'd*, 2011 WL 6413617 (8th Cir. BAP 2011) – A payoff letter signed by a secured party stating that the secured party agreed to terminate its security interest in all the collateral and consenting to the filing of amendments to effect "these terminations" was sufficient to authorize the filing of termination statements under UCC §§ 9 513, 9 509 and 9 510. The court notes it is "hesitant to endorse" the *Roswell Capital* decision, treating the debtor as authorized to file financing statements, on the grounds it "appears to be contrary to the plain language of the UCC." The secured party later asserted that the security interests and financing statements were intended to remain in effect with respect to certain collateral not released. The court held that the secured party should have been more carefully in the scope of the release/termination authorized by the document. The secured party provided a payoff letter providing a payoff figure and stating "[u]pon

receipt of payoff all liens will be released." The response authorized prospective secured party to file a termination statement.

- *Quality Ford Auto. Sales, Inc. v. Ford Motor Credit Co., LLC*, 2011 WL 2935161 (Ky. Ct. App. 2011) – A corporate car dealership that signed a security agreement with a secured party remained bound by the agreement after ownership of the corporation changed.

- *Merrill Lynch Bus. Fin. Serv., Inc. v. Kupperman*, 441 F. App'x. 938 (3d Cir. 2011) (unpublished) – A fraudster granted a security interest in corporate assets to one secured party, then quietly transferred them to an affiliate without consideration and granted a security interest in the same collateral to another secured party. The first secured party claimed a prior perfected security interest in all assets held by the second debtor. The court held in favor of the first secured party. It viewed Debtor 2 as a successor to Debtor 1, bound by Debtor 1's pledge under the successors and assigns provision of the loan documents. It thus found an attached security interest and concluded without much discussion that it remained perfected and prior in both transferred and newly arising assets of Debtor 2. The equities of the situation clearly weighed on the court. At the conclusion of its opinion, the court noted "[Debtor 2], a mere continuation of [Debtor 1], secretly evaded its obligations to [SP1] utilizing fraudulently acquired assets. Under these circumstances, [Debtor 2] should not be treated as a standard "new debtor" [under Article 9]. In sum, [Debtor 1's] unilateral, unlawful actions do not diminish [SP1]'s perfected security interest in current and future collateral of [Debtor 1] and its successors".

- *Official Committee of Unsecured Creditors v. City National Bank, N.A.*, No. C09-03817 MMC, 2011 U.S. Dist. LEXIS 51628 (N.D. Cal. May 13, 2011) – A secured party authorized a title company to file "all appropriate amendments" to a financing

statement to reflect the partial release of collateral. After the secured party delivered a proper release to the title company, someone at the title company apparently checked the "termination" box and terminated the filing. Secured Party challenged the termination as unauthorized. The court held that the agency relationship between the secured party and the title company was limited and did not include authority to terminate. Accordingly, the financing statement was not terminated.

E. Priority

1. Lien Creditors

- *Jabers v. Morgan,* 2011 U.S. Dist. LEXIS 10504 (S.D. Miss. 2011) – The court treated a Mississippi state tax lien as security interest subject to general UCC priority rules. The court concluded that a secured creditor's prior perfected security interest in accounts – even after acquired accounts – had priority over the Mississippi tax lien.

- *Nabers v. Morgan*, 2011 WL 359069 (S.D. Miss. 2011) – A perfected security interest in accounts has priority over subsequent state tax lien because the tax lien is a security interest and priority goes to the first to file or perfect.

- *Green Tree-AL LLC v. Dominion Resources, L.L.C.*, 2011 WL 3963010 (Ala. Civ. Ct. App. 2011) – The treatment of a manufactured home as realty for purposes of taxation does not convert it to real property. A manufactured home remains personal property unless and until its certificate of title is cancelled. As a result, a secured party with perfected Article 9 security interest in a manufactured home that became a fixture had priority over a buyer of the real property at tax sale.

- *In re O & G Leasing, LLC*, 456 B.R. 652 (Bankr. S.D. Miss. 2011) – A financing statement filed more than 30 days after separate

secured loans were consolidated did not render the security interest preferential. Earlier filed financing statements for each individual loan, each with its different collateral, remained effective to perfect the security interests in the collateral.

- *Scion, Inc. v. Martinez*, 2011 WL 744912 (Mich. Ct. App. 2011) – A garnishor had priority over a secured party whose interest was perfected two weeks after the writ of garnishment was served.

- *National City Bank v. Texas Capital Bank*, 2011 WL 5926661 (Tex. Ct. App. 2011) – A garnishee bank that maintained an investment portfolio account for client. The bank had a security interest in that account to secure a line of credit. The security interest had priority over the rights of the garnishor. The garnishee bank was liable to the garnishor for funds that it returned to the debtor after service of the writ and liquidation of the account, but was not liable for amounts it set off against the client's obligation on the line of credit.

2. *Buyers*

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

- *United States v. Stevens*, 2011 WL 4448721 (4th Cir. 2011) – A debtor was guilty of transporting a stolen vehicle in interstate commerce, in violation of 18 U.S.C. § 2312, because he transported a motorcycle with the intent to dispose of the

motorcycle by selling it to a third party and knowing he was depriving a secured party of its security interest.

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

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

determined from the perspective of the buyer but the perspective of the secured party.

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

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

- *DCFS USA, LLC v. District of Columbia*, 2011 WL 3606623 (D.D.C. 2011) – The District of Columbia violated a secured party's constitutional rights by selling an impounded vehicle free and clear of the secured party's security interest without providing notice of the sale to the secured party.

- *Rabbia v. Rocha*, 2011 WL 5930416 (N.H. 2011) – A payee, for whom a debtor, pursuant to court order, wrote checks to its attorney to place funds in escrow, took free under UCC § 9-332 of the security interest of the dealer's floor plan financier.

- *BNP Paribas v. Olsen's Mill, Inc.*, 799 N.W.2d 792 (Wis. 2011) – A court could not order a receiver to sell collateral free and clear of a secured party's security interest without the secured party's consent. The secured party did not consent by initiating

and participating in the receivership. Even if the sale proceeds paid the secured party the full amount of its secured claim, the sale order was invalid because it provided for the buyer to honor certain trade obligations of the debtor, thereby improperly giving them priority over the undersecured portion of the secured party's claim.

3. *Statutory Liens; Forfeiture*

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

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

- *Oyens Feed & Supply, Inc. v. Primebank*, 2011 WL 6849603 (Iowa 2011) – Pursuant to Iowa agricultural lien statute, an agricultural supplier must comply with a notice procedure to share equal priority with a prior perfected secured party. The supplier need not comply with the notice procedure to have priority over a prior perfected secured party to the extent of the difference between the acquisition price of the livestock and

either the fair market value of the livestock at the time the lien attaches or the sale price of the livestock, whichever is greater.

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

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

- *Wiers Farm, Inc. v. Waverly Farms, Inc.*, 2011 WL 1296867 (M.D. Fla. 2011) – A secured party who acquired an interest in a produce distributor's accounts did not take free of PACA claims of produce suppliers because the secured party did not buy the accounts, thereby removing them from the PACA trust. Rather the secured party loaned money secured by the accounts.

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

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

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

- *In re South Louisiana Ethanol, LLC*, 2011 WL 148053 (Bankr. E.D. La. 2011) – A secured party's perfected security interest in a debtor's equipment had priority over an equipment seller's vendor's lien.

- *Jabers v. Morgan,* 2011 U.S. Dist. LEXIS 10504 (S.D. Miss. 2011) – Treating Mississippi state tax lien as security interest subject to general UCC priority rules and concluding that secured creditor's prior perfected security interest in accounts – even after acquired accounts – trumped the Mississippi tax lien; this conclusion ultimately turns on Mississippi's revenue laws but seems potentially suspect given Article 9's lien creditor rules.

4. *Subordination and Subrogation*

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

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

   - *Mazon Associates, Inc. v. Heritage Wholesale Nursery, Inc.*, 2011 WL 1107219 (Tex. Ct. App. 2011) – A secured party had a perfected security interest in accounts. The secured party had an agreement with the buyer of the debtor's assets other than accounts for the secured party to forward checks for goods sold after the asset purchase in exchange for assistance from the buyer in receiving payment for goods sold prior to the purchase. The secured party was bound by that agreement despite its priority in the pre-asset sale accounts.

   - *Domus, Inc. v. Davis-Giovinazzo Constr. Co., Inc.*, No. 10-1654, 2011 U.S. Dist. LEXIS 93426 (E.D. Pa. Aug. 22, 2011) – In an interpleader proceeding, the court considered the "doctrine of unclean hands" to determine whether a UCC first priority perfected secured party should be subordinated to other creditors. The court concluded that the doctrine would permit subordination where secured party engaged in "egregious

misconduct", acted fraudulently, acted with bad faith, or acted unconscionably.

- *American Sterling Bank v. Johnny Mgmt. LV, Inc.,* 245 P.3d 535 (Nev. 2010) (en banc) – Refusing to apply the principle of equitable subordination where the lender had materially moved up the maturity date, even though the accelerated maturity date would prejudice intervening lienholders.

- *Kerr v. Commercial Credit Group, Inc. (*In re *Siskey Hauling Co., Inc.)*, 456 B.R. 597 (Bankr. N.D. Ga. 2011) – Debtor granted a security interest in its accounts receivable to SP-1, who filed the first financing statement. Then the debtor granted a security interest in its accounts receivable to SP-2, who filed the second financing statement. Then the debtor granted a security interest in and sold its accounts receivable to SP-3, who filed a financing statement and, in exchange for paying off debtor's obligation to SP-1, obtained a release and termination of SP-1's lien and security interest. SP-3 subsequently argued it should be prior to SP-2 because it should be equitably subrogated to SP-1's claim. The court rejected this assertion, on the grounds that the transaction was not an assignment from SP-1 to SP-3 but a release; that SP-3 knew of an intervening creditor and could not jump ahead of it; and that the equities did not lie in favor of subrogation. SP-3 also argued that its "purchase" of the receivables placed them outside the debtor's estate and gave SP-3 sole access to them. The court also rejected this argument, because the "purchase" was a full-recourse factoring arrangement and even if it were a purchase, the purchased assets would remain subject to SP-2's prior lien.

5. *Equitable Claims*

- *The National Bank v. FCC Equipment Financing, Inc.*, 797 N.W.2d 624 (Iowa Ct. App. 2011) – A secured party received a wire transfer from buyer's lender for most of amount of the secured obligation. The secured party was not liable in unjust

enrichment to return the funds when the buyer failed to pay the remainder of the secured obligation. There was no unjust enrichment because the transfer reduced a lawful obligation and the lender erred in making the transfer without assuring the rest of the obligation would be paid off.

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

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

- *Davis v. Guaranty Bank and Trust Co.*, 58 So. 3d 1233 (Miss. Ct. App. 2011) – A secured party that released its security interest on a truck to facilitate the sale of the truck was not entitled to an equitable lien on the truck when the debtor failed to remit the sale proceeds as promised.

- *In re Bill Heard Enters., Inc.*, 438 B.R. 745 (Bankr. N.D. Ala. 2010) – A bank was able to exercise setoff rights against a deposit account that held commingled funds belonging to another creditor, where bank was not aware of that fact.

6. *Set Off*

- *Mississippi County v. First Tennessee Bank*, 2011 WL 2160281 (E.D. Ark. 2011) – A secured party with a security interest in a hospital's Medicare accounts took those accounts subject to the government's right to reimbursement for overpayments by the government.

- *Variety Wholesalers, Inc. v. Prime Apparel, LLC*, 2011 WL 6036084 (N.C. Ct. App. 2011) – A secured party with a perfected security interest in a clothier's accounts was not entitled to funds due from clothier's customer because the goods sold to the customer violated the trademark rights of another entity. Thus the debtor did not have any right in the account to pass to the secured party.

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

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

7. *Priority — Competing Security Interests*

   - *Platte Valley Bank v. Tetra Fin. Group, LLC,* 2011 U.S. Dist. LEXIS 9278 (D. Neb. 2011) – A secured party with a security interest in a deposit account perfected by control had priority over a secured party whose collateral was sold and whose proceeds were deposited into the deposit account controlled by the secured creditor party.

   - *Merrill Lynch Business Financial Services, Inc. v. Kupperman*, 2011 WL 3328492 (3d Cir. 2011) – A secured party of a predecessor business had priority over a secured party of a successor with respect not only to collateral transferred but also as to collateral acquired after the successor began operations because the security interest granted by the predecessor covered after-acquired collateral and the successor was a "continuation" of the predecessor.

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

   - *In re Siskey Hauling Co., Inc.*, 456 B.R. 597 (Bankr. N.D. Ga. 2011) – A secured party that acquired a third-priority security interest in a debtor's accounts and whose loan was used to pay off the secured party with the first-priority security interest was not entitled to be subrogated to the first-priority secured party's rights because the transaction was structured as a payoff, not an assignment. Further the third-priority secured party was

responsible for inexcusable neglect since it knew of the second-priority security interest but failed to take the steps necessary to give itself a superior position.

- *Prestige Capital Corp. v. Pipeliners of Puerto Rico, Inc.*, 2011 WL 4899968 (D.P.R. 2011) – A secured party with a security interest in the debtor's existing and after-acquired accounts and who filed first had priority over government-run bank with a later-filed financing statement even as to an account owed by a Commonwealth agency. The secured party's failure to comply with the Puerto Rico Assignment of Claims Act was not relevant to the relative priority of the security interests and the secured party's UCC-3 amending the debtor's name was properly filed even though for some unexplained reason it was not disclosed in a search.

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

- *Citizens Bank and Trust Co. v. Riederer (*In re *Brooke Capital Corp.)*, No. 08-22786-7, 2011 Bankr. LEXIS 210 (Bankr. D. Kan. Jan. 20, 2011) – A subsidiary loaned cash to its parent and took back a security interest in the parent's interest in a sister subsidiary.

The lender subsidiary's agent took possession of the pledged stock certificate. The lender subsidiary granted participation interests in this loan to third parties. No financing statements were filed to reflect the participation. The parent later granted an unaffiliated lender a junior security interest in the pledged stock, perfected by filing a financing statement and perhaps by possession through the subsidiary lender's agent. The unaffiliated secured party sought summary judgment that its interests in the shares were senior to those of the lender subsidiary and its participants, in part arguing that the participations should be recharacterized as loans. After significant analysis of legal precedent on "true" participation interests and the relevant facts, the court concluded there was not enough evidence to grant summary judgment in the unaffiliated secured party's favor.

8. *Purchase-Money Security Interests*

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

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

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

- *In re Leading Edge Pork, LLC,* 2010 WL 2926155, 72 U.C.C. Rep. Serv. 2d 866 (Bankr. C.D. Ill. 2010) – Emails from purchase money livestock lender that did not contain all information required by UCC § 9-324(d)(4) did not constitute an adequate PMSI notice.

9. *Proceeds*

- *Tsui v. Cheng*, 18203/07, NYLJ 1202471205714 (NY Sup., Aug. 20, 2010) – Where trust and private funds are commingled in a deposit account, there is a presumption that subsequent withdrawals are of the private funds. When the balance falls below the amount of the trust, subsequent deposits are intended to restore the trust funds.

  Comment: U.C.C. § 9-315(b)(2) provides that proceeds (other than goods) that are commingled with other property are identifiable proceeds (in which a security interest will continue as provided in UCC § 9-315(a)) to the extent the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than Article 9 with respect to commingled property of the type involved. *See* U.C.C. § 9-315, Comment 3.

- *Comerica Bank v. Jones*, 2011 WL 4407422 (E.D. Mich. 2011) – A secured party with security interest in all of the debtor's assets, including investment property, had priority in proceeds of the sale of the debtor's stock in a subsidiary over a loan participant that had agreed to subordinate its interest even though the

assets of the subsidiary were not collateral and even though the secured party may have made a representation to that effect.

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

- *In re Young*, 2011 WL 3799245 (Bankr. D.N.M. 2011) – A debtors granted a security interest in its membership interest in an LLC. The court held that distribution on account of the member interests were not "proceeds" of the LLC interests and hence the secured party's security interest in those membership interests did not attach to the withdrawals. The court treated as dispositive the ruling in *In re Hastie*, 2 F.3d 1042 (10th Cir. 1993), without considering subsequent enactment of UCC § 9-102(a)(64)(B), which rejected the holding in *Hastie*.

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

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

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

F. Default and Foreclosure

1. Default

- *Ford Motor Co., LLC v. Heinrich*, 2011 WL 5453316 (Wis. Ct. App. 2011) – A secured party could still bring an action on the secured obligation even though the secured party had previously obtained a judgment and writ of replevin for collateral.

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

- *Buzzell v. Citizens Auto. Finance, Inc.*, 2011 WL 2728299 (D. Minn. 2011) – A secured party that regularly accepted late payments was required to provide the debtor with notification of its intent to repossess vehicle before doing so. The secured party's failure to provide the notice made the repossession wrongful.

- *Wells Fargo Bank v. Main*, 2011 WL 449562 (Wash. Ct. App. 2011) – A debtor in a secured transaction had no valid defense or claim against its secured party for the secured party's decision not to lend an additional amount. The alleged oral promise by the secured party to lend an additional amount was unenforceable under the statute of frauds. Although the promise was not barred by the general statute of frauds as something that could not be performed within one year, it was barred by the credit statute of frauds because it was not primarily for personal, family, or household purposes.

- *Great Western Bank v. Branhan*, 804 N.W.2d 447 (S.D. 2011) – The debtors agreed, after default, to surrender and transfer collateral stock to the secured party and the value of that collateral was used in calculating the amount of a deficiency judgment. As a result, the secured party had become the owner of the collateral and the secured party was entitled to retain processes that arose after the debtors paid the deficiency.

- *General Electric Capital Corp. v. John Carlo, Inc.,* 2010 WL 3937313, 72 U.C.C. Rep. Serv. 2d 1128 (E.D. Mich. 2010) – Pursuant to UCC § 9-601 (and applicable contractual provisions), a secured party could foreclose on collateral *and* pursue a judgment simultaneously.

2. *Repossession of Collateral*

- *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.

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

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

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

- *Pollitt v. DRS Towing, LLC*, 2011 WL 1466378 (D.N.J. 2011) – A car owner stated a claim under a state consumer fraud act against both its secured party and the secured party's repossession agent for refusing to release the car unless the owner paid a $644 fee for repossession and storage costs. The owner had already paid the secured party the stated redemption amount.

- *Whitney National Bank v. Flying Tuna, LLC*, 2011 WL 2669450 (S.D. Ala. 2011) – A secured party that had made a showing of default to which the debtor had not responded was entitled to a preliminary injunction prohibiting the debtor from disposing of any collateral. The secured party was not able to demonstrate the likelihood of irreparable injury necessary for a preliminary

injunction requiring the debtor to provide an inventory of the collateral, to provide an accounting of accounts receivable, or to turn over artwork subject to the security interest.

- *VW Credit, Inc. v. Robertson*, 2011 WL 1642597 (E.D.N.Y. 2011) – A secured party was not entitled to a pre-judgment writ of possession for collateral (a motor vehicle) sold by the debtor. Even though the security interest was noted on the certificate of title for the vehicle, it was not clear from the documents provided whether the secured party had perfected its interest in the vehicle before the buyers took possession pursuant to their purchase agreement.

- *Firestone Financial Corp. v. Maxx Fun, LLC*, 2011 WL 4459388 (M.D. Pa. 2011) – A secured party did not show that it was entitled to an *ex parte*, pre-judgment seizure of the collateral because the claim that the collateral would decrease in value was unsupported. The secured party's assertion that the collateral may be moved outside the jurisdiction was vague and much of the collateral was already outside the jurisdiction. In addition, the secured party had not established the value of the collateral and some of the collateral was in the hands of a non-party.

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

- *Home Savings & Loan Co. of Youngstown, Ohio v. Super Boats & Yachts, LLC* 2011 WL 2447641 (S.D. Fla. 2011) – A secured party with a purchase-money security interest in a vessel perfected by notation on the vessel's certificate of title had neither a maritime lien nor a preferred mortgage. As a result, there was

no federal court jurisdiction over the secured party's effort to replevy the vessel from a buyer.

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

- *Ford Motor Credit Co. v. Ryan*, 939 N.E.2d 891, 72 U.C.C. Rep. Serv. 2d 977 (Ohio Ct. App. 2010) – A reasonable finder of fact could conclude that a breach of peace occurred when a tow truck driver attempted to repossess a car from a debtor's carport and grabbed the hands of and pushed the debtor while shouting threats.

- *In re Bolin & Co., LLC,* 437 B.R. 731, 72 U.C.C. Rep. Serv. 2d 1096 (D. Conn. 2010) – No breach of peace where repossessor was permitted to enter jewelry store, even though record showed store was disheveled after repossession.

3. *Notice of Foreclosure Sale*

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

- *Barclays Bank PLC v. Poynter*, 2011 WL 3794890 (D. Mass. 2011) – Because the Ship Mortgage Act does not preempt state law on enforcement of security interests in vessels, the secured party was permitted to conduct a non-judicial, private sale of the

vessel. As a result, the notification provided by the secured party, which did not state the time and place of the sale, merely the date after which the sale would be conducted, was sufficient.

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

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

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

- *Cappo Management V, Inc. v. Britt*, 711 S.E.2d 209 (Va. 2011) – Automobile seller that repossessed the car subject to a conditional sale contract when the financing fell through was required to give the buyer notification of a resale. Even though

the Supplement to Purchase Contract declared that the car remained property of the dealer pending approval of the lender, other contract documents treated the vehicle as belonging to the buyer and the ambiguity had to be construed against the dealer.

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

- *Kight v. Ford Motor Credit Company, LLC*, 2011 WL 6091230 (Ga. Ct. App. 2011) – A secured party sent a notice of disposition by certified mail to the debtor's address listed in the security agreement. The notification, required by non-uniform state law, of the second party's intent to pursue a deficiency was not sufficient because the debtor had earlier notified the secured party of a change in address.

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

- *DCFS USA, LLC v. District of Columbia*, 2011 WL 3606623 (D.D.C. 2011) – The District of Columbia violated a secured party's constitutional rights by selling an impounded vehicle free and clear of security interest without providing notice of the sale to the secured party, whose predecessor's interest was

noted in the records of the office that had issued a certificate of title for the vehicle.

4. *Commercial Reasonableness of Foreclosure Sale*

   - *Fifth Third Bank v. Miller,* 2011 U.S. Dist. LEXIS 3618 (E.D. Ky. 2011) – The burden to prove the commercial reasonableness of a foreclosure sale is on the secured party. The secured party failed to meet its burden because it provided little or no evidence regarding the conduct of its sale of the collateral, which yielded significantly less than an earlier appraised value. The secured party provided little to no specific information on the method, manner, time, or other terms of its disposition of collateral, no evidence regarding the commercial practices among dealers in horses, and no evidence showing that its actions conformed to these practices.

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

   - *In re Inofin, Inc.*, 455 B.R. 19 (Bankr. D. Mass. 2011) – The foreclosure sale of collateral was not commercially reasonable because: (i) the first and third notifications contained the wrong date and the second was sent only two days before the date of sale; (ii) the secured party's attorney was unaware whether the debtor was in default and did not cause notification of default to be sent to the debtor; (iii) and no effort was made to solicit

bids from individuals or entities in the industry by placing ads in trade publications; there were only two ads in the *Boston Herald.*

- *Southern Developers & Earthmoving, Inc. v. Caterpillar Financial Services Corp.*, 56 so. 3d 56 (Fla. Ct. App. 2011) – A secured party sold collateralized earthmoving equipment through private sales and internet auctions. In a subsequent deficiency action, the secured party provided evidence about the notifications provided to the debtor and the guarantors. The secured party did not provide details about the sales transactions themselves or the practices and methodology of selling used equipment in the industry. The secured party was not entitled to summary judgment after the debtor placed the commercial reasonableness of the dispositions at issue.

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

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

- *People's United Equipment Finance Corp. v. Hartmann*, 2011 WL 3476610 (5th Cir. 2011) – Public sales of collateralized equipment at which the secured party was the only bidder were commercially reasonable because they were conducted in

accordance with industry standards and the sale prices represented, according to various pricing resources, the equipment's fair market value as of the dates of sale.

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

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

the claim that prospective bidders were charged a non-refundable $25,000 fee were inadequate to show that the procedures were rigged in favor of the senior lienor.

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

- *SLT Dealer Group, LTD. v. AmeriCredit Financial Services, Inc.*, 336 S.W.3d 822 (Tex. Ct. App. 2011) – A secured party had no obligation to conduct a disposition in commercially reasonable manner because the secured party did not take possession of and sell the collateral. Instead an unrelated third party foreclosed on a statutory mechanic's lien. The secured party had no obligation to participate in that process to protect its interest in the collateral.

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

- *Patel v. Modi*, 2011 WL 1335189 (Cal. Ct. App. 2011) – Pursuant to both Article 9 and the parties' agreement, the secured party

need not foreclose on the collateral before pursuing the debtors on the secured note.

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

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

   - *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.

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

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

was not seeking to recover a specific asset and had not proven fraud, despite evidence that the debtor had made misrepresentations.

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

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

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

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

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

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

- *Call Center Technologies, Inc. v. Grand Adventures Tour & Travel Publishing Corp.*, 635 F.3d 48 (2d Cir. 2011) – Successor liability of a new corporation that purchased all of the assets of the original debtor at a foreclosure sale as a "mere continuation" of the debtor does not require a continuity of ownership. There were sufficient facts to preclude summary judgment: some of the managers, the majority of employees, the physical location of the business, and most of the services provided were the same, the purchaser assumed at least some of the liabilities of the debtor, and the purchaser was formed for the purpose of acquiring the debtor's assets.

- *NLRB v. Leiferman Enterprises, LLC,* 649 F.3d 873 (8th Cir. 2011) – An entity that purchased debtor's assets free and clear from court-appointed receiver was liable, as a successor-in-interest, for the debtor's unfair labor practices because the purchaser acquired substantial assets of the debtor with knowledge of the pending unfair labor practice charges and continued, without

interruption or substantial change, the debtor's business operation.

- *Ortiz v. Green Bull, Inc.,* 2011 WL 5554522 (E.D.N.Y. 2011) – Tort claimant pled a cause of action based on successor liability against the newly formed entity that, after debtor's default, purchased a secured party's note and security interest, and then entered into a collateral transfer agreement with the debtor pursuant to which it acquired most of the debtor's assets. Although a *de facto* merger requires some continuity of ownership and the tort claimant pled that it lacked knowledge of any such continuity, dismissal was premature because the transactions were confidential and plaintiff was entitled to discovery on the issue.

- *Mamacita, Inc. v. Colborne Acquisition Co.,* 2011 WL 881654 (N.D. Ill. 2011) – A buyer that purchased assets of debtor at a foreclosure sale did not have successor liability under either the *de facto* merger or mere continuation rules because there was no continuity of ownership even though the family that owned the debtor was alleged to be in control of the purchaser after having recruited its business associates to buy the assets. However, judgment creditor did state a fraudulent transfer claim.

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

- *New Century Financial, Inc. v. Olympic Credit Fund, Inc.,* 2011 WL 918380 (S.D. Tex. 2011) – Take-out factor had no claim against prior factor for non-disclosure or misrepresentation in describing the factoring relationship with the debtor as "good" despite the debtor's prior conversion of a check. The payoff

agreement, drafted by the take-out factor, disclaimed any representation or warranty and included a merger clause.

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

- *Wavedivision Holdings, LLC v. Highland Capital Management L.P.*, 2011 WL 5314507 (Del. Super. Ct. 2011) – A putative buyer that contracted to buy debtor's assets had no cause of action against the debtors secured parties for intentional interference with contract for refusing to consent to the sale because the secured parties would not have been paid in full from the sale proceeds.

G. Collection

- *HAM Investments, LLC v. U.S.*, 388 Fed. App. 958 (Fed. Cir. 2010) – Federal government did not waive the requirement under the federal anti- assignment statutes (the Assignment of Claims Act) and related regulations permitting assignment only to a "bank, trust company or other financing institution, including any federal lending agency." The secured party was an investment company and not a financing institution. Accordingly under the federal statute and regulations the secured party could not collect payments due under a government contract directly from the government agency.

  Comment: U.C.C. § 9-406(a)-(c) direct collection rights of a secured party do not override federal law.

- *Davis Forestry Products, Inc. v. Downeast Power Co.*, 12 A.3d 1180 (Me. 2011) – A subsidiary of secured party that purported to acquire debtor's deposit account through a UCC § 9-610

disposition did not have priority over subsequent lien creditor because the secured party never acquired control of the deposit account and the only way to foreclose on a deposit account is through § 9-607 or judicial process, and thus the purported disposition did not divest the debtor of its ownership.

- *Mobile-One Auto Sound, Inc. v. Whitney National Bank,* 2011 WL 5386624 (La. Ct. App. 2011) – A bank was not required to provide borrower with notification of default before debiting the borrower's checking account of funds that the borrower had earmarked for floor plan financiers.

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

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

- *Agri-Best Holdings, LLC v. Atlanta Cattle Exchange, Inc.,* 2011 WL 3325847 (N.D. Ill. 2011) – A secured party that obtained relief from the stay and then notified an account debtor to pay the

secured party directly was the real party in interest in an action against the account debtor that the debtor commenced shortly after filing for bankruptcy and the secured party could be substituted for the debtor.

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

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

- *Maple Trade Finance, Inc. v. Lansing Trade Group, LLC,* 2011 WL 1060961 (D. Kan. 2011) – An account debtor that signed a debtor's invoices acknowledging receipt of the goods was not estopped from denying receipt in an action brought by a secured party that had loaned against the invoices in reliance on the account debtor's acknowledgment. Unless it agrees

otherwise, an account debtor is entitled to raise defenses arising under the contract and estoppel is not an agreement to waive those rights. Even if estoppel were available, the secured party would not be entitled to summary judgment because there was evidence indicating that it had not followed its own procedures.

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

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

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

- *Bank of America v. Trinity Lighting, Inc.,* 2011 WL 3489693 (N.D. Ill. 2011) – An account debtor could had a right, valid against a

buyer of an account, to set off against its account obligation the amounts the debtor owed to the account debtor from other, unrelated transactions and which obligations arose *before* the account debtor received notification of the assignment.

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

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

- *Citywide Banks v. Armijo,* 2011 WL 4837501 (Colo. Ct. App. 2011) – A secured party with a security interest in and possession of a negotiable promissory note secured by a deed of trust could not enforce the obligation of the maker who had paid the note in full to the debtor because the bank had allowed the debtor to service the loan and thus the debtor was the bank's agent.

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

- *Vogel v. Onyx Acceptance Corp.,* 2011 WL 6316014 (Wyo. 2011) – A buyer of chattel paper did not violate the Uniform Consumer Credit Code by charging account debtors for the option of paying by phone or internet because that fee was not incident

to the extension of credit, and thus did not constitute a "credit service charge" within the meaning of the UCCC. The UCCC does not prohibit such an unenumerated fee.

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

- *International Son-Ry's Enterprises, Inc. v. B & T Pools, Inc.,* 2011 WL 5314508 (N.C. Ct. App. 2011) – Because a subordination clause – including standstill requirement – was in the promissory note, the debtor and guarantors had standing to raise the subordination agreement as a defense to an action against them on the note and guarantees.

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

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

- *Symetra Life Insurance Co. v. Rapid Settlements, Ltd.,* 2011 WL 4807901 (S.D. Tex. 2011) – An obligor on structured settlements

had a claim for tortious interference with contractual relations against an assignee of the structured settlement payments that attempted to use arbitration to avoid state statutes requiring court approval of the transfers because the assignee had no colorable argument that arbitration could be used in such a manner.

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

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

H. Retention of collateral

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

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

- *Plainfield Specialty Holdings II Inc. v. Worldwide Water, Inc.,* 2011 WL 1005008 (Wash. Ct. App. 2011) – A receiver could abandon all assets of the debtor that the receiver had not sold – including a claim against the secured party – to the secured party.

- *In re CBGB Holdings, LLC,* 439 B.R. 551 (Bankr. S.D.N.Y. 2010) – The court entered an agreed upon strict foreclosure where default had been acknowledged in a forbearance agreement and the forbearance agreement permitted the secured party to foreclose and retain collateral per UCC § 9-620 if payment was not made by a certain date. UCC § 9-620.

- In March 2011 the Permanent Editorial Board for the UCC published its *Draft Report on UCC Rules Applicable to the Assignment of Mortgage Notes and to the Ownership and Enforcement of those Notes and the Mortgages Securing Them*. The final Report is expected to be published later this year. The draft Report can be accessed at http://extranet.ali.org/directory/files/PEB_Report_on_Mortgage_Notes-Circulation_Draft.pdf

- *Deutsche Bank Trust Co. v. McCoy*, 29 Misc. 3d 1202, 2010 WL 3769220 (N.Y.Sup. 2010) – While the mortgage follows the note, the reverse is not the case.

- *U.S. Bank v. Ibanez,* 941 N.E.2d 40 (Mass. 2011) – Mortgage noteholders were not entitled to enforce the mortgages non-judicially because they failed to prove that they had received an assignment of the mortgages. Under Massachusetts common law, assignment of a mortgage note does not automatically carry with it an assignment of the mortgage.

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

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

- *Bloomfield State Bank v. United States,* 644 F.3d 521 (7th Cir. 2011) – Mortgagee's interest in rents collected by court-appointed receiver

after a notice of federal tax lien had been filed had priority in the rents because the rents were proceeds of the underlying real property.

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

- *First Nat'l Bank of Omaha v. Anxon, Inc.,* 2010 U.S. Dist. LEXIS 114003 (D. Minn. 2010) – An alleged oral agreement by a lender to accept a deed in lieu instead of a repayment did not satisfy the statute of frauds. This lender could not be forced to accept property in lieu of repayment.

III. GUARANTIES

A. *Existence and Formation*

- *The Development Acquisition Group, LLC v. eaConsulting, Inc.* (March 8, 2011, No. 2:08-cv-03008-MCE-JFM) 2011 U.S. Dist. LEXIS 23473 – An individual shareholder's pledge of stock to secure a loan to a corporation was equivalent to a personal guaranty and therefore the loan transaction was not exempt from the usury laws: "The foregoing exemption does not apply to loans made or guaranteed by individuals, a revocable trust having one or more individuals as trustors, or partnerships in which, at the time of issuance, one or more individuals are general partners," (California Corp C § 25118(e)(1)).

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

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

- *Stokes v. Southern States Co-op., Inc.,* 651 F.3d 911 (8th Cir. 2011) – A creditor with a guaranteed note could not have an objectively reasonable belief that it could allow a related entity to intercept the debtor's payments by check and credit them to an unguaranteed

note. Thus the creditor could be liable for malicious prosecution for its unsuccessful action against the guarantor.

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

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

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

- *GECC v. Delaware Machinery & Tool Co.,* Inc., 2011 WL 1899203 (S.D. Ind. 2011) – A guarantor of equipment leases did not have a fraudulent inducement defense based on the lessor's representation that the lease agreement would be treated as a lease, not as a secured sale. Fraudulent inducement cannot be based on the legal effect of an agreement. The guarantor also had no defense based on the lessor's failure to perfect the disguised security interest because the guaranty agreement expressly stated that the guaranty obligation would be unaffected by a failure to perfect a security interest.

- *U.S. Federal Credit Union v. Stars & Strikes,* LLC, 2011 WL 1466383 (Minn. Ct. App. 2011) – Individuals who guaranteed existing and future debt of an LLC that they owned were liable for debts

incurred by LLC while under the control of a court-appointed receiver.

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

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

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

- *Textron Financial Corp. v. Ship and Sail, Inc.,* 2011 WL 344134 (D.R.I. 2011) – A jury waiver clause in a loan agreement was not binding on the guarantors of the loan, whose guaranties did not contain a waiver.

- *Groth Family Limited Partnership v. TD Bank,* 2011 WL 6268423 (Conn. Super. Ct. 2011) – Guarantors who signed a guaranty when the loan agreement was executed were bound by a waiver of the

right to a jury trial contained in loan agreement but not included in guaranty.

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

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

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

- *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.,* 939 N.E.2d 487 (Ill. 2010) – The party at issue was a "guarantor" and not a "surety" and thus the protections of the Illinois Sureties Act did not apply.

B. Scope

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

- *JPMorgan Chase Bank, N.A. v. Safeco Ins. Co. of Am. (*In re *Commercial Money Center, Inc.)*, No. 1-02CV16000, 2011 U.S. Dist. LEXIS 91179 (N.D. Ohio Aug. 16, 2011) –In a financial guarantee structure, the original lessee, not subsequent assignees nor their lenders, were intended obligees on the guarantees.

C. Discharge

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

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

- *Kudler v. Ingber*, 9 Misc.3d 1223, 920 N.Y.S.2d 242, 2010 WL 4630273 (N.Y.Sup. 2010) – A judgment creditor challenged a husband's transfer of assets to his wife as a fraudulent conveyance under New York's fraudulent conveyance statute. The court concluded that while the creditor failed to show actual or constructive fraud, the conveyances were fraudulent. The transfers occurred after the creditor began legal proceedings against the husband and the wife failed to show that the conveyances were for fair consideration. Under NY law no showing of insolvency was required as long as the judgment was unpaid.

- *Parker v. Handy (In re Handy)*, 624 F.3d 19 (1st Cir. 2010) – A creditor of a debtor's ex-husband commenced suit against the debtor to avoid a fraudulent transfer. The creditor did not obtain a judgment or an attachment before the debtor filed for bankruptcy relief. The court held that the creditor's constructive trust claim was only for a remedial device, not a cause of action. Thus, without a valid attachment on the fraudulently transferred property, the creditor could not pursue the claim after bankruptcy.

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

- *Perkins v. Haines*, 661 F.3d 623 (11th Cir. 2011) – Payments to investors by a debtor who ran a Ponzi scheme are necessarily made with fraudulent intent. However, the investors are entitled to a good faith defense and, for that purpose, the investors gave value in exchange for the transfer by implicitly relinquishing their

claims for restitution or fraud, even though the investment was structured as equity, not debt. Thus, the investors were protected to the extent that the payment returned their initial investment but were not protected to the extent that the payment represented fictitious profits from the scheme.

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

- *In re TOUSA, Inc.*, 444 B.R. 613 (S.D. Fla. 2011) – Lenders that shortly before bankruptcy received the proceeds of a new loan secured by subsidiaries' assets did not have fraudulent transfer liability for the funds received. The funds were not property of the subsidiaries and were not controlled by the subsidiaries, even though the subsidiaries were co-borrowers. Moreover, the subsidiaries received reasonably equivalent value in indirect benefits: the opportunity to avoid default and bankruptcy.

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

- *In re Creative Capital Leasing Group, LLC*, 2011 WL 1042666 (Bankr. S.D. Cal. 2011) – Funds paid by LLC on credit cards issued to its sole member were avoidable transfers for less than reasonably equivalent value because even though the member deposited

funds borrowed on the cards in the LLC's bank accounts, those deposits were capital contributions, not loans, and thus the LLC was never liable for the credit card debt.

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

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

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

V. LENDER AND BORROWER LIABILITY

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

- *NML Capital v. Banco Central de la Republica Argentina*, 414 Fed. Appx. 514 (2d Cir. 2011) – Funds in an account of the Central Bank of Argentina could not be attached under FSIA. The funds were held at the Federal Reserve Bank of New York. FSIA provides rules for the "attachment, arrest and execution of foreign state property". The court held that in this case, the funds were those of the Central Bank – not the government of Argentina that had defaulted on bonds. The court rejected suggestions that the level of independence of the central bank from the government should determine whether the funds were subject to attachment.

- *TCF National Bank v. Bernanke,* 643 F.3d 1158 (8th Cir. 2011) – Rejecting an attempt to enjoin enforcement of Dodd-Frank's limits on interchange fees for processing debit card transactions (the "Durbin Amendment") because the plaintiff was unlikely to prevail on a claim that the provision was unconstitutional.

- *People's United Bank v. Wetherill Associates*, 2011 WL 383740 (Conn. Super. Ct. 2011) – Directors of a corporation do not owe creditors a fiduciary duty, regardless of the corporation's solvency. Thus, a supplier had no cause of action against a secured party that allegedly took control of the debtor for either breach of fiduciary duty or aiding and abetting such a breach. The supplier had no claim against secured party for equitable subordination because such a claim is restricted to bankruptcy proceedings. However, the supplier had pled a claim for tortious interference with business relations by alleging that the secured party interfered with the supplier's relations with the debtor when the secured party took control of the debtor and refused to pay the supplier what it was owed. Creditor also pled a claim for failing to conduct a commercially reasonable disposition due to the secured party's

haste in conducting the sale. The supplier's claim that the sale was an avoidable transfer for less than reasonably equivalent value would not be stricken because whether sale was non-collusive - and therefore immune for avoidance - is a question of fact not appropriate to resolve on a motion to strike.

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

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

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

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

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

- *In re National Century Financial Enterprises, Inc.*, 783 F. Supp. 2d 1003 (S.D. Ohio 2011) – An investment bank that assisted a debtor and its special purpose subsidiaries in fraudulently marketing investment grade notes could not be liable to a trust that succeeded to the debtor's causes of action because the fraud of the debtor's principals, who controlled the debtor, was chargeable to the debtor and therefore the debtor was *in pari delicto* with the investment bank. Prepetition payments to the investment bank were not avoidable preferences or fraudulent transfers because the investment bank was fully secured.

- *Finn v. Centier Bank*, 2011 WL 4036107 (N.D. Ind. 2011) – A bank that purchased an entire loan from originator who was engaged in a Ponzi scheme. The originator oversold participations and, as servicer, paid off earlier investors with funds received from later investors. The bank was not liable to disgorge payments subsequently received because the loan was real, the borrower paid the debt to the originator, and the originator held those funds in trust for the bank. The fact that the originator had commingled the funds with other monies before paying the bank was immaterial.

- *Costello v. Grundon*, 2011 U.S. App. LEXIS 13129 (7th Cir. 2011) – Employees who borrowed money to buy an employer's shares pursuant to an employer–guaranteed plan could allege violations of Regulations U and G (providing limits on loans secured by shares) as affirmative defenses to repayment.

- *Auto. Fin. Corp. V. Joliet Motors, Inc.,* 2011 U.S. Dist. LEXIS 1067 (N.D. Ill. 2011) – The court pierced veil under Illinois law where personal and corporate assets and liabilities were intertwined. The court found that a failure to pierce the corporate veil would promote fraud, injustice or inequity.

- *Harris N.A. v. Acadia Invs. L.C.,* 2010 U.S. Dist. LEXIS 121565 (N.D. Ill. 2010) – The Illinois Credit Agreement Act precluded an oral agreement to create credit documents, even though some loan funds allegedly were used by hedge fund members for personal expenses.

B. Obligations Under Corporate Laws

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

- *Sanders v. Ohmite Holding, LLC*, 17 A.3d 1186 (Del. Ch. Ct. 2011) – A creditor had a security interest in 7.75% of membership units in LLC and later received a complete assignment of those units and became a member. The creditor subsequently discovered that the units have been diluted to 0.000775% of the total units. The credit was entitled to inspect the books and records of the LLC for the period in which the dilution occurred. Nothing in the LLC

agreement restricted members' rights to inspect records, the creditor had a proper motive – investigating a possible breach of the duty of loyalty – and members were not limited to inspecting books and records solely for the period in which they were members.

- *Kirzhner v. Silverstein*, 2011 WL 4382560 (D. Colo. 2011) – A state statute that provided that corporate officers and directors "shall not have any fiduciary duty to any creditor of the corporation arising only from the status as a creditor" was not so clear as to abrogate a common-law rule that officers and directors do have a fiduciary obligation to creditors when the corporation is insolvent.

- *Alcorn, Ltd. V. Smeding,* 53 Bankr. Ct. Dec. 223 (9th Cir. 2010) – California law does not recognize a general *alter ego* theory in which a shareholder is liable for the debts of a corporation.

C. *Borrower Liability*

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

D. *Disputes Among Creditors and Intercreditor Issuer*

- *American Bank of St. Paul v. TD Bank*, 2011 WL 1810643 (D. Minn. 2011) – A bank that learned of borrower's insolvency and fraud through its own investigation, and not through its relationship with the borrower, had no duty to disclose that information to syndicate formed to provide take-out financing. By releasing its security interest in shares of stock so that the syndicate would have senior interest, the bank did not represent that the stock had value. However, the bank may have aided and abetted the

borrower's fraud by releasing its security interest and purchasing a share of the take-out loan to enable the takeout loan to close when it knew of the borrower's fraud.

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

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

- *ZBD Constructors, Inc. v. Billings Generation, Inc.*, 2011 WL 1327144 (S.D.N.Y. 2011) – A subordinated creditor could not bring a declaratory judgment action against the debtor to determine the amount of interest owing on the subordinated loan because the intercreditor agreement required the subordinated creditor to obtain the consent of the senior lenders before commencing any action relating to the subordinated debt and compliance with this condition was not rendered impossible – merely difficult and

expensive – by the fact that the senior debt had been resold to thousands of bondholders all over the world.

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

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

A. Scope

1. General

2. Software and Other Intangibles

- *The Compliance Source, Inc. v. Green Point Mortgage Funding, Inc.*, 624 F.3d 252 (5th Cir. 2010) – A lender who permitted its outside attorneys to use licensed software for financing forms violated the lender's license agreement with the owner of the software.

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

1. General

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

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

2. *Battle of the Forms*

- *CFN, Inc. v. Drake Petroleum Co., Inc.*, 2010 R.I. Super. LEXIS 141 (Silverstein, J.) – A gas station and fuel distributor entered into a contract to develop the gas station. The agreement provided, among other things, for a $40,000.00 advance for "re-imaging" the station. The gas station granted a mortgage and security interest to secure its obligations under the contract. The re-imaging project ran over budget. Later, the distributor prepared an amendment to the contract that would make the gas station liable for the overruns, but the gas station never signed it. Eventually, the gas station terminated the contract and paid all amounts due except the cost overruns. The distributor sought to foreclose to recover the overruns. The court held that, under R.I.G.L.§ 6A-2-202, the parol evidence rule prevented the distributor from introducing evidence that the gas station was responsible for the cost overruns. The Statute of Frauds in R.I.G.L.§ 6A-2-201 rendered the amendment ineffective. The court granted the distributor's claim for unjust enrichment for the cost overruns and ordered the gas station to pay them as an unsecured claim. See also under "Real Property Secured Transactions" (above).

C. *Warranties and Products Liability*

1. *Warranties*

2. *Limitation of Liability*

- *Hartford Fire Insurance Co. v. Roadtec, Inc.*, 2010 WL 4967979 (S.D.N.Y. 2010) – Manufacturer/seller of equipment did not effectively disclaim the implied warranty of merchantability under U.C.C. § 2-316. A warranty (containing limitations and disclaimers) was contained only in manuals that were "hundreds of pages long" and delivered with the equipment. The disclaimer therefore was not timely (it did not appear in the agreement that both parties signed, but only in the manuals

delivered after the contract was formed and therefore was not part of the agreement under U.C.C. § 2-207; see also OC 4 to 2-207)) and was not conspicuous as required by U.C.C. § 2-316 (and as defined in Former U.C.C. § 1-201(10)). Printing the disclaimer at the end of the manuals was not an "eye catching location" that commands "the attention of the non-drafting party." The court also found that the buyer had not waived the implied warranty of merchantability through its conduct. While U.C.C. § 2-316 provides that an implied warranty can be excluded or modified by course of dealing or course of performance, the buyer's request for replacement parts did not indicate an acquiescence in or even an awareness of the disclaimers of implied warranties.

3. "Economic Loss" Doctrine

D. Performance, Breach and Damages

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

E. Personal Property Leasing

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

inappropriate in this case because the lessor/beneficiary was not unjustly enriched.

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

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

- *Vreeland v. Ferrer*, 71 so. 3d 70 (Fla. 2011) – 49 U.S.C. § 44112, which insulates lessors and lienors from vicarious liability for personal injury property loss on land or water resulting from the crash of an aircraft, preempts state law only to the extent the injury occurred to a person or property on the ground or water, not to passengers on the plane.

- *Lyon Fin. Servs., Inc., v. Shyam L. Diahya, M.D., Inc.,* 71 U.C.C. Rep. Serv. 2d 257 (D. Minn. 2010) – Exploring criteria for finance lease and stating that in an Article 2A finance lease that contains a "hell or high water" provision, the lessee is responsible for making all payments under the lease, regardless of any claim the lessee may have against lessor or the equipment.

- *Leaf Fin. Corp. v. ACS Servs., Inc.,* 71 U.C.C. Rep. Serv. 2d 698 (Del. Super. Ct. 2010) – Concluding transaction was finance lease.

VII. COMMERCIAL PAPER AND ELECTRONIC FUNDS TRANSFERS

A. Negotiable Instruments and Holder in Due Course

- *Mayo v. GMAC Mortgage, LLC,* 2011 U.S. Dist. LEXIS 3349 (W.D. Mo. 2011) – Concluding mortgage notes are promissory notes and thus a negotiable instrument governed by the UCC without discussing negotiability criteria.

- *In re Veal,* 449 B.R. 542 (9th Cir. B.A.P. 2011) (A recent decision by the Bankruptcy Appellate Panel of the Ninth Circuit U.S. Court of Appeals addresses lingering questions regarding transfers of mortgages and accompanying mortgage notes and which parties are entitled to enforce mortgages and mortgage notes. Appears to be the first case to cite a pending PEB Comment on UCC issues relating to mortgage notes).

- *Correia v. Deutsche Bank Nat'l Tr. Co. (In re Correia)*, 2011 Bankr. LEXIS 2461 (Bankr. 1st Cir.) – The assignee of the original mortgage holder foreclosed on the mortgage. The mortgagors sued to set aside the foreclosure, because the assignee and servicer had not complied with the pooling and service agreement ("PSA") governing the mortgage. The court held that the mortgagors had no standing to sue, because they were not parties to the PSA. The court also held without explanation that the mortgagors were not third-party beneficiaries to the PSA.

- *Porter v. First NLC Financial Serv., LLC*, 2011 R.I. Super. LEXIS 45 (Rubine, J.) – A mortgagor's declaratory judgment action, challenging the validity of a foreclosure sale, failed because the unambiguous language of the mortgage specifically granted the mortgagee, who was also the lender's nominee, the statutory power of sale, and R.I.G.L.§ 34-11-22 allowed the mortgagee to exercise the power of sale in the mortgage. The Court followed Justice Silverstein's rationale in *Bucci v. Lehman Bros. Bank*, 2009 WL 3328373 (R.I. 2009). Similar to the case in *Bucci*, here the plain

language of the Mortgage, signed by Plaintiff as Mortgagor, authorizes MERS to exercise the statutory power of sale contained in the recorded mortgage instrument. Plaintiff undisputedly borrowed the funds to buy her home, arranged for the home to serve as security for the Note, and subsequently defaulted by her nonpayment under the Note. No holding of the Court should invalidate the foreclosure, which Plaintiff agreed would ultimately be the consequence of nonpayment of the mortgage loan.

- *Payette v. Mortgage Electronic Registration Systems*, 2011 R.I. Super. LEXIS 117 (Rubine, J.) – In 2006, Plaintiffs executed a promissory note in favor of IndyMac Bank, FSB and also executed a mortgage on Warwick property to secure payment of the Note, naming IndyMac as the lender and MERS as the mortgagee and as nominee of IndyMac and IndyMac's successors and assigns. In 2008, the Office of Thrift Supervision closed IndyMac and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver for IndyMac. FDIC reorganized IndyMac into a new entity it named IndyMac Federal, and transferred all of IndyMac's assets to IndyMac Federal. FDIC, acting as receiver for IndyMac Federal, transferred the rights associated with the Note to OneWest Bank, FSB. In *Porter vs. First NCL Financial Services,* decided earlier in the year (referenced above), the Court had adopted the Superior Court's rulings and reasoning in *Bucci v. Lehman Bros. Bank, No. PC-2009-3888, 2009 R.I. Super. LEXIS 110*. Both Porter and Bucci concerned the propriety of foreclosure sales conducted by MERS, one of the Defendants in this case. This case presents many of the same facts critical to the analyses in those cases. Thus, to the extent that this case presented similar facts implicating the same legal issues, the Court followed Porter and Bucci. The Court found that the undisputed exhibits demonstrate a chain of title to the mortgage that is consistent with the right of OneWest ultimately to conduct the mortgage sale. Pursuant to Porter and Bucci, the Court found that the assignment here was sound as a matter of law. The Court paused to address a factual distinction presented in this case that Plaintiffs argue compelled

the Court to deviate from the rulings in Porter and Bucci. Porter and Bucci concerned foreclosures conducted by MERS, the lender's original nominee and mortgage assignee. Here, the original lender, IndyMac, assigned the Mortgage to MERS and MERS then assigned its nominee status and mortgagee interest to OneWest, the foreclosing party. The Court was not convinced that this fact made any a difference in its analysis. Plaintiffs agreed by signing the Mortgage to "mortgage, grant, and convey [the property] to MERS . . . and to the successors and assigns of MERS." Plaintiffs further contend that IndyMac's initial assignment of the Mortgage to MERS disconnected the Note and Mortgage, leaving both obligations invalid at their inception. The Court disagreed. The analyses in both Porter and Bucci found that an assignment of the mortgage to MERS did not fatally disconnect the Note and Mortgage. Courts in other jurisdictions have squarely addressed this contention, and have found that no disconnection occurs.

- *Ameriquest Mortgage Co. v. Nosek (In re Nosek)*, 609 F.3d 6 (1st Cir. 2010) – The debtor obtained a mortgage loan from Ameriquest. Ameriquest later assigned the mortgage to Norwest Bank, but agreed to continue servicing the loan. In the debtor's bankruptcy case, Ameriquest filed a proof of claim in its own name and moved for relief from the automatic stay. Ameriquest's motion asserted that it was the holder of the mortgage. The debtor sued Ameriquest for mishandling the accounting on her loan. Although the claim was ultimately dismissed, while the debtor's judgment against Ameriquest was still in effect, Ameriquest asserted that it was not the mortgage holder. The bankruptcy court assessed $250,000.00 in sanctions against Ameriquest under FED. R. BANKR. P. 9011; and FED. R. CIV. P. 11. The First Circuit reduced the sanction to $5,000.00, because there was no substantial evidence that Ameriquest made deliberately false statements or tried to mislead the court or the debtor, and because the debtor suffered no prejudice from Ameriquest's statements.

- *Perry v. Blum*, 629 F.3d 1 (1st Cir. 2010) – The original holder of a promissory note went into bankruptcy and disclosed in his bankruptcy that the outstanding balance on the note as $X. The note was later assigned to another party, and the assignee asserted a substantially higher outstanding balance. The maker of the note claimed that the assignee was judicially estopped from asserting the higher balance, based on the original note holder's statement. Judicial estoppel generally applies if (1) a party's earlier and later positions are clearly inconsistent, (2) the party succeeded in persuading a court to accept the earlier position, and (3) the party seeking to assert the inconsistent position must stand to derive an unfair advantage if the court accepts the new position. The maker never proved that the bankruptcy court accepted the original holder's representation of the balance due. Therefore, the court never reached the question whether judicial estoppel argument was a "personal" defense or a "real" defense under UCC § 3-305. The court also upheld the trial court's equitable accounting of the rents on the subject properties. "In performing an equitable accounting, the district court is not a mere scrivener, charged with carrying out a ministerial task. Instead, the court is charged with tempering arithmetic with equity, or, . . . 'bring[ing] the scales into balance.'" (Internal citation omitted).

- *RBS Citizens Bank, N.A. v. Issler*, No. 2009-356-Appeal., SUPREME COURT OF RHODE ISLAND, 21 A.3d 293; 2011 R.I. LEXIS 78, June 16, 2011 - When a wife and her estranged husband were both signatories on a joint personal bank account, the bank had a right to use funds in that account to set off the husband's debt, even though the funds in the account derived solely from the wife; and even through the signature card's "Agreement" section indicated that the bank only had that right to set off funds in that account upon the death of any account owner, but did not specifically mention the banks right to set off "in praesenti". Fact that this was joint account with right of survivorship gave Bank all the rights it needed for the set off.

- *McManus v. McManus*, No. 2009-191-Appeal., SUPREME COURT OF RHODE ISLAND, 18 A.3d 550; 2011 R.I. LEXIS 55, May 10, 2011 - Where trustee and settlor of an inter vivos trust opened joint bank account, fact that neither the signature cards nor any signed customer agreement provided the right of survivorship was conclusive evidence of the intent not to transfer an ownership right to the survivor; therefore, the account did not pass by right of survivorship to the trustee and became an asset of the trust after settlor's death.

- *Creative Ventures, LLC v. Jim Ward & Assocs.*, (2010) 195 CA. 4th 1430, 2011 Cal. App. LEXIS 666 – Certain types of loan transactions are exempt from California usury laws, including loans arranged by a person licensed as a real estate broker and secured, directly or collaterally, by liens on real property (Cal. Const. art. XV and Cal. Civ. Code § 1916.1). It is crucial that the person or entity "arranging" the exempt loan is properly licensed with the relevant licensing board.

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

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

- *1/2 Price Checks Cashed v. United Automobile Insurance Co.*, 344 S.W.3d 378 (Tex. 2011) – Because a check is a contract, holder of dishonored check that successfully sued the drawer is entitled to

attorney's fees under state statute allowing a claimant to recover attorney fees in a suit on a contract; the statute does not conflict with Article 3.

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

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

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

- *Mayo v. GMAC Mortgage, LLC,* 2011 U.S. Dist. LEXIS 3349 (W.D. Mo. 2011) – Mortgage notes are promissory notes and thus a negotiable instrument governed by the UCC without discussing negotiability criteria.

- *3525 North Reta Inc. v. FDIC*, 2011 U.S. Dist. LEXIS 1879 (N.D. Ill. 2011) – Upholding under Illinois law an interest rate provision in a commercial loan agreements that was pegged to the lender bank's base lending rate. The fact that the rate varied by customer and was not based on a specific index did not render the interest rate too indefinite to enforce a violation of the Illinois Interest Act or common law. *In re Veal*, 449 B.R. 542 (9th Cir. B.A.P. 2011) – Addresses questions regarding transfers of mortgage notes and related mortgages and which parties are entitled to enforce mortgages and mortgage notes. The court cites the PEB Commentary on UCC issues relating to mortgage notes.

B. Electronic Funds Transfer

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

A. Letters of Credit

- *CRM Collateral II, Inc. v. Tri-County Metropolitan Transportation District,* 715 F.Supp.2d 1143 (D.Or. 2010) -- Account party was a surety whose obligations were discharged by an amendment of the underlying transaction to which the surety had not consented. While beneficiary's draw on the letter of credit did not violate warranties made to the issuer and beneficiary as to the absence of material fraud under U.C.C. § 5-109, it did violate the warranty under U.C.C. § 5-110 that the draw request did not violate any agreement. While the court had refused to enjoin the beneficiary's draw on the letter of credit in an earlier proceeding, that did not prevent the beneficiary from seeking repayment of the funds after the draw.

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

B. Investment Securities

- *Chase Investment Services Corp. v. Law Offices of Jon Divens*, 748 F.Supp.2d 1145 (C.D. Cal. 2010) – There were competing claims to securities (CMOs) held in a brokerage account and the securities intermediary filed an interpleader action. Divens had opened the account (*i.e.* was the entitlement holder). Divens argued that as the entitlement holder it had the right to receive and retain the interest paid on the CMOs and that Divens took its interest in the CMOs free of the other parties' claims under U.C.C. § 8-502. Since Divens was acting as an agent/trustee for other parties, the fact

that it was the entitlement holder did not insulate it from its obligations to turn payments on the CMOs over to the beneficial owners. The court analyzed the U.C.C. § 8-502 arguments and found that (i) the beneficial owners had an adverse claim (*i.e.* a property interest, not a breach of contract claim) of which Divens had notice and (ii) Divens had not given value. Accordingly, Divens did not qualify for the free of claims protection in U.C.C. § 8-502.

Comment: The court does a nice analysis of what giving value means and concludes that even if Divens had provided services to the beneficial owners, that was not a bargained for value in exchange for a transfer of an interest in the securities for purposes of U.C.C. § 8-502.

- *Guthartz v. Park Centre West Corp.*, 409 Fed. App. 248 (11th Cir. 2010) (unpublished opinion) – Even if stock powers for shares of ownership in three companies could have conveyed ownership of uncertificated share under Article 8 of the UCC, the mother that signed them held the shares as a tenant by the entireties and could not unilaterally convey the shares.

- *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.

- *In re Estate of Charles Galen Rider,* 2011 S.C.App. LEXIS 164 (S.C. Ct. App. 2011) (Entitlement orders with respect to securities account given, but not executed, prior to entitlement holder's death, could not be executed under 8-102(a)(8). The principles in 8-107(a) and (e) that an entitlement order is "effective" if made by an "appropriate person", that "effectiveness" is determined as of the date the entitlement order is made and that later circumstances do not cause the entitlement order to become ineffective cannot overcome general agency concepts that would terminate an agent's ability to act after a person's death).

- *In re Estate of Charles Galen Rider*, 2011 S.C.App. LEXIS 164 (S.C. Ct. App. 2011) – Entitlement orders with respect to securities account given, but not executed, prior to entitlement holder's death, could not be executed under UCC § 8-102(a)(8). The principles in UCC § 8-107(a) and (e) that an entitlement order is "effective" if made by an "appropriate person", that "effectiveness" is determined as of the date the entitlement order is made and that later circumstances do not cause the entitlement order to become ineffective did not overcome general agency concepts that would terminate an agent's ability to act after a person's death.

- *Smith v. Powder Mountain, LLC*, 2011 U.S. Dist. LEXIS 64650 (S.D. Fl. 2011) – An "agreement" is required for control over a securities account pursuant to UCC§ 8-106(d)(2). While that agreement may be less than a formal written contract, there must be evidence of some meeting of the minds. Evidence of a general willingness of the securities intermediary to acquiesce in the secured party's orders, or evidence of past acquiescence, is insufficient for control.

IX. CONTRACTS

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

- *Jack Henry & Associates, Inc. v. BSC, Inc.*, 753 F.Supp.2d 665 (E.D. Ky. 2010) – While it is possible to contract for a higher rate of post-judgment interest than that specified in federal statute, the language of the agreement was not sufficient to do so. A provision that "amounts outstanding after the due date are subject to an interest charge to date of payment at the lesser of 18% per annum or the highest legally allowable rate" was not a clear and unequivocal agreement as to a post-judgment rate of interest higher than the 0.22% then provided for by the applicable federal statute.

- *Teachers Insurance and Annuity Association of America v. CRIIMI MAE Services LP*, 681 F.Supp.2d 501 (S.D.N.Y. 2010) – Indenture provided that security holders could not institute any suit, action or proceeding in equity or at law upon or under or with respect to the agreement unless (ii)trustee was given written notice of default, (ii) holders of securities representing at least 25% of each affected class of certificates made request to the trustee to institute such action as trustee and offered indemnification, and (iii) the trustee had not acted within 30 days. The reference to "each affected class" in a securitization (with multiple classes of securities) created uncertainty as to the identity of the security holders required to act and would require factual finding. The court excluded from the required vote classes held by the parent of the servicer whose actions were alleged to be in breach of the indenture. The court also held that the fact that a class that might have been affected (but did not direct the trustee as required by the "no action" provision of the indenture) was repaid in full after the action was brought did not alter the requirement of the indenture that

applied at the time the plaintiff class brought its suit against the servicer.

- *Naldi v. Grunberg*, 2010 WL 3855189, 2010 N.Y. Slip Op. 07079 (NY App. Div. Oct. 5, 2010) – Email exchange can satisfy the requirements of the statute of frauds and create an enforceable contract (in this case relating to a right of first refusals with respect to real property). Records of electronic communications and electronic signatures satisfied the requirements of the New York statute (NY GOL § 5-703) that there be a writing subscribed by the party to be charged or agent with apparent authority to act. In this case, however, the court found that there was no contract because there was no meeting of the minds between the parties as to the material terms of the transaction – the plaintiff's email acceptance did not comply with the terms of the defendants' email offer. The court did not address whether the defendant's broker had authority to bind the defendant because it had determined no contract was formed.

- *Intertex Trading Corp. v. Ixtaccihuatl S.A.*, 754 F.Supp. 2d 610 (S.D.N.Y. 2010) – While commission agreement was not rendered void by the statute of frauds as a contract incapable of performance within one year of formation, it was rendered void by provisions of New York statute of frauds applicable to contracts providing compensation for services rendered in negotiating exchange of business opportunities (NY GOL § 5-701).

- *Arfa v. Zamir*, 76 A.D.3d 56, 905 N.Y.S.2d 77 (NY App. Div. 2010) – Plaintiff did not reasonably rely on defendant's representations and warranties and did not make further inquiry or add appropriate language to their agreement for their protection. The agreement had been the result of arms length negotiation between sophisticated parties who were already in an adversarial position. The plaintiff's did not allege

that defendant had impeded plaintiff's ability to investigate the accuracy of the relevant representations, plaintiffs did not ask for any documentation, relevant information was a matter of public record and plaintiffs had already received "hints of falsity" that should have placed them on guard.

- *Casano v. New 19 West LLC*, 29 Misc.3d 1223, 920 N.Y.S.2d 240, 2010 WL 4630269 (NY Sup. 2010) – Contract contained both an integration clause and a disclaimer of reliance on information other than representations and warranties contained in contract. Party claiming reliance on statements made prior to the contract, which contained disclaimers and were not covered by representations and warranties contained in contract, had no fraud defense to his failure to close the transaction.

- *Torres v. D'Alesso,* 2010 N.Y. Slip. Op. 07127, 2010 WL 3909984 (NY App. Div. 2010) – Real estate sales agreement contained an integration clause. Buyer claimed an oral condition precedent to the contract had not been fulfilled and buyer was not bound. Restatement (Second) of Contracts § 217 provides that when parties orally agree that performance of an agreement is subject to the occurrence of an oral condition, the agreement is not integrated with respect to that condition; the integration clause is of no effect unless the contact is in effect, and there is no contract until the condition precedent is satisfied. The court ruled that the alleged unfulfilled oral condition could not be used to avoid the agreement in this case because (i) this was a contract for the sale of real estate (so required to be in writing under the statute of frauds and distinguishable from other New York cases), (ii) the purported oral condition contradicted the merger clause and was of a type that normally would be included in such an agreement, and (iii) since conditions precedent are disfavored, the necessary intent to create the condition was not apparent from the language used by the buyer.

- *10 Ellicott Square Corp. v. Mountain Valley Indemnity Co.*, No. 10-1799, 2010 WL 5295420 (2d. Cir. Dec. 28, 2010) – Condition precedent not fulfilled, therefore no obligation of insurer to provide defense or coverage under a liability policy.

- *Gotham Partners, L.P. v. High River Limited Partnership*, 76 A.D.3d 203, 906 N.Y.S.2d 205 (N.Y. App. Div. 2010) – Indemnification language in contract covered only third party claims and not a dispute (or related attorney's fees) between the parties to the contract. Because payment of other party's attorney's fees is not the norm under U.S. law, the provision in the contract must unequivocally be meant to cover claims between the contracting parties rather than third party claims.

- *Goshawk Dedicated Limited v. Bank of New York,* 2010 WL 1029547 (S.D.N.Y. 2010) -- A very detailed case on New York law on determining whether an indemnification provision extends beyond third party claims (and related drafting pitfalls). The decision addresses issues including (i) who is a third party (in this case parties to related contracts, but not to the contract where the indemnity was provided, were not "strangers to the transaction" and therefore not third parties), (ii) whether the language clearly contemplated that claims of parties to the contract would be covered (including language such as duty to notify of claims and assume defense, which the court will view as indicia of intent to limit to third party claims) and (iii) whether third party claims were possible at the time the contract was entered into (e.g. an escrow agreement involving only the parties to the escrow might lead to interpretation of broad general language to cover the escrow agent's rights against another party to the escrow agreement)

- *Arcelormittal Cleveland, Inc. v. Jewell Coke Co.*, 750 F. Supp.2d 839 (N.D. Ohio) – Purchaser sought reformation of mistake in long term contrast for supply of coke, arguing that numerator and

denominator in a formula were reversed resulting in a premium rather than discounted price. . The court discussed the doctrines of mutual mistake (including scrivener's error) and unilateral mistake as grounds for recission or reformation of contract. While a unilateral mistake is not usually a basis for reformation of a contract, where it occurred due to a drafting error by one party and the other party knew of the error and took advantage of it, the court may reform the contract.

- *Peter Lampack Agency Inc. v. Grimes*, 29 Misc.3d 1208(a), 2010 WL 3960602 (N.Y. Sup. Ct. 2010) – Merely declaring an agency (including a power of attorney) irrevocable has no effect in the absence of a coupled interest. Merely asserting the existence of an agency coupled with an interest will not overcome the presumption that an agency relationship may be terminated at any time. An agent can gain an interest in the subject matter of the agency relationship by obtaining a security interest in the property or by becoming a part owner of it. Having a right to payment of commissions based on future third–party payments or the right to reimbursement of expenses from those payments was not sufficient.

- *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.

- Two recent decisions apply interpretive rules that might affect the interpretive process in some of *HSBC Bank USA v. Bank of New York Mellon*, 646 F.3d 90 (1st Cir. 2011) – The court

interpreted an intercreditor agreement to determine whether the junior creditors had subordinated their claims to interest accruing on the senior debt after the common debtor had gone into bankruptcy. At the time the parties entered into the intercreditor agreement, the prevailing appellate law applied the "rule of explicitness." Under that rule, a junior creditor did not subordinate its claim to post-petition interest on the senior debt unless the intercreditor agreement "explicitly" said so. The intercreditor agreement at issue did not "explicitly" provide that the junior debt would be junior to post-petition interest on the senior debt. The First Circuit held that the "rule of explicitness" had not survived the adoption of the Bankruptcy Code of 1978 (which preceded the agreement at issue) and thus the intercreditor agreement should be interpreted under ordinary principles of contract interpretation.

However, in apply the rules of contract interpretation, the court held that the trial court should take into account the parties' understanding the of the applicable law at the time the intercreditor agreement was entered into, even if it turned out that the understanding was wrong:

> ". . . courts may determine the meaning of ambiguous terms based on the law in force at the time the agreements are made, as 'the law in force . . . becomes . . . part of the agreement . . . and the contract will be construed in the light of such law."

Here the trial court determined that because it was widely (though it turns out incorrectly) understood that the "rule of explicitness" required an "explicit" provision for post-petition interest on senior debt to have seniority over the junior debt, the absence of such a provision was proper evidence of the intent of the parties that they did not intend at the time that the post-petition interest on the senior debt would be senior to the junior debt.

- *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. ZF Boge Elastmetall LLC*, _ F.3d _ (7th Cir. August 19, 2011) – The court had to determine the expiration date of a collective bargaining agreement. An employer and a union had entered into a collective bargaining agreement in 2005 ("2005 CBA"). In 2007 it entered into an agreement with the title "Agreements: ZF Boge Elastmetall/UAW 2343 regarding items discussed to influence the plant selection decision and long term viability of the Paris facility." The 2007 agreement was set forth in the form of a chart, "placing the previously negotiated provision of the still-in-effect 2005 CBA next to the newly negotiated terms, topic-by-topic." An issue arose as to whether the provisions of the 2007 agreement survived the expiration date of the 2005 CBA, or had an independent termination date.

  The court held that the interpretation of an agreement the court should examine:

  > " . . . the language, *structure*, history, and functions of the contract." (emphasis added)

  The court held that the chart structure of the 2007 agreement:

  > "leaves little doubt that it is intended as a modification to the existing CBA. . . . the clear intent of the *structure* was to alter specific provisions of the existing contract without doing violence to any of the unchanged terms of the then-existing CBA, including its expiration date." (emphasis added)

- *First National Mortgage Co. v. Federal Realty Investment Trust*, 631 F.3d 1058 (9th Cir. 2011) – "Final Proposal" signed by both parties and providing that "[t]he above terms are hereby accepted by the parties subject only to approval of the terms and conditions of a formal agreement" created an enforceable agreement to lease real estate with both put and call options,

even though the term of the lease was not specified: the lease term could be implied from the put and call options.

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

- *Interpharm, Inc. v. Wells Fargo Bank*, 655 F.3d 136 (2d Cir. 2011) – Debtor that had executed several settlement agreements with its secured lender in which the debtor agreed to "waive, release and discharge any and all claims or causes of action, if any, of every kind and nature whatsoever" it may have against the secured lender was bound by those releases despite the debtor's claims of economic duress. There was no duress because the secured lender had made no wrongful threat that deprived the debtor of its free will. The secured lender may have insisted on onerous terms after the debtor defaulted under the loan agreement, but such insistence is not wrongful given that the secured lender did not cause the debtor's default.

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

- *In re FH Partners, L.L.C.*, 335 S.W.3d 752 (Tex. Ct. App. 2011) – Although agreements to extend credit are not normally assignable by the debtor without the creditor's consent, the

creditor's rights are assignable without the debtor's consent unless the agreements indicates to the contrary. As a result, bad debt specialist that acquired bank's interest in line of credit was entitled to enforce jury waiver clause.

- *In re Bank of New England Corporation*, 646 F.3d 90 (1st Cir. 2011) – Where subordination agreement did not explicitly provide that subordinated creditors were subordinate to senior creditors with respect to interest payments owing post-insolvency/post-petition, there was no subordination. The court cited an internal law firm drafting manual for indentures as evidence that there was "institutional knowledge" of the "Rule of Explicitness" requiring post-petition interest payments to be expressly prioritized as well as the then common (albeit) understanding of the law.

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

- *Tourneau LLC v. 53rd & Madison Tower Development LLC*, 27 Misc.3d 953, 896 N.Y.S.2d 631 (N.Y. Sup. Ct. 2010) – Commercial tenant claimed that lease violated rule against perpetuities and therefore void. Court disagreed, finding that the terms of the contract required landlord's performance (completion of renovated premises and commencement of tenancy) within less than 21 years plus lives in being.

- *Wachovia Bank N.A. v. Preston Lake Homes, LLC,* 750 F.Supp.2d. 682 (W.D. Va. 2010) – Implied duty of good faith that bank owed to borrower in connection with financing, which bank had agreed to provide for a definite two year period, did not obligate the bank to enter into an entirely new agreement by renewing or extending the existing financing. Any oral promise of the bank to renew was unenforceable under Virginia law, as a violation of the statute of frauds.

- *BKCAP, LLC v. Captec Franchise Trust 2000-1*, 701 F.Supp.2d 1030 (N.D. Ind. 2010) -- A provision requiring borrower to pay lender's attorneys fees in connection with enforcement did not apply to fees lender incurred when borrower brought a declaratory judgment action as to interpretation of the agreement and otherwise sought to enforce borrower's rights. "American rule" is a presumption against reimbursement of attorneys fees.

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

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

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

- *In re Sokolik*, 635 F.3d 261 (7th Cir. 2011) – Loan agreement in which debtor promised to pay "all reasonable collection costs, including attorney's fees and other charges, necessary for the

collection of any amount not paid when due" covered attorney's incurred in successfully challenging the dischargeability of the debt.

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

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

- *Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n*, No. CIV-08-1125-C, 2011 U.S. Dist. LEXIS 93927 (W.D. Okla. Aug. 23, 2011) – The court investigated whether repurchase agreement in a CMBS transaction, requiring the seller of mortgages to repurchase non-complying loans at the purchase price plus interest and costs, constituted either an impermissible requirement of specific performance or unenforceable liquidated damages. The court also cited competing CMBS precedent in concluding that on facts of this case, failure by the purchaser to mitigate damages should only offset the requirement to repay the purchase price as a result of any failure by the special servicer to service the loans post-default.

- *Lehman Bros. Holdings Inc. v. Bethany Holdings Group, LLC*, 10 Civ. 4373 (SHS), 2011 U.S. Dist. LEXIS 86786 (S.D.N.Y. Aug. 5, 2011) – Jury trial waivers in guaranties are enforceable where the

guarantor had sufficient bargaining power and "business acumen". The guarantor had authorized his attorney to attach his pre-signed signature page and the jury trial waiver was sufficiently conspicuous.

C. Choice of Law

- *General Retirement System of the City of Detroit v. UBS,* 2011 U.S. Dist. LEXIS 70639 (E.D. Mich. 2011) (Court upholds New York choice of law where there were no New York contacts and there were alleged public policy issues on the grounds that given New York's highly developed body of commercial law, the choice was reasonable; court also evaluates various pension fund investor claims against investment banks that sold it Acadia CLO securities, dismissing most of the claims).

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

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

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

- *Plainfield Specialty Holdings II Inc. v. Worldwide Water, Inc.*, 2011 WL 1005008 (Wash. Ct. App. 2011) – Receiver could abandon all assets of the debtor not sold – including claim against the secured lender – to the lender. Appellate court would not consider on appeal arguments not made to the trial court, and thus would not consider: (i) argument that claim – for which no complaint had ever been filed – was not a contract claim but a commercial tort claim outside the scope of the lender's security interest; or (ii) that even if the lender had a security interest in the claim, abandonment to the secured lender is not consistent with Article 9's enforcement methods. *Heartland Cement Co. v. Ultimax Cement Corp.*, 2011 WL 239660 (E.D. Pa. 2011) – Clause providing for arbitration of "[a]ny controversy or claim arising out of or relating to" Distribution Agreement did not require arbitration of claim to enforce Supply Agreement and Security Agreement even though the Distribution Agreement expressly authorized debtor to setoff amounts owed under the Supply Agreement with amounts due under the Distribution Agreement. The Supply and Security Agreements are not so intertwined as to make them depend on each other for their existence: the Security Agreement exists only to secure the credit line provided for in the Supply Agreement

whereas the Distribution Agreement grants a license to distribute certain products.

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

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

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

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

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

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

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

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

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

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

- *General Retirement System of the City of Detroit v. UBS*, 2011 U.S. Dist. LEXIS 70639 (E.D. Mich. 2011) – Court upholds New York a choice of law where there were no New York contacts and there were alleged public policy issues on the grounds that given New York's highly developed body of commercial law, the choice was reasonable. Restatement Conflict of Laws (Second) § 187.

D. Arbitration

- *Nachimani v. By Design, LLC*, 901 N.Y.S.2d 838 (2010) – A clause in a contract stating that any dispute would be settled by binding arbitration in accordance with the commercial rules of the American Arbitration Association (AAA) was only a "choice of law" clause and not an agreement that the arbitration be administered by the AAA. The parties conduct (initiating the arbitration process without referring the matter to AAA for administration) and other aspects of the parties pursuit of the case may have influenced the court's interpretation of the provision, which differed from the holding in a number of prior cases.

X. OTHER LAWS AFFECTING COMMERCIAL TRANSACTIONS

A. Bankruptcy Code

1. Automatic Stay

- *Laboy v. Doral Mortgage Corp. (In re Laboy)*, 2011 U.S. App. LEXIS 10881 (1st Cir.) – The mortgagee failed to record a mortgage properly before the mortgagor filed for bankruptcy relief, but recorded the mortgage post-petition without court permission. The bankruptcy court held that cancelation of the mortgage was an adequate remedy for the creditor's willful violation of the automatic stay and denied the debtors' request for damages. The First Circuit reversed and instructed the trial court to conduct a hearing on damages. Section 362(h) requires an award of actual damages, and the debtors have the right to prove actual damages.

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

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

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

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

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

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

- *In re Johnson*, 2011 WL 1983339 (E.D. Mich. 2011) – Potentially secured party did not violate discharge injunction by seeking to ascertain from counsel of debtor's former employer whether the

secured party in fact had a valid lien on the debtor's disability benefits. A creditor need not prove the validity of its lien to defend its actions in attempting to determine the validity of the lien.

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

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

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

2. *Substantive Consolidation*

- *In re Jennifer Convertibles,* 447 B.R. 713 (Bkrtcy. S.D.N.Y. 2011) (Court generally approves substantive consolidation plan using standard analysis but notes that for a small percentage of creditors the record was inadequate as to potential harm; court requires further evidence or that those creditors be paid).

- *In re AHF Dev., Ltd.*, No. 09-20703-RLJ-11, 2011 Bankr. LEXIS 3118 (Bankr. N.D. Tex. Aug. 17, 2011) – The court refused substantive consolidation as an alternative to dismissing a

Chapter 11 filing by a company with no outstanding operations. The court cited key cases and noted that substantive consolidation is an unusual remedy.

Comment: The case is a helpful example of a court respecting the need to satisfy technical requirements for bankruptcy filings and refusing to order substantive consolidation out of convenience.

- *In re Pearlman*, 450 B.R. 219 (Bankr. M.D. Fla. 2011) – The court overrode a trustee's desire to limit substantive consolidation to preserve "wrong payor" fraudulent transfer claims for unsecured creditors, calling the trustee's concerns "disingenuous". The financial affairs of debtors were "inextricably interwoven". The court noted there is no Eleventh Circuit precedent for "partial" substantive consolidation, but that the theory has limited support in other jurisdictions in cases that ordered substantive consolidation but preserved fraudulent transfers. *In re Bonham*, 229 F.3d 750 (9th Cir. 2000); *First Nat'l Bank of El Dorado v. Giller (*In re *Giller)*, 962 F.2d 796 (8th Cir. 1992). Aside from the trustee, no creditor objected to substantive consolidation.

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

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

- *In re Garden Ridge Corp.*, 386 F. App'x 41 (3d Cir. 2010) (nonprecedential) – Rejecting setoff claim for lack of mutuality after consolidation, with a strong dissent by *Owens Corning* author, Judge Ambro, regarding how mutuality of obligations should be considered when entities are substantively consolidated.

- *In re SK Foods, L.P.*, 2010 U.S. Dist. LEXIS 136178 (E.D. Cal. 2010) – Concluding there was a likelihood of success on merits of substantive consolidation claim under Ninth Circuit precedent.

- *In re Gyro-Trac (USA), Inc.*, 2010 Bankr. LEXIS 4718 (Bankr. D.S.C. 2010) – Approving consolidation over objection of one creditor citing test in *Derivium Capital*, a 2006 South Carolina bankruptcy case, which authorized consolidation when "(1) creditors dealt with the entities as a single economic unit and did not rely on separate identities in extending creditor or (2) when the affairs of the debtor are so entangled that consolidation will benefit all creditors". court concluded that at least one of the factors was met because lenders received guaranties and collateral from multiple affiliates.

- *In re Geo. W. Park Seed Co., Inc.*, 2010 Bankr. LEXIS 4632 (Bankr. D.S.C. 2010) – Approving substantive consolidation under *Derivium Capital* and Second Circuit tests where debtors' affairs were hopelessly entangled and consolidation would benefit creditors.

- *In re Jennifer Convertibles*, 447 B.R. 713 (Bkrtcy. S.D.N.Y. 2011) – Court generally approves substantive consolidation plan using standard analysis but notes that for a small percentage of creditors the record was inadequate as to potential harm.

- *Paloian v. LaSalle Bank Nat'l Ass'n (*In re *Doctors Hospital of Hyde Park, Inc.)*, Bankr. No. 00B11520, 2011 Bankr. LEXIS 4745 (Bankr. N.D. Ill. Dec. 2, 2011) – The court examined the bankruptcy remoteness/separate legal existence of a financing SPV and

attempted to determine whether assets sold to it were sold in a true sale. Finding insufficient evidence, the court denied motions for summary judgment and decided to proceed to trial. The court's discussion of separateness is particularly interesting – it views the 7th Circuit opinion as requiring a degree of "operational function and independence" for bankruptcy remote entities not seen in prior cases. This issue is especially intriguing because the court appears to raise the practical concept of bankruptcy remoteness to the level of a legal standard separate from *alter ego* or substantive consolidation theories. On true sale, the court notes that at trial the court will have to determine whether the use of a contribution structure rather than a cash purchase price negatively impacts the true sale.

3. Claims

- *Official Committee of Unsecured Creditors of Champion Enterprises, Inc. v. Credit Suisse,* 2010 WL 3522132 (Bankr. D. Del. Sept. 1, 2010) – Secured bank lenders shared collateral for their loan to borrower equally and ratably with notes issued by the parent of the borrower. Borrower later amended its bank loan to avoid covenant defaults. In one amendment the parent agreed to issue new unsecured subordinated notes and use the proceeds to redeem the parent's existing secured notes and repay part of borrower's bank loan. The repayment of the parent's secured notes improved the bank lenders' position. The borrower, parent and affiliates went into Chapter 11 two years later. The unsecured creditors committee sought to equitably subordinate the banks' loan to the borrower under Section 510(c) of the Bankruptcy Code. The court held that the committee did not allege facts that, even if true, would (i) support that the lenders were insiders (and subject to a greater level of scrutiny) or (ii) rise to the level of inequitable conduct sufficient to warrant subordination. The court stated that the lenders' influence on the debtor's actions arose merely by operation of bargained for

rights under the credit agreement and that the fact of contractual leverage did not indicate that dealings were not at arm's length.

Comment: The *Champion* court distinguished *In re Exide Technologies*, 299 B.R. 732 (Bankr. D. Del. 2003) where the lender had dictated which of the debtor's affiliates would commence bankruptcy cases and when those cases would be commenced.

- *American Consolidated Transportation Companies, Inc. v. RBS Citizens N.A.*, 433 B.R. 242 (Bankr. N.D. Ill. 2010) – Lender's conduct did not support equitable subordination. Debtors could have refused lender's demands and allowed it to purse its remedies under the loan documents and lender did not induce the borrowers to enter into a forbearance agreement that obligated borrower to take actions (including retaining a restructuring consultant chosen by lender) against their wishes. Borrowers chose to agree to lender's terms. The restructuring consultant was limited to advising and assisting in business decisions and did not have the power to make any business decisions unilaterally. The court provided examples of when sufficient lender control may exist, including a lender with a legal right to a controlling interest in the borrower's stock, termination of all employees except those needed to liquidate the business, determining which creditors are paid or telling a corporate officer that he can resign if he does not agree with lender's actions.

- *In re Innkeepers USA Trust,* 448 B.R. 131 (Bkrtcy. S.D.N.Y. 2011) (Concluding that a CMBS certificateholder did not have the direct ability to intervene in bankruptcy proceedings where a special servicer was appointed to represent its interests).

- *In re Bank of New England Corporation,* 646 F.3d 90 (1st Cir. 2011) (Where Indenture and Subordination Agreement did not explicitly provide that subordinated creditors were subordinate to senior creditors with respect to interest payments owing

post-insolvency/post-petition, there was no subordination. The Court cited an internal Davis Polk drafting manual for indentures as evidence that there was "institutional knowledge" of the "Rule of Explicitness" requiring post-petition interest payments to be expressly prioritized).

- *HSBC Bank USA v. Bank of New York Mellon Trust Co. (In re Bank of New England Corp.)*, 2011 U.S. App. LEXIS 12701 (1st Cir.) – See also under IV. "Guaranties Lender and Borrower Liability" (below) – In the 1970's, several courts articulated the "Rule of Explicitness" for subordination agreements, which permitted senior creditors to recover post-bankruptcy interest only if the subordination agreement explicitly states that the junior creditor assumes the risk for such payment. In 2004, the First Circuit reversed a bankruptcy court order directing payment to the junior creditors under the Rule of Explicitness and ruled that the enactment of the Bankruptcy Code in 1978 extinguished the Rule. *HSBC Bank USA v. Branch (In re Bank of New England Corp.)* 364 F.3d 355 (1st Cir. 2004). On remand, the bankruptcy court held evidentiary hearings to determine whether the senior creditors or junior creditors would receive the disputed funds. The bankruptcy court determined that the junior creditors did not intend the senior creditors to get post-petition interest prior to payment of the junior debt. In this most recent decision, the First Circuit affirmed the bankruptcy court because its factual findings were sufficient to support its legal conclusion.

- *Stern v. Marshall*, 131 S.Ct. 2594 (U.S. 2011) – The debtor was the widow of a billionaire. She accused her late husband's son of fraudulently inducing her late husband to cut her out of his estate plan. After the widow filed for bankruptcy, the son filed a proof of claim for defamation and sought a judgment that his claim was non-dischargeable under 11 U.S.C. § 523(a). The debtor counterclaimed for tortuous interference with her expected gift. The bankruptcy court granted the widow's

motion for summary judgment on the son's complaint and entered judgment in her favor on the tortuous interference claim. The U.S. Supreme Court held that the bankruptcy court lacked the Constitutional power to adjudicate the counterclaim. Generally, the judicial power of the United States is vested in so-called "Article III" courts, where judges serve during good behavior, and their compensation cannot be reduced. The exception to this rule is the "public rights" exception, involving federal regulatory schemes. In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the U.S. Supreme Court had held that Congress could not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review. In response to *Northern Pipeline*, Congress conferred jurisdiction on bankruptcy courts for so-called "core" matters, including "counterclaims by the estate against persons filing claims against the estate." 28 U.S.C. § 157(b)(2)(C). In *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), the Court held that a fraudulent conveyance action against a non-creditor did not fall within the public rights exception, because fraudulent conveyance actions were quintessentially suits a common law that more nearly resemble state law contract claims than they do creditors' claims to a share of the bankruptcy estate. However, the public rights exception would permit resolution of a state law claim that is necessarily resolved by a ruling on a creditor's proof of claim. In this case, however, the widow's counterclaim was "independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy."

- *Cesar Castillo, Inc. v. Fundacion Dr. Manuel de la Pila Iglesias, Inc.*, 2011 Bankr. LEXIS 953 (Bankr. 1st Cir.) – The debtor-in-possession had 30-day terms with its vendor. The debtor's pan provided for various types of administrative-priority claims to

be paid from particular funds, but the plan did not specify the consequences if these funds were not sufficient to pay the claims in full. The vendor voted for the plan, and the funds were not sufficient to pay the vendor's claim in full. The court held that the plan terms superseded the post-petition, pre-confirmation contract terms. In dictum, the court stated that, even if the vendor had not waived the claim, the administrative payment clause in the plan did not preserve the pre-confirmation contract terms.

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

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

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

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

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

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

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

- *In re Ferris*, 447 B.R. 516 (Bankr. E.D. Va. 2011) – Used car dealer who presented certificates of title to lender when each loan was consummated thereby represented that he was in possession of the vehicles and would not transfer them without first obtaining the certificates from the lender and repaying the

amount owed. The dealer knew these representations were false as to 72 vehicles; the debtor had a history and practice of falsely representing online to the DMV that the dealer had the certificates, so that the dealer could transfer record title to buyers and sell the vehicles out of trust. Thus the dealer's debt was nondischargeable under § 523(a)(2).

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

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

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

- *In re Doughty*, 2011 WL 4368689 (Bankr. S.D. Ind. 2011) – Debt was nondischargeable under § 523(a)(6) because the debtor

concealed the collateral, lied under oath about what he did with it, and then sold the collateral without the creditor's consent and without remitting the proceeds to secured party in accordance with the security agreements.

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

4. *Bankruptcy Estate*

- *In re Buttermilk Towne Center, LLC*, 428 B.R. 700 (Bankr. E.D. Ky. 2010) – Assignment of leases and rents governed by Kentucky law stated that it was an "absolute transfer and assignment . . . given to secure" the debtor's obligations under a loan. Debtor filed for bankruptcy and asserted the rents remained property of the estate eligible for use as cash collateral. The bankruptcy court noted that courts different on their assessment of an assignment of rents and leases. The court concluded that the assignment was security for the loan, and not an absolute assignment, given the reference in the agreement to it being given to secure the debtor's loan repayment obligations and provided that the assignment would be void upon the fulfillment of the debtor's obligations under the loan.

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

- *BNP Paribas v. Olsen's Mill, Inc.*, 2011 Wisc. 61 (Wi 2011) (Evaluating appropriateness of non-consensual transfer of Lender's collateral under assignment for the benefit of creditors law).

- *In re Orange Rose, LLC*, 446 B.R. 543 (Bankr. M.D. Fla. 2011) – Fleet of mobile homes that the debtor purchased but which the debtor never had re-titled in its name were not property of the

estate because the Florida certificate of title statute requires compliance for the buyer to have marketable title.

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

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

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

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

bankruptcy estate, even though the assignment terminates upon the extinguishment of the mortgage debt.

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

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

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

investors a fixed amount regardless of the sums collected. Therefore prepetition payments to the pool investors were avoidable preferences. *See also Strange v. Cage*, 2011 WL 1337130 (S.D. Tex. 2011) (same).

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

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

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

5. *Secured Parties, Set Off, Leases*

- *In re Enron Creditors Recovery Corp.*, 2011 U.S. App. LEXIS 13177 (2d Cir. 2011) (Payments by Enron to redeem commercial paper

prior to redemption were protected settlement payments under 546(e) of the Bankruptcy Code and could not be avoided; the redemptions were "the delivery and receipt of funds and securities". Enron redeemed the commercial paper by drawing on its standby revolver. In reaching its conclusion, the Court determined that "settlement payments" as defined in the Bankruptcy Code did not include only transactions in which securities changed hands and were acquired by another investor. The court also concluded settlement payments need not be of the sort that were common in the securities industry. The decision includes a strong dissent).

- *In re River Road Hotel Partners, LLC*, 2011 U.S. App. LEXIS 13131 (7th Cir. 2011) (Contrary to the recent *Philadelphia Newspaper* and *Pacific Lumber* cases, 7th Circuit holds that secured creditor has a right to credit bid in a bankruptcy proceeding).

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

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

- *In re Asbury*, 2011 WL 44911 (Bankr. W.D. Mo. 2010) – Debt of debtor-wife to bank was nondischargeable because bank reasonably relied on borrowing base certificate signed by husband indicating that couple owned 4,667 head of cattle when, in fact, they owned no more than 2,000 head of cattle. The couple were partners in the cattle business and the wife

should have known of the misrepresentation given that she signed the note and security agreement, which included a representation that she owned the collateral.

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

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

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

- *In re MacMenamin's Grill Ltd.*, 450 B.R. 414 (Bankr. S.D.N.Y. 2011) – Funds wired directly from lender to three shareholders' bank accounts in connection with stock purchase transaction that allegedly qualified as a constructively fraudulent transfer was not insulated from avoidance by § 546(e). Despite the broad language of the definition of "settlement payment," § 546(e) does not apply to a private stock sale that has little

relationship with the provision's goal of reducing systemic risk to financial intermediaries and the financial markets. Section 546(e) also does not apply to the loan incurred by the debtor in connection with the transaction.

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

- *In re Lehman Bros, Inc.*, No. 08-01420, 2011 Bankr. LEXIS 3714 (Bankr. S.D.N.Y. Oct. 4, 2011) – The court refused to permit post-bankruptcy a *SemCrude*-style triangular setoff pursuant to which parties agreed to allow setoff against sums owed to affiliates. The feature fails in bankruptcy due to the lack of mutuality required by Bankruptcy Code § 553. Further, citing *Swedbank*, 433 B.R. 101 (Bankr. S.D.N.Y. 2010), the court concluded that the safe harbors in Bankruptcy Code §§ 560 and 561 do not override the requirement of mutuality.

- *In re Lehman Brothers Holdings Inc. (Swedbank AB v. Lehman Brothers Holdings Inc.)*, 2011 U.S. Dist. LEXIS 10973 (S.D.N.Y. 2011) – Upholding Bankruptcy Court decision rejecting swap counterparty's attempt to set off post-petition assets in bank account against pre-petition swap agreement obligations under

the Bankruptcy Code's safe harbor provisions. The safe harbor provisions do not create an exception to Bankruptcy Code § 553's limitation of setoff rights to prepetition collateral.

- *In re Enron Creditors Recovery Corp.*, 2011 U.S. App. LEXIS 13177 (2d Cir. 2011) – Payments by Enron to redeem commercial paper prior to redemption were protected settlement payments under Bankruptcy Code § 546(e) and could not be avoided. The redemptions were "the delivery and receipt of funds and securities". Enron redeemed the commercial paper by drawing on its standby revolver. In reaching its conclusion, the court determined that "settlement payments" as defined in the Bankruptcy Code did not include only transactions in which securities changed hands and were acquired by another investor. The court also concluded settlement payments need not be of the sort that were common in the securities industry.

- *In re River Road Hotel Partners, LLC*, 2011 U.S. App. LEXIS 13131 (7th Cir. 2011) – Contrary to the recent *Philadelphia Newspaper* and *Pacific Lumber* cases, Seventh Circuit holds that secured party has a right to credit bid in a bankruptcy proceeding.

- *Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v. Am. United Life Ins. Co. (*In re *Quebecor World (USA) Inc.)*, 453 B.R. 201 (Bankr. S.D.N.Y. 2011) – Following *Enron Creditors Recovery Corp. v. Alfa*, 651 F.3d 329 (2d Cir. 2011), the court concluded that repayments made on notes during the preference period were "settlement payments" qualifying for safe harbor treatment under the Bankruptcy Code § 546(e) and transfers to or for the benefit of a financial institution in connection with a securities contract under Bankruptcy Code § 741(7).

6. Avoidance Actions

- *Banco Bilbao Vizcaya Argentaria v. Wiscovitch-Rentas (In re Net-Velazquez)*, 625 F.3d 34 (1st Cir. 2010) – Within 90 days before

the debtor filed bankruptcy, a creditor garnished funds in an account in the name of a corporation wholly owned by the debtor and his wife. At trial, the creditor asserted that depositing personal funds into a corporate account converted the funds from a personal asset to a corporate asset. However, if successful this argument would mean the creditor had garnished funds from someone who owed it no money. The creditor raised other arguments on appeal, but the First Circuit held the creditor had waived the arguments by not raising them at trial.

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

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

- *In re Billesbach*, 2011 WL 3295299 (Bankr. D. Neb. 2011) – Trustee could avoid lien on truck that was perfected by notation on certificate of title eight days after the bankruptcy petition was filed and one day after expiration of the 30-day period provided for in §§ 362(b)(3) and 547(e)(2)(A). The

section 547(c)(1) defense for a substantially contemporaneous exchange does not apply to post-petition transfers.

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

7. *Executory Contract*

   - *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.

8. *Plan*

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

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

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

- *In re SW Boston Hotel Venture, LLC*, 2011 WL 5520928 (Bankr. D. Mass. 2011) – Portion of subordination agreement granting senior lender the right to vote the junior lender's claim in bankruptcy was unenforceable.

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

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

9. *Other*

- *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.

- *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 RMAA Real Estate Holdings, LLC,* 54 Bankr. Ct. Dec. 19 (Bankr. E.D. Va. 2010) – Sanctioning attorney who filed misleading involuntary petition on behalf of a subset of LLC's members against the LLC; stating that LLC's are to be treated as corporations in bankruptcy. The LLC's operating agreement stated it could not file for bankruptcy without its managers' consent. One of its managers was a subsidiary of a key creditor.

- *In re Innkeepers USA Trust*, 448 B.R. 131 (Bkrtcy. S.D.N.Y. 2011) – Concluding that a CMBS certificateholder did not have the direct ability to intervene in bankruptcy proceedings where a special servicer was appointed to represent its interests.

- *Meoli v. The Huntington Nat'l Bank (*In re *Teleservices Group, Inc.)*, 456 B.R. 318 (Bankr. W.D. Mich. 2011) – The court discussed how the Supreme Court's *Stern* decision applies to determination of what Bankruptcy Courts can hear: "[m]y frustration with *Stern* is that it offers virtually no insight as to how to recalibrate the core/non-core dichotomy so that I can again proceed with at least some assurance that I will not be making the same constitutional blunder with respect to some other aspect of Authority Section 157(b)(2)".

B. Consumer Law

C. Professional Liability

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

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

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

D. Other

- *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.