2014 COMMERCIAL LAW DEVELOPMENTS

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

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- *Delphi Automotive Systems, LLC v. Capital Community Economic/Industrial Dev. Corp.,* 434 S.W.3d 481 (Ky. 2014) – Court evaluates two key scope questions – (1) whether a transaction was a lease or security interest (security interest) and (2) whether a governmental unit exclusion from Article 9 excluded transactions in which the government unit was the secured party.
- *In re Polke*, 2014 WL 5474632 (Bankr. N.D. Ga. 2014) – Transaction by which creditor paid off the initial lender in a car title pawn transaction, received title in his name, and obtained a security agreement and promissory note from the debtor was a secured transaction because, by everyone's account, the car was to belong to the debtor once she made all of the payments. Even though Georgia statutes govern title pawns and afford fewer protections to the debtor than the UCC, such transactions

are still secured transactions, not absolute sales. Moreover, the creditor did not comply with the title pawn statute either in the form of documentation or the procedures on default. By selling the car without sending prior notification to the debtor, the creditor failed to comply with the UCC and is subject to a claim for damages by the debtor.

- *Strata Title* (BAP 9th Cir Feb 21 2014): forfeiture of LLC interest as "security interest."

2. *Insurance*
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3. *Licensing*
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4. *Consignments*
   - *In re Salander-O'Reilly Galleries, LLC*, 506 B.R. 600 (Bankr. S.D.N.Y. 2014) – Court evaluates competing claims of lenders and consignor in famous Botticelli painting. Case is a reminder that an Article 9 consignment is treated as a purchase money security interest, requiring a UCC financing statement and potentially notices to prior creditors.
   - *Shrenuj USA, LLC v. Rosenthal & Rosenthal, Inc.*, 2014 WL 1226469 (S.D.N.Y. 2014) – While summary judgment would not be granted on jewelry consignor's conversion claim against lender that financed the debtor's inventory because of a factual dispute about whether the lender seized and sold any of the consigned goods, sanctions were appropriate against the lender because it continued to sell and melt down seized jewelry long after it knew that litigation was likely and even after the consignor's complaint was filed, and those actions undermined the consignor's ability to prove that the lender had seized consigned goods.

5. *Real Property*

- *Burton v. Lucido*, 82 U.C.C. Rep. Serv. 2d 801 (N.Y. Sup. Ct. 2014) – Security interest in a real estate broker's right to a commission was not excluded from Article 9 by § 9-109(d)(3) as compensation to an employee because the broker is an independent contractor, not an employee, or by § 9-109(d)(5) as an assignment of accounts for collection only because the right to the commission secured a loan to the broker.
- *Warrior Energy Services Corporation v. ATP TITAN M/V*, 551 Fed.Appx. 749 (5th Cir. 2014) – Offshore oil drilling rig was not a "vessel" for purposes of maritime lien act where it was permanently moored to the ocean floor, had not been moved since constructed, had no means of self-propulsion, and would require over a year and $70-$80 million to move.
- *In re Anderson*, 2014 WL 172222 (Bankr. D. Utah 2014) – Despite a state statute providing that water shares – rights to use water evidenced by shares of stock in a corporation – shall be transferred pursuant to U.C.C. Article 8, such shares remain real property, not personal property, and hence a security interest in them can be perfected through a properly recorded deed of trust.
- *In re Faison*, 2014 WL 5281053 (Bankr. E.D.N.C. 2014) – Husband who, in connection with divorce proceedings, filed lis pendens against wife did not thereby perfect any interest he might have in the wife's 20% interest in an LLC, which is a general intangible. Filing a financing statement is the only way to perfect an interest in a general intangible.
- *Quarles v. D&D Transport, Inc.*, 2014 WL 6685479 (Ky. Ct. App. 2014) – Assignee of unperfected security interest in manufactured home had priority over buyer of real estate to which the home was attached because the security interest was enforceable even though unperfected and the buyer acquired no interest in the manufactured home because the

manufactured home was not converted to real estate under state law and was expressly excluded from the tax sale deed.

6. *Leasing*

- *In re Purdy; Sunshine Heifers, LLC v. Citizens First Bank*, 763 F.3d 513 (6th Cir. 2014), rehearing denied September 2014, remand to Bankruptcy Court, 2015 Bankr. LEXIS 2938 (Bankr. W.D. Ky. 2015) – 50-month leases of dairy cows were true leases even though the lessee had no right to terminate and 50 months exceeds the economic life of dairy cows, 30% of which need to be culled each year. The relevant "good" was the herd of cattle, which had an economic life far greater than the lease term, not the individual cows originally provided. However, lessor could not trace which cows were subject to the leases and thus did not prevail in its claims to the cows.
- *Sunshine Heifers, LLC v. Moohaven Dairy, LLC*, 13 F. Supp. 3d 770 (E.D. Mich. 2014) – Post-petition lease of 240 cows to a dairy for 48 months was a true lease because, even though the transaction was not terminable by the dairy, there was no option or obligation to renew the lease or to buy the cows, and the term of the lease did not exceed the economic life of the cows because data indicates that more than 57% of cows produce milk for longer than four years. Accordingly, the transaction was in the ordinary course of business of the dairy and consistent with the confirmed plan, and thus did not need bankruptcy court approval.
- *In re Gutierrez*, 2014 WL 3888277 (Bankr. D.P.R. 2014) – Six-year lease of automobile, after which the putative lessee had the option to purchase the automobile for $150 was a true lease because the agreement expressly provided that it was a finance lease under the Puerto Rice Act to Regulate Personal Property Lease Contracts, not a secured transactions, and thus the lessee had waived the right to have the lease treated as a secured transaction.

- *In re James*, 2014 WL 5785316 (Bankr. D. Kan. 2014) – Three-year lease of used vehicle was a sale with a retained security interest because even though the debtor could terminate the lease early, the debtor remained obligated for the rent due during the entire rental period, and the debtor had an option to purchase during the lease term by paying the remaining rent, an option which a rational lessee would exercise.
- *In re ES2 Sports & Leisure, LLC*, 519 B.R. 476 (Bankr. M.D.N.C. 2014) – 40-month lease of exercise equipment that was not subject to cancellation and under which the lessee had an option to purchase the equipment at the end of the lease term for $1 was not a true lease, but instead a sale and retained security interest. This conclusion was bolstered by the fact that lease payments exceeded $262,000 but the value of the equipment when delivered was less than $200,000.

7. *Sales*

- *Clinton v. Adams*, 2014 WL 6896021 (C.D. Cal. 2014) – Even if law firm had a security interest in its client's copyright infringement action, that security interest was outside the scope of Article 9 because the firm received merely a promise to pay money that might accrue in the future as a means of collecting its fees and § 9-109(d)(5) excludes an assignment of payment intangibles "which is for the purpose of collection only" and § 9-109(d)(9) excludes an assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral.
- *In re Doctors Hospital of Hyde Park*, 504 B.R. 900 (Bkrtcy. N.D. Ill. 2014) – This ongoing litigation has led to several key court decisions on fraudulent transfers, spvs, enforceable loan terms and more. This iteration evaluates UCC security interests.
- *ConocoPhillips Alaska, Inc. v. Williams Alaska Petroleum, Inc.*, 322 P.3d 114 (Alaska 2014) – Agreement by which crude oil buyer provided $13 million to seller following seller's demand for adequate assurance of the buyer's ability to comply with a

retroactive price increase that might be mandated by the Federal Energy Regulatory Commission, which funds were segregated pending resolution of the FERC action, was a modification of the parties' sales agreement governed by Article 2, not a security interest governed by Article 9, and § 2-207 applied to resolve the interest rate to which the buyer was entitled on those funds.

- *In re C.W. Mining Company*, 509 B.R. 378 (Bankr. D. Utah 2014) – Agreements by which coal broker purported to prepay mining company for coal to be mined and expressly provided that the broker would be the owner of the coal upon severance of the land, but which also purported to grant the broker a security interest in the proceeds of all of the debtor's coal sale contracts did not mean that broker owned the receivables from such contracts. Even though the broker was the party that sent the invoices, the mining company owned the receivable and the broker had merely a security interest. That security interest was not excluded from Article 9 by § 9-109(d)(5) or (6) and, because it was unperfected, was therefore junior to the interests of the mining company's bankruptcy trustee.
- *Southern Fidelity Managing Agency, LLC v. Citizens Bank & Trust Co.*, 82 U.C.C. Rep. Serv. 2d 412 (D. Kan. 2014), *rev'd*, *In re Brooke Capital Corp*, 2014 WL 6873180 (10th Cir. 2014) – Regardless of whether the participation interests in a loan secured by shares of stock were sales of a fractional interest or secured loans, the participants acquired a security interest in the stock because the participation agreements expressly so provided and those security interests were perfected under § 9-310(c) because the originator's interest was perfected by possession. The originator's subsequent subordination agreement with another secured party was not binding on the participants because the participation agreement required the participants' consent to any subordination agreement.

  On appeal, because the participants' interests were loans to the originator secured by a general intangible (the secured

receivable), not sales of fractional interests in the loan, the participants' interests were not automatically perfected. Because the participants did not file a financing statement, their interests were unperfected and thus subordinate the interest of another secured party with a perfected security interest.

- *Cox v. Community Loans of America, Inc.*, 2014 WL 1216511 (M.D. Ga. 2014) – Car title pawn transactions with members of the armed services were not sales with an option to repurchase but secured loan transactions subject to the federal Military Lending Act, even though the service member has no personal liability for the amount advanced. Thus, the pawnbrokers could be liable for their violations of the act.
- *Bankdirect Capital Finance v. Insurance Co. of State of PA*, 992 N.Y.S.2d 271 (N.Y. App. Div. 2014) – The trial court properly denied summary judgment on the claim of a putative assignee of an insurance premium financing agreement against the insurer for refunding the premium to the broker because it was unclear whether: (i) the policy holder transferred its entire interest or merely a security interest in the return premium; (ii) the original financier properly notified the insurer of its interest; (iii) the original financier assigned its interest to the putative assignee; and (iv) the putative assignee properly notified the insurer of the assignment.

8. *Intellectual Property and Licenses*

- *In re Free Lance-Star Publishing Co. of Fredericksburg*, 512 B.R. 798 (Bkrtcy. N.D. Va. 2014) – Case regarding security interests in FCC licenses; result is not helpful to secured parties.
- *United Tactical Systems, LLC v. Real Action Paintball, Inc.*, 2014 WL 6788310 (N.D. Cal. 2014) – Entity that allegedly bought all of the debtor's tangible and intangible property, including the trademarks and goodwill, at a UCC foreclosure sale did not prove likelihood of success in its claim under § 32 of the Lanham Act, so as to be entitled to a preliminary injunction, because that claim (as distinguished from a claim under § 43(a))

can be brought only by the "registrant," and the buyer failed to prove that it was the registrant despite evidence of an assignment *nunc pro tunc* and bill of sale from the secured party to itself, and a later written assignment from the secured party to the buyer. There was no evidence of an assignment from the debtor to the secured party.

- *Merit Homes, LLC v. Joseph Carl Homes, LLC*, 570 F. App'x 707 (9th Cir. 2014) – Because the bank that made a construction loan received from the borrower a collateral assignment of the construction plans for the benefit of itself, as well as for its successors and assigns, and the borrower warranted that it had received from its predecessors an assignment of all rights to the plans, the bank and its assignee had at least an implied license from the apparent copyright owner – a guarantor and partial owner of the debtor – to use the plans to complete construction.
- *In re Trump Entertainment Resorts, Inc.*, 2015 WL 756873 (Bankr.D.Del. 2015) – Rights of trademark licensee not assignable without affirmative consent of licensor.
- *Hendrick & Lewis*, 766 F.3d 991 (9th Cir 2014) – Enforce lien on copyright through state law.

9. *Tort and Insurance Claims*

- *In re: Montreal Maine & Atlantic Railway Ltd.*, 2015 Westlaw 4934212 (1st Cir. 2015) – Security interest in intangible assets does not extend to a business insurance policy under the UCC § 9-109 insurance exclusion and secured party did not satisfy requirements outside of Article 9 to perfect a security interest in a claim under an insurance policy.
- *Attorney's Title Guaranty Fund, Inc. v. Town Bank*, 850 N.W.2d 28 (Wisc. 2014) – Evaluating the question of whether the proceeds of a legal malpractice claim are assignable, court concludes that the proceeds were assignable. The court goes to great lengths to support secured creditors.

- *Pain Control Institute, Inc. v. GEICO General Insurance Co.*, 2014 WL 5474777 (Tex. Ct. App. 2014) – Even if the woman injured in an auto accident had a claim against the driver's insurer, so that she could grant a security interest in that claim to the medical provider that treated her, such a security interest would be excluded from the scope of Article 9 under § 9-109(d)(12).
- *Joseph Skilken & Co. v. Oxford Aviation, Inc.*, 2014 WL 5361336 (D. Me. 2014) – Because a judgment creditor is entitled to turnover of and a lien on only the property in which a creditor could obtain an Article 9 security interest, the creditor in this case was not entitled to a lien on the judgment debtor's claim against the underwriter of an insurance policy on the debtor's aircraft because a lien on such claim is "arguably" excluded from Article 9 under § 9-109(d)(8) or (12).

B. Security Agreement and Attachment of Security Interest

1. Security Agreement

- *Weinandt v. Peckham*, 84 U.C.C. Rep. Serv. 2d 118 (Minn. Ct. App. 2014) – A filed financing statement did not, by itself, satisfy the requirement for an authenticated security agreement even though the debtor filled in the form by hand because the debtor did not authenticate the financing statement.
- *In re Eyerman*, 517 B.R. 800 (Bankr. S.D. Ohio 2014) – Individuals who guaranteed the debts of two LLCs that they owned had not granted a security interest in their personal property to secure the debts because each security agreement identified the "borrower" as one of the LLCs and the guarantors signed only as a "member" of the LLCs, not in their individual capacities. Although a filed financing statement identified the guarantors as additional debtors, the financing statement lacked granting language and does not constitute a security agreement.
- *In re Inofin, Inc.*, 512 B.R. 19 (Bankr. D. Mass. 2014) – Original security agreement that described the collateral to be installments sales contracts "purchased by Debtor with the

proceeds of loans from Secured Party and assigned and delivered to Secured Party" did not include chattel paper not financed by the secured party, and because the secured party could not show that any installment contracts were traceable to the proceeds of its loans, the security agreement was ineffective to grant a security interest. Subsequent loan agreement did not remedy the problem because it lacked granting language. However, the parties' course of performance over 15 years in which the debtor, in return for financing, weekly delivered installment contracts with allonges stating that the debtor "hereby assigns [to Secured Party] all of its right, title and interest in, to and under the following [Retail Installment Sale Agreement]" was sufficient to serve as a security agreement and grant a security interest in the delivered contracts, regardless of whether those contacts were purchased with the loan proceeds. Moreover, the loan modification agreement entered into by the parties modified the scope of the security interest and granted the secured party a security interest in all delivered installment contracts.

- *Saili v. Parkland Auto Center, Inc.*, 329 P.3d 915 (Wash. Ct. App. 2014) – Because the purchase agreement for a GMC car, pursuant to which the buyer purported to grant a security interest in both the GMC and in a Chevy, was conditioned on financing that was denied, the agreement was void, thus the seller did not acquire a security interest in the Chevy, and the seller committed conversion by repossessing the Chevy.
- *Tough Company, Inc. v. Wurlitzer*, 2014 WL 298699 (Cal. Ct. App. 2014) – Credit buyer of a truck, a trailer, and a bulldozer had granted a security interest in all three items even though the bill of sale did not mention a security interest because all documents relating to the transaction can be read together, the title documents for the truck and trailer identified the seller as a lienholder, the seller testified he believed the bill of sale was granted as security, and a bill of sale, although absolute in form, may be shown in fact to have been given as security.

- *Jones v. Simon*, 2014 WL 3695818 (W.D. Ky. 2014) – Settlement Agreement pursuant to which the debtor promised to pay $30,000 within one year, unless specified pending litigation was "successfully mediated or settled" sooner, in which case the debtor would have six months from the date of the mediation or settlement to pay, did not give the creditor a security interest in the settlement proceeds. The settlement agreement addressed *when* payment would come due; it did not discuss a source of funds or indicate whether any property would secure the obligation.
- *In re Pallet Company LLC*, 2014 WL 432790 (Bankr. D. Del. 2014) – Law firm that represented the bankruptcy debtor in its pending tort litigation had no lien on the proceeds of the sale of the debtor's assets – including the pending tort claims – because the sale order provided for liens to attach to the proceeds to the extent of their value and validity at the time of the sale but the law firm did not have a valid charging lien at the time of the sale because a charging lien does not arise until a judgment is issued.
- *Jackson Walker LLP v. FDIC*, 13 F. Supp. 3d 953 (D. Minn. 2014) – Law firm had no security interest in retainer paid to it because the retainer agreement, although it stated that the law firm could apply the retainer to the payment of fees and expenses from time to time, did not commit the retainer as a means to ensure payment and in fact contemplated that the client would timely pay for services through direct billing. Further, the retainer served as advance payment because the agreement provided that it would be applied toward the final statement. Even if the retainer agreement were a security agreement, the additional $100,000 retainer provided later was not collateral because the agreement provided that it could only be modified by a signed writing.
- *Clinton v. Adams*, 2014 WL 6896021 (C.D. Cal. 2014) – Law firm did not acquire a security interest in its client's copyright infringement action because the "Assignment of Monies"

signed by the client did not expressly grant a security interest in or assign the action. Instead, the client merely agreed "to irrevocably assign any and all money due to [him] based on the claim(s) made" in infringement action, and thus merely promised to pay proceeds from the action that may accrue in the future.

- *In re Jeter*, 2014 WL 993043 (Bankr. E.D. Tenn. 2014) – Financier that provided nonrecourse funding to accident victim and in return received an assignment of a portion of the victim's right to proceeds of his tort claim obtained an outright assignment valid under New Jersey law even though the agreement contained a backup grant of a security interest because the agreement contained clear evidence of the intent to assign the proceeds, the proceeds were described sufficiently to identify what was covered, and the victim retained no power to revoke the assignment.
- *Commercial Law Corp. v. FDIC*, 2014 WL 413934 (E.D. Mich. 2014), reversed, 777 F.3d 324 (6th Cir. 2015) – Security interest in favor of law firm providing services to a bank was effective against the FDIC, even though the security agreement was approved by the bank's board of directors, because 12 U.S.C. § 1823(e) does not apply to agreement for ordinary services.
- *In re STN Transport Ltd.*, 2014 WL 585311 (Bankr. S.D. Tex. 2014) – Even if a person who puts up collateral but is not an obligor on the secured debt qualifies as a "debtor" for the purposes of the Uniform Fraudulent Transfer Act, the corporation that owned trucks allegedly used to collateralize a loan to one of its directors did not grant a security interest in the trucks because the director lacked authority to bind the corporation. The director lacked actual authority because the document purporting to grant that director authority to act for the corporation was signed only by that sole director, not by both of the directors. The director lacked apparent authority because the corporation did nothing to create the appearance that the director was authorized to act on the corporation's behalf.

- *Terry J. Nosan Declaration of Trust v. GS CleanTech Corp.*, 2014 WL 2753150 (Mich. Ct. App. 2014) – While the guaranty agreements signed by the debtor's affiliates stated that the note to a group of new lenders "shall be guaranteed by a pledge of the [debtor's] net cash flows" and the subordination agreement signed by the prior lender stated that "[t]he Borrower shall be entitled to pledge the Net Cash Flow" to the new lenders, there was no security agreement signed by the debtor and thus the new lenders did not acquire a security interest.
- *Patterson v. University Ford, Inc.*, 758 S.E.2d 185 (N.C. Ct. App. 2014) – Because the retail installment contract for the purchase and sale of an automobile and the conditional delivery agreement were part of the same transaction and could be read together even though the retail installment contract contained a merger clause, and because parol evidence is admissible to show the existence of a condition precedent, the unsatisfied financing condition in the conditional delivery agreement prevented the existence of a contract.

2. *Obligation Secured*

- *In re Duckworth*, 2014 WL 6602521 (7th Cir. 2014) – Although security agreement that misdescribed the secured obligation as a note executed on December 13, 2008, when the note was actually executed and dated December 15, 2008, could be reformed as between the debtor and the secured party, it was not effective to perfect the security interest against the debtor's bankruptcy trustee, who had the status of a judicial lien creditor and against whom parol evidence is inadmissible.
- *Heritage Bank v. Kasson*, 853 N.W.2d 868 (Neb. Ct. App. 2014) – Parents, who had granted a security interest in their farm products to a bank to secure their debts were not in a partnership or joint venture with their son, who had granted the bank a security interest in his farm products to secure his obligations to the bank. Even though the parents and son occasionally shared equipment and resources, they held themselves out to be engaged in separate businesses, they

obtained separate financing, they maintained separate accounts and records, they used different identifying marks on their cattle, and they maintained separate insurance on their equipment and herds. Thus, the parents were not liable for the son's debts and the bank could not use the proceeds of the parents' cattle to reduce the debt owed by the son.

- *Mount Spelman & Fingerman, P.C. v. GeoTag, Inc.*, 2014 WL 4954632 (E.D. Tex. 2014), 2014 WL 6065703 (E.D. Tex. 2014) (revised opinion) – Contingent fee agreement between a law firm and its client that granted the firm a lien on recoveries "for any amounts owing to us" and which also stated that "[f]ees are fully earned as of the date of execution of the settlement agreement between plaintiff and defendant," created a lien only on amounts due in settled cases, even if the client owed the firm for services in connection with other cases or as a result of the client's termination of the firm. Moreover, the lien on the receivable in connection with any single case is limited to the fee owing in connection with that case; it does not secure the client's obligations in connection with other cases.
- *Matter of Liquidation of Freestone Insurance Co.*, 2014 WL 7399502 (Del. Ch. Ct. 2014) – Bank could not retain the assets credited to the custodial account of an insurance company, now in receivership, to protect the bank's contingent right to indemnification because that right was not secured by the collateral. The custody agreement granted the bank a security interest to secure "payment obligations," which, when the agreement is read in context, mean (i) costs incurred by the bank in providing the limited administrative services contemplated by the agreement, (ii) fees charged for those services, (iii) advances of funds by the bank to make payment on or against delivery of securities, and (iv) overdrafts in the account; the term "payment obligations" does not include claims for indemnification.

3. *Rights in the Collateral*

   - *Architectural Iron Workers' Local No. 63 Welfare Fund v. American Steelworks, Inc.*, 2014 U.S. Dist. LEXIS 30675 (N.D. Ill. 2014) – Alleged collateral never became property of debtor.
   - *Nautilus Insurance Co. v. Cheran Investments LLC*, 82 U.C.C. Rep. Serv. 2d 560 (Neb. Ct. App. 2014) – Bank with a security interest in assets of seller had no right to insurance proceeds of goods sold to buyer who failed to pay therefor because the buyer acquired ownership of the goods despite the failure to pay. However, because the interpleader action brought by the insurer is an equitable proceeding, the bank had a security interest in the seller's right to payment from the buyer, and the seller agreed that the proceeds should go to the bank, the trial court could direct that the insurance proceeds be paid over to the bank.
   - *Southern Fidelity Managing Agency, LLC v. Citizens Bank & Trust Co.*, 2014 U.S. Dist. LEXIS 4344 (D.Kan 2014) – A question arose as to whether a contract assigned a security interest in stock or a security interest in the assignor's security interest in the stock. Court concluded assignment was of the security interest in the stock, so assignee had a perfected security interest. Assignment was drafted as a participation, but recharacterized. Case includes a detailed analysis of UCC 9-310.
   - *Vehicle Development Corp. v. Livernois Vehicle Development, LLC*, 995 F. Supp. 2d 758 (E.D. Mich. 2014) – Bank with a perfected security interest in all inventory and equipment of a Michigan borrower that operated a vehicle repair facility did not have a security interest in the 81 trucks that a Singapore company provided to the borrower for conversion from left-hand drive to right-hand drive. The written agreement expressly stated that title to the trucks remained with the Singapore company and thus the borrower lacked sufficient rights in the trucks for the bank's security interest to attach to them. Moreover, the trucks did not fit within the definition of either equipment or inventory.

- *Perini/Tompkins Joint Venture v. Comerica Bank*, 2014 WL 1028945 (E.D. Mich. 2014) – Because, pursuant to the Michigan Builder's Trust Fund Act a contractor holds building contract fund in trust for unpaid subcontractors and suppliers, a lender's security cannot attach to those funds. The funds paid to the lender can be recaptured to the extent the subcontractors and suppliers were unpaid at the time of the payment but offset by the amount that the funds provided by the lender were used to pay subcontractors and suppliers.
- *Dougherty v. Trustmark Bank*, 2014 WL 2767380 (Tex. Ct. App. 2014) – Although the individual debtor represented in a security agreement with a lender that he was the owner of specified property in which he purported to grant a security interest, the debtor's sworn testimony three years later in bankruptcy that his corporation owned the property meant that the lender obtained no security interest. The representation in the security agreement was insufficient to create an issue of fact to avoid summary judgment in the lender's action against the bank that later obtained and foreclosed on a security interest from the corporation.
- *Fifth Third Bank v. Gulf Coast Farms, LLC*, 573 F. App'x 515 (6th Cir. 2014) – LLC that authenticated security agreement purporting to grant a bank a security interest in all its stallions, stallion syndicate agreements, fractional interests in stallions, and stallion shares did in fact grant a security interest in a share of Distorted Humor, a thoroughbred, because the evidence established that: (i) the owners of the dissolved partnership that previously owned the share contributed it to the LLC; (ii) the LLC reported the income subsequently produced from ownership of the share on its tax returns while the dissolved partnership did not file further tax returns; (iii) the income from the share was deposited into the LLC's deposit account; and (iv) the LLC, not the partnership, insured the share. It was irrelevant that another entity had a right of first refusal on the partnership's share because that right was never triggered due

to the fact that the partnership and the LLC had common owners.

- *In re Webb*, 742 F.3d 824 (8th Cir. 2014) – Joint venture by husband and wife was not a partnership, it was just an agreement about how they would conduct their farming business together, and thus not a legal entity. The security agreements signed by the husband on behalf of the venture were not effective because the venture did not have rights in the collateral to grant a security interest. Secured party did not have a valid security interest because it mistakenly treated the "debtor" as a separate legal entity.
- *Pain Control Institute, Inc. v. GEICO General Insurance Co.*, 2014 WL 5474777 (Tex. Ct. App. 2014) – Because under Texas law a person injured in an auto accident has no direct claim against the driver's insurer, a woman so injured could not grant a security interest in her right to payment from the driver's insurer to the medical provider that treated her. Consequently, the insurer did not, after settling with the woman, violate the provider's rights by paying the woman directly despite having received instructions to pay the provider. No discussion of why the security interest could not attach to the right to payment under the settlement agreement.
- *Woodbridge Structured Funding, LLC v. Arizona Lottery*, 235 Ariz. 25, 326 P.3d 292 (Ariz. Ct. App. 2014) – Structured settlement company had no interest in annuity where state-required court proceedings had not been completed and company had not given alleged assignor value required under 9-203.
- *Blanken v. Kentucky Highlands Investment Corp.*, 82 U.C.C. Rep. Serv. 2d 815 (E.D. Ky. 2014) – Language in a security agreement defining "excluding property" to consist of "any contract, lease, license, or other agreement that contains a provision prohibiting the assignment or grant of a security interest therein" did not exclude equipment that the debtor acquired in a transaction structured as a lease but which was really a sale

with a retained security interest even though those transaction documents prohibited future encumbrances. Equipment is not a "contract, lease, license, or other agreement." Moreover, the prohibition on further encumbrances was ineffective under UCC § 9-407 to prevent the attachment of a second security interest.

- *Dow Family, LLC v. PHH Mortgage Corp.*, 848 N.W.2d 728 (Wis. 2014) – The doctrine of equitable assignment survives in Wisconsin and has been codified by UCC § 9-203(g), so that a person who becomes a holder of a promissory note automatically becomes entitled to enforce a mortgage that secures the note.

- *In re Salander-O'Reilly Galleries, LLC*, 506 B.R. 600 (Bankr. S.D.N.Y. 2014), *rev'd*, 2014 WL 7389901 (S.D.N.Y. 2014) – Bank's blanket lien on art gallery's inventory attached to consigned painting even though the security agreement provided that: (i) goods held on consignment were excluded from the borrowing base; and (ii) the gallery warranted that it had ownership of all "collateral." However, a dispute about whether the consignor actually retrieved the painting after the consignment agreement expired and then returned the painting to the gallery for exhibition purposes prevented summary judgment on the issue of priority between the consignor and the bank.

  On appeal, court ruled that security agreement granting a security interest in "assets and rights of the [gallery] wherever located, whether now owned or hereafter acquired or arising," was limited to property then or thereafter owned by the gallery, and thus did not cover property held on consignment.

- *Hartford Fire Insurance Co. v. Columbia State Bank*, 334 P.3d 87 (Wash. Ct. App. 2014) – Even though the agreement between an insurer and contractor for a surety bond provided that "[a]ll money paid [under the construction contract] shall be impressed with a trust for the purpose of satisfying the obligations of the Bond," the insurer had no claim against the

contractor's secured lender for applying a progress payment deposited into a control account to the secured obligation. The agreement was not with the owner who provided the funds, did not provide that payments be held in trust for subcontractors, and did not actually require that the funds be "held" at all, merely "impressed" with a trust. Therefore, the contract provided for the creation of a trust at some point in the future, after the insurer made payment on the bond, which was after the secured party acted.

- *Wakefield Kennedy, LLC v. Baldwin*, 2014 WL 910029 (D. Utah 2014), *affirmed* 2015 US App. LEXIS 9739 (10th Cir. 2015) – Debtor that, pursuant to contract to sell a note and mortgage, placed the note into escrow had insufficient rights remaining in the note to grant a security interest in the note superior to the rights of the buyer. Further, even if secured party had a security interest in the note, buyer had possession and priority under UCC § 9-330(d). Although contract had an effect choice-of-law provision choosing New York law, the Court applied the law of the location of the note with respect to priority issues, under UCC § 9-301(2).
- *Cantor v. FDIC (In re Downey Financial Corporation)*, _ F.3d _ (3d Cir. 2015) –Tax sharing agreement did not create agency relationship because alleged principal did not 'control' alleged agent; thus property in possession of 'agent' was agent's property.

4. *Restrictions on Transfer*

- *Woodbridge Structured Funding, LLC v. Arizona Lottery*, 326 P.3d 292 (Ariz. Ct. App. 2014) – Financier did not acquire a security interest in individual's right to periodic payments of state lottery jackpot because even though the individual signed an assignment agreement with the financier before petitioning a court to approve an assignment to a different jackpot buyer, the financier had not paid the individual and thus had not given value for the security interest to attach.

- *Richter v. CC-Palo Alto, Inc.*, 2014 WL 6687238 (N.D. Cal. 2014) – Residents of retirement community, as part of their residency contract, loaned funds to the owner of the retirement community. They did not have a security interest in the funds because the documents failed to label the loan as "secured" or "unsecured".
- *In re Circle 10 Restaurant, LLC*, 519 B.R. 95 (Bankr. D.N.J. 2014) – New Jersey liquor license is not property for the purposes of state law even though it is property: (i) to which a federal tax lien can attach; (ii) for the purposes of due process; and (iii) that can be sold in bankruptcy. Because the debtor's license is not property, it does not qualify as a general intangible, § 9-408 is inapplicable, and no security interest can attach to it.
- *Attorney's Title Guaranty Fund, Inc. v. Town Bank*, 850 N.W.2d 28 (Wisc. 2014) – Evaluating the question of whether the proceeds of a legal malpractice claim are assignable, court concludes that the proceeds were assignable. The court goes to great lengths to support secured creditors.
- *McDonald v. Yarchenko* (D. Or. 2013) – LLC member consent may be necessary for creation of security interest in member's interest.
- *Crossover Financial I, LLC (CO)*, 477 B.R. 196 (Bankr. D. Colo. 2012) – Possible limitations on proxies of LLC interests and may need consent of issuer under state LLC statute.

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

- *In re Eyerman*, 517 B.R. 800 (Bankr. S.D. Ohio 2014) – Even if a promissory note and filed financing statement were together sufficient to indicate an intention by individual guarantors to grant a security interest, the documents' only description of the collateral as "certain business assets" would not be sufficient to reasonably identify what was covered.
- *In re Nickeson*, 2014 WL 6686524 (Bankr. D.S.D. 2014) – Security agreement that described the collateral as "all farming equipment

and machinery, Farm Products, claims, accounts receivable, inventory, general intangibles, business tort claims, and all other business and agricultural assets owned by [Debtor]" did not cover the debtor's stock in a closely held corporation, which is classified as investment property, not a general intangible. Although the filed financing statement identified the stock, it did not create or provide for the security interest and it was not signed by the debtor.

- *In re Sterling United; Ring v. First Niagara Bank, N.A.*, 2014 Bankr. LEXIS 4238 (Bankr.W.D.N.Y. 2014) – Court evaluates whether a collateral description in a financing statement is seriously misleading under Article 9. Court concludes filings were good enough to put subsequent searchers on notice.
- *Russell Road Food and Beverage, LLC v. Galam*, 2014 WL 6746569 (9th Cir. 2014) – Even if the lender had attempted to enforce the guaranty, which granted a security interest in property "in the physical possession of or on deposit with the Lender," that would not have covered the guarantor's trademark. Although the guarantor's corporate resolutions authorized the guarantor to give the lender a security interest in the trademark, the guarantor did not expressly provide such a security interest in the guaranty.
- *In re Conklin*, 511 B.R. 688 (Bankr. D. Id. 2014) – Pursuant to a 2007 amendment to Idaho's certificate-of-title statute, a security interest in a vehicle is perfected when a properly completed application for a certificate is received by the Department of Transportation or its agent, not the date the certificate is issued. Because that date was within 30 days of when the debtor acquired the vehicle, the bankruptcy trustee could not avoid the security interest.
- *In re Inofin, Inc.*, 512 B.R. 19 (Bankr. D. Mass. 2014) – Security Agreement describing collateral as installment sales contracts purchased with loan proceeds not effective to attach security interest where no records tracing particular contracts to loan proceeds.

- *In re Baker*, 511 B.R. 41 (Bankr. N.D.N.Y. 2013) – Financing statement that identified collateralized cattle by name and ear tag number was ineffective with respect to cattle whose ear tag had either fallen off or did not match one of the listed numbers. While the names of the cattle were referenced in a certificate of registration for each cow, each certificate included a sketch of the cow's distinctive markings, and those markings could be used to identify the cows, there was insufficient evidence that lenders to the cattle industry, in the course of their due diligence, regularly used registration certificates to identify cattle subject to a prior interest for the certificates to overcome the deficiencies in the financing statement.
- *In re Sterling United, Inc.*, 2014 WL 4966293 (Bankr. W.D.N.Y. 2014) – Because a filed financing statement is seriously misleading, and therefore ineffective, only if a reasonably diligent searcher would be misled, a financing statement that ambiguously describes the collateral as "all assets, including [x, y, and z] now owned or hereafter acquired and located at [a specified place]" is not ineffective even if the collateral is located elsewhere. Moreover, in this case there was a long succession of filed financing statements that set forth the debtor's name change, address change, and the change in the description of the collateral, so that no reasonably diligent searcher could not have been misled.
- *Jennings v. Shuler*, 2014 Miss. App. LEXIS 55 (Miss. Ct. App. 2014) – Where an attorney prepares a security agreement but does not file a financing statement, the question of whether failure to file the financing statement constitutes malpractice is a question of fact not resolvable on summary judgment. No liability for attorney in this case, where damages not established and statute of limitations had run.
- *In re Residential Capital, LLC*, 495 B.R. 250 (Bankr.SDNY 2013) – Reference to "excluded assets" in security agreement not clear as to whether particular assets become un-excluded once assets no longer fit the definition.

D. Perfection

1. Certificates of Title

- *In re Lloyd; Warfield v. Santander Consumer USA, Inc.*, 511 B.R. 657 (Bankr.D.Ariz., 2014) – Certificate of title application filed shortly after debtor filed for bankruptcy perfected the security interest; perfection related back prior to the perfection of the security interest.
- *Stanley Bank v. Parish*, 317 P.3d 750, 298 Kan. 755 (Kan. 2014) – Examining competing liens in an automobile and the impact of the Kansas electronic certificate of the law.
- *Reinbold v. Wells Fargo Bank, N.A.* (In re Palet Alvarado), 517 B.R. 880 (Bkrtcy. N.D. Ill. 2014) – Financing statement with errors and certificates of title.
- *In re Scott*, 2014 WL 6871932 (Bankr. W.D. Mo. 2014) – Bank perfected its security interest in a vehicle when a new certificate of title noting the bank's lien was issued. Because that was 36 days after the date the security interest attached, perfection did not relate back to the time of attachment under Mo. Rev. Stat. § 301.600(2) and was avoidable as a preference. The bank could have perfected earlier by filing a notice of lien, but submitting the title application did not substantially comply with that process because the application did not provide the requisite information and fee on the requisite form.
- *In re Alvarado*, 517 B.R. 880 (Bankr. C.D. Ill. 2014) – Secured party that was properly identified as lienholder on California certificate of title but that changed its name before the debtor moved and had the car re-titled in Illinois remained perfected even though the Illinois certificate used the former name of the secured party. The address listed for the secured party was correct and an inquiry directed to that address in the secured party's former name would have enabled a reasonably diligent creditor to ascertain the correct information about the status of the lien.

- *In re Bryant*, 2014 WL 6968066 (Bankr. W.D. Ky. 2014) – Lender had a perfected security interest in the debtor's car even though the duplicate certificate of title erroneously listed the lender as a second lienholder rather than the only lienholder and even though because of space limitations it identified the lender as "Santander Consumer" rather than by its correct name, "Santander Consumer USA, Inc."
- *Stanley Bank v. Parish*, 317 P.3d 750 (Kan. 2014) – Bank perfected its security interest in vehicle by properly filing a filed a notice of security interest with the Kansas Department of Revenue, which maintained a record of the lien in its electronic database even though it later issued a certificate that omitted the lien. 2014 Commercial Law Developments Page 16
- *In re Thompson*, 2014 WL 2919313 (Bankr. W.D. Mich. 2014) – Because Michigan law provides that a security interest in a motor vehicle is perfected upon receipt by the Secretary of State of a proper application for a certificate of title that identifies the security interest, not upon issuance of the certificate, the lender's security interest in the debtor's vehicle was perfected when the dealer submitted two conflicting applications for a certificate of title, one of which correctly identified the secured party as lienholder, even though the Secretary of State initially issued a certificate based on the other application that named a different entity as the lienholder.
- *In re Lozar*, 2014 WL 910352 (Bankr. N.D. Ohio 2014) – Secured party with a security interest in a motorcycle perfected by notation on the certificate of title became unperfected when, upon receiving a check – later dishonored – for the secured obligation, it noted a lien release on the certificate and returned the certificate to the debtor.
- *In re Webb*, 2014 WL 5472568 (Bankr. E.D. Ark. 2014) – Secured parties whose security interests were not noted on the certificates of title for the debtors' vehicles were not perfected in the two trailers that qualified as vehicles under the state's

certificate of title statute even though no certificates of title for those trailers were admitted into evidence.

- *In re Keen*, 2014 WL 6871867 (Bankr. W.D. Va. 2014) – Bank that had a security interest in numerous items of the individual debtor's equipment to secure the debt owed by the individual's business was not perfected in the motor vehicles, trailers or the boat listed because the only way to perfect the security interest in such items is to have the security interest noted on the certificate of title, and there was no evidence that the bank had done that.
- *Stanley Bank v. Parish*, 317 P.3d 750 (Kan. 2014) – Bank whose security interest in a vehicle was perfected by compliance with the applicable certificate of title statute had priority over a buyer who purchased the vehicle from a subsequent judicial lien creditor after the state issued a certificate of title omitting reference to the lien. The buyer could not win under § 9-320(b) because compliance with the statute was the equivalent of filing a financing statement and the buyer could not win under § 9-337 because that provision applies only to a security interest perfected under another state's law.
- *Mercedes-Benz Financial v. Powell*, 2014 WL 3844013 (Mich. Ct. App. 2014) – The buyer who purchased a vehicle after a bank's security interest in the vehicle was removed from the certificate of title with a forged release of lien could have taken free of the security interest if the buyer had no notice of any fraud or irregularity in the title and he paid valuable consideration for the vehicle, so as to qualify as a good faith purchaser.

2. *Control*

- *In re SGK Ventures, Inc.*, 2014 WL 5782994 (Bankr. N.D. Ill. 2014) – Debtor's advance deposits for rent, utilities, legal services, and insurance were not deposit accounts because they were not maintained with a bank and thus control was not required to perfect a security interest in those deposits.

- *Zimmerling v. Affinity Financial Corp.*, 86 Mass.App.Ct. 136, 14 N.E.3d 325 (Mass. App. Ct. 2014) – Security interest attached to funds transferred to an escrow account; 9-332 did not cleanse the funds because the equitable interest of debtor remained.
- *In re Gem Refrigerator Co.; Seitz v. Republic First Bank*, 512 BR 194 (Bankr. ED Pa. 2014) – This significant decision evaluates the definitions of securities account and deposit account, determining that the particular account at issue was a securities account with subaccounts. The court's opinion offers a rare glimpse at how a court would evaluate relatively common account structures (although the conclusion is not free from doubt) and is an important reminder of the complexities of account collateral.
- *Del Moral v. UBS Financial Services Inc. of Puerto Rico*, 2014 WL 6386964 (D.P.R. 2014) – Securities intermediary that, after being served with a writ of execution on behalf of a judgment creditor, liquidated the account and remitted a portion of the proceeds to a related party that had a security interest perfected by control and the remaining balance to the judgment creditor, was liable for the portion remitted to the secured party because the secured party never instructed the intermediary to pay it.
- *Terry Phillips Sales, Inc. v. SunTrust Bank*, 2014 WL 670838 (E.D. Va. 2014) – Employee of bank that had a security interest in customer's investment account did not commit conversion by waiting a day to release a hold on withdrawals because the security agreement expressly stated that no withdrawals were permitted without the bank's prior written consent and thus there was not wrongful exercise or assumption of authority over the assets in the account.

3. *Possession*

- *In re Inofin, Inc.*, 512 B.R. 19 (Bankr. D. Mass. 2014) – Lender that financed the debtor's purchase of installment sales contracts from car dealerships, and which had a security interest in the delivered contracts in its possession, but whose financing

statement did not adequately describe the collateral, was perfected by possession of the installment contracts even though it did not possess the original Partial Purchase and Assignment that the debtor entered into with the dealerships because, without expert testimony as to how the business of purchasing and servicing sub-prime loans is documented, the trustee had failed to prove that the PPAs were the operative documents or part of the chattel paper.

- *In re GEM Refrigerator Co.*, 512 B.R. 194 (Bankr. E.D. Pa. 2014) – Bank with a security interest in the debtor's investment account with a securities intermediary brokerage – as to which the bank both filed financing statements and entered into a control agreement with the intermediary – remained perfected when the assets credited to the account were transferred to three sub-accounts at the same intermediary. The original investment account was investment property, not a deposit account, and the sub-accounts were also investment property even though they contained some cash. The financing statements covering "all investment property" were sufficient to perfect the security interest.
- *In re Jesup & Lamont, Inc.*, 507 B.R. 452 (Bankr. S.D.N.Y. 2014) – Bank that had a perfected security interest in deposited funds lost that interest when the funds were transferred to a second bank and then a third bank because control is required to perfect of security interest in a deposit account and the second and third banks took free of the security interest under § 9-332(b). As a result, subsequent transfer of the funds to the original bank during the preference period was an avoidable preference.
- *Cantor v. FDIC (In re Downey Financial Corporation)*, _ F.3d _ (3d Cir. 2015) – Tax sharing agreement did not create agency relationship because alleged principal did not 'control' alleged agent; thus property in possession of 'agent' was agent's property.

4. *Financing Statements: Debtor and Secured Party Name*
    - *In re Patriot Electric and Mechanical, Inc.*, 2014 Bankr. Lexis 1962 (Bankr. D. Md. 2014) – Court certifies question regarding UCC financing statements and search logic to State Supreme Court; question involves state search logic that said "enter as much or as little of the debtor name: so long as you start at the beginning." Filed financing statement had the beginning of the debtor name but failed to include entire debtor name, so filing will be found if partial name entered.
5. *Filing of Financing Statement — Manner and Location*
    - *Sturtz Machinery, Inc. v. Dove's Industries, Inc.*, 83 U.C.C. Rep. Serv. 2d 425 (N.D. Ohio 2014) – Lender perfected its security interest in the debtor's fixtures by filing a financing statement in Pennsylvania, where the debtor was located, even though the fixtures were located in Virginia.
    - *Clinton v. Adams*, 2014 WL 6896021 (C.D. Cal. 2014) – Even if law firm had an Article 9 security interest in the debtor's copyright infringement claim, that security interest was unperfected because the law firm filed a financing statement in California, where the infringement claim was prosecuted, rather than in Florida, where the debtor is located.
    - *In re Eng*, 83 U.C.C. Rep. Serv. 2d 500 (Bankr. E.D.N.C. 2014) – Recorded deed of trust served as an effective fixture filing because it stated that the "collateral is or includes fixtures . . . including but not limited to all heating, plumbing, ventilating, cooling, and lighting goods, equipment and other tangible and intangible property now or hereafter acquired, attached to or reasonably necessary to the use of such property."
6. *Amendments, Termination and Lapse of Financing Statement*
    - *In re Motors Liquidation Co.*, 755 F.3d 78 (2d Cir. 2014) – Debtor's counsel filed termination statements for multiple secured transactions, only some of which were being refinanced. Court certified to the Delaware Supreme Court the question of whether a termination statement is authorized if the secured

party of record reviewed and approved its filing or whether the secured party must also intend to terminate the security interest.

2014 WL 5305937 (Del. 2014) – A termination statement is authorized by the secured party if the secured party of record reviewed and knowingly approved the termination statement for filing, regardless of whether the secured party subjectively intended or understood the effect of the filing.

__ F. 3d __ (2d Cir. 2015) (rehearing and request for *en banc* hearing denied) – Court held that secured party had authorized filing of termination statement.

- *Fjellin ex rel. Leonard Van Liew Living Trust v. Penning*, 2014 WL 4298053 (D. Neb. 2014) – Termination statement filed without the knowledge or consent of the secured parties by the law firm representing the debtor was ineffective; the security interest remained perfected and continued to encumber the collateral, even after the debtor sold it.
- *United States v. Agra*, 113 A.F.T.R.2d 2014-1896 (E.D. Cal. 2014) – Taxpayer had no basis for filing financing statements against two IRS employees and thus court could order that the financing statements be stricken from the filing office's records and the taxpayer enjoined from filing any notices of non-consensual liens, recording any documents, or otherwise taking any action in the public records which purports to name a federal officer as a debtor or encumber the rights or the property of any federal officer.
- *State v. Andrus*, 2014 WL 3881553 (Ariz. Ct. App. 2014) – Individual who submitted for filing baseless financing statement against court clerk was guilty of one count of harassment of a public officer even though the filing office did not record or index the financing statement.
- *Nichols v. Branton*, 2014 WL 4816075 (N.Y. Sup. Ct. 2014) – Judge presiding over an incarcerated defendant's criminal trial was entitled, under the state's non-uniform UCC § 9-518, to have

the financing statement filed by the defendant against the judge expunged from the public record. The defendant was also liable for the costs incurred by the state attorney general's office in responding to the defendant's frivolous cross-motions.

- *United States v. Halajian*, 2014 WL 4968287 (E.D. Cal. 2014) – Because the financing statement that an individual and corporation filed against a bankruptcy court clerk was baseless and false, the clerk was entitled to a declaratory judgment that the financing statement has no legal effect. Because the filing of the financing statement violates 18 U.S.C. § 1343, the clerk was also entitled to an injunction under 18 U.S.C. § 1345 prohibiting the individual and corporation from filing another financing statement against the clerk.
- *In re Colony Beach and Tennis Club, Inc.*, 508 B.R. 468 (Bankr. M.D. Fla. 2014) – Post-petition lapse of financing statement did not cause the secured party to lose its lien or make the lien avoidable under Bankruptcy Code § 544(a) because lapse makes the security interest retroactively unperfected only against purchasers, not lien creditors.
- *In re Northern Beef Packers Ltd. Partnership Tax ID/EIN 26-2530200*, 83 U.C.C. Rep. Serv. 2d 104 (Bankr. D.S.D. 2014) – Even if equipment lessor had a blanket security interest in the debtor's other assets, that security interest became unperfected when the lessor amended its financing statement to "restate" the collateral to consist only of the equipment covered now or in the future by a lease or security agreement between it and the debtor.
- *Official Committee of Unsecured Creditors of Motors Liquidation Company v. JPMorgan Chase Bank, N.A.*, __ A.3d __ (Del.Sup. Ct. 2014) – "… the Second Circuit has asked us to assume that the secured party itself—JPMorgan— 'review[ed] and knowingly approved for filing a UCC–3 purporting to extinguish the perfected security interest.' … for a termination statement to become effective under § 9–509 and thus to have the effect

specified in § 9–513 of the Delaware UCC, it is enough that the secured party authorizes the filing to be made …".

- *Official Committee of Unsecured Creditors of Motors Liquidation Company v. JPMorgan Chase Bank, N.A.*, __ F.3d __ (2nd Cir. 2015) – 'From these facts it is clear that although JPMorgan never intended to terminate the Main Term Loan UCC-1, it authorized the filing of a UCC]3 termination statement that had that effect. "Actual authority . . . is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal 's assent that the agent take action on the principal 's behalf."'
- *In re The Adoni Group, Inc.*, 2015 WL 2080521 (Bankr. S.D.N.Y. 2015) – Debtor can ratify earlier, unauthorized filing of a financing statement.

E. Priority

1. Lien Creditors

- *Farmers National Bank v. Green River Dairy, LLC*, 318 P.3d 622 (Idaho 2014) – The statutory lien of agricultural commodity dealers who supplied feed for the maintenance of a debtor's dairy cows did not extend to the livestock that consumed the encumbered feed, and thus a bank with a perfected security interest in the debtor's cows was entitled to the proceeds from the sale of the cows.
- *In re Big Sky Farms Inc.*, 512 B.R. 212 (Bankr. N.D. Iowa 2014) – Feed supplier's agricultural lien on the debtor's hogs had priority over previously perfected security interest only for the price of the feed supplied with the 31 days preceding the supplier's filings. In the absence of an agreement, payments to the supplier are credited to the oldest invoices first.
- *In re Schley*, 509 B.R. 901 (Bankr. N.D. Iowa 2014) – Summary judgment denied on whether a feed supplier had an agricultural lien on the proceeds of the debtor's pigs that was prior to the perfected security interests of two lenders because: (i) the debtor had pigs at different locations and it was unclear

whether the pigs sold had consumed the feed supplied; (ii) priority applies only to the feed supplied with the 31 days preceding the supplier's filings and it was unclear whether the payments made to the supplier paid for that feed. However, although Article 9 is silent on the issue, an Iowa agricultural lien does extend to proceeds of the collateral to which the lien attached.

- *J & M Cattle Co. v. Farmers National Bank*, 330 P.3d 1048 (Idaho 2014) – The agister's lien of company that provided food, care, and other services necessary to raise the debtor's dairy cattle had priority over Bank's previously perfected security interest in the cattle. Under § 9-333(b), a possessory lien, such as the agister's lien in this case, has priority unless the statute creating the lien expressly provides otherwise. Although the statute specifies that proceeds of the cattle "must be applied to the discharge of any prior perfected security interest, the lien created by this section and costs; [and] the remainder, if any, must be paid over to the owner," this language could be either a directive on priority or merely a list of the potential payees. Because it was ambiguous, the statute did not expressly give priority to the secured party.
- *In re Cam Trucking LLC*, 84 U.C.C. Rep. Serv. 2d 588 (Bankr. D. Ariz. 2014) – Lender's perfected security interest in vehicle had priority over later garagemen's lien regardless of whether Arizona or Colorado law applies. Arizona's § 9-333 gives priority to a possessory lien unless the statute creating it expressly provides otherwise and its garagemen's lien statutes does expressly provide otherwise. Colorado's non-uniform § 9-333 gives priority to a garagemen's lien only if the statute creating so provides and its garagemen's lien statute does not so provide. Although the security interest was governed by Arizona law and the garagemen's lien was created under Colorado law, the garageman could not combine the Arizona § 9-333 and the Colorado garagemen's lien statute to obtain priority, particularly given that Colorado cases decided before

the current version of Article 9 refused to accord a garagemen's lien priority over a prior, perfected security interest.

- *In re Bissett Produce, Inc.*, 512 B.R. 528 (Bankr. E.D.N.C. 2014) – Grower that provided sweet potatoes to its own agent for storage, curing, packaging, and sale was not exempt from the PACA notice requirements and, because it did not comply with those requirements, was not entitled to the benefits of a PACA trust against either the agent or its secured lender.
- *Attorney's Title Guaranty Fund, Inc. v. Town Bank*, 850 N.W.2d 28 (Wis. 2014) – Lender with a perfected security interest in the proceeds of the debtor's malpractice action, which attached upon settlement of the action, had priority over the rights of an earlier judgment creditor because even though the judgment creditor obtained a court order requiring the debtor to appear at supplemental proceedings, that did not give the creditor a judgment lien.
- *Heartland Bank & Trust Co. v. Leiter Group*, 18 N.E.3d 558 (Ill. Ct. App. 2014) – Lender with a security interest in borrower's equipment and accounts had a claim for conversion against the law firm that first deposited into its IOLTA account checks from the borrower's customers and checks representing proceeds of the borrower's equipment, and then used the IOLTA account to pay its fees. The law firm was not a holder in due course of the checks because it knew of the lender's security interest. The law firm did not take free under § 9-332(b) because the deposit account was not the debtor's, it was the law firm's.
- *Zimmerling v. Affinity Financial Corp.*, 14 N.E.3d 325 (Mass. Ct. App. 2014) – Account debtor's wire of funds to an escrow account pursuant to a court order in action brought by judgment creditor did not cause either the escrow agent of the judgment creditor to take free of the secured party's perfected security interest under § 9-332(b), particularly given that the court order was intended to preserve the existing priorities.

- *Mishcon de Reya New York LLP v. Grail Semiconductor, Inc.*, 82 U.C.C. Rep. Serv. 2d 778 (S.D.N.Y. 2014) – The attachment lien that a law firm obtained on a client's patent arose when the attachment order was entered, not when a receiver was later appointed, and thus had priority over a security interest in the patent that was created and perfected subsequently. The security interest was extinguished when the attachment lien was foreclosed at an auction sale at which the law firm was the highest bidder.
- *Blue Sky Telluride, LLC v. Intercontinental Jet Service Corp.*, 328 P.3d 1223 (Okla. Ct. App. 2014) – Summary judgment could not be awarded on secured party's action to replevy aircraft from service company that had possession of and had made repairs to aircraft because, while it remained unclear if the service company had a possessory lien on the aircraft due to questions about whether it was authorized to make repairs, if it did have a lien, that lien has priority under § 9-333 over the secured party's perfected security interest.
- *Tenet Health Care Sys. Hospitals Dallas, Inc. v. North Texas Hosp. Physicians Group, P.A.*, 438 S.W.3d 190 (Tex Ct. App. 2014) – Judgment creditor of tenant could garnish sublessee's obligation to pay rent despite landlord's security interest in the tenant's accounts because the landlord never filed a financing statement to perfect its security interest and by serving the writ of garnishment the judgment creditor became a lien creditor.
- *ACF 2006 Corp. v. Merritt*, 557 F. App'x 747 (10th Cir. 2014) – Lender with a perfected security interest in law firm's accounts had priority in the firm's share of the proceeds of a client's tort claim settlement over those who had provided services in connection with the litigation and were still unpaid for their services, even if the service providers had a contractual lien on the settlement proceeds – a fact that had not proven – because there was no evidence that the lien was perfected. The service providers were not entitled to a constructive trust because the law firm did not unjustly acquire the funds nor was it

inequitable for the lender to take priority. One dissenting judge concluded that the firm's right to funds for expenses was not a right to payment for the firm's services, and thus was not an account. Moreover, the firm had no right to reimbursement with respect to those funds because the firm had not paid the expenses. Thus, the dissenting judge would have ruled that the firm did not have a right to the portion of the settlement allocated to it for expenses, and therefore the lender's security interest did not attach to that portion.

- *Blue Sky Telluride, L.L.C. v. Intercontinental Jet Service Corp*, 328 P.3d 1223 (Okla. Ct. App. 2014) – Possessory statutory lien in aircraft trumped perfected security interest; case is an important reminder of the complexities of "hidden liens" and aircraft financing.
- *Associated Bank N.A. v. Collier*, 2014 WI 62, 355 Wis.2d 343 (Wis. 2014) – Evaluating priorities between a judgment lien and perfected security interest.
- *In re Cam Trucking LLC*, 2014 Bankr. LEXIS 3896 (Bankr.D.Ariz. 2014) – Court examines impact of conflicting statutory lien provisions in Arizona and California law. Court attempted to apply the purpose of the law.
- *Farmers Nat'l Bank v. Green River Dairy, LLC*, 318 P.3d 622 (Idaho 2014) – Court interprets a state agricultural lien on "agricultural products and the proceeds of sale of agricultural products" as not creating a lien in cows that ate agricultural products. The case is an important reminder to look for state law hidden liens.
- *In re Elk Grove Village Petroleum*, 510 B.R. 594 (Bkrtcy. N.D. Ill. 2014) – Evaluating priority of state tax liens.

2. *Buyers and Other Transferees*

- *Financial Federal Credit, Inc. v. Crane Consultants, LLC*, 2014 WL 1883811 (W.D.N.Y. 2014), *affirmed* 604 F.3d Appx. 38 (2d Cir. 2015) (unpublished) – Agreement providing for buyer of new crane to trade in an old crane to the seller was to be regarded as

two independent transactions because neither was conditioned on the other, the buyer paid cash for the new crane while the seller provided a note for the old crane, the seller never paid any part of the price, and the buyer never delivered the old crane. The buyer was a buyer in ordinary course of business with respect to the new crane even though the buyer had the right to sell the new crane back to the seller for a specified price if the seller did not have possession of the old crane. Thus, the buyer took free of a perfected security interest in the new crane.

- *VW Credit, Inc. v. Robertson*, 2014 WL 4207635 (E.D.N.Y. 2014) – Neither the lender with a security interest in a vehicle nor the buyers of the vehicle from the borrower were entitled to summary judgment in the lender's replevin action. Although the lender's security interest was not perfected at the time of the sale to the buyers, factual issues remained as to whether the borrower/seller was authorized to sell the vehicle free of the security interest and, even if so, whether the buyers acted in good faith given the allegation that they paid substantially less than the value of the vehicle.
- *Chen v. New Trend Apparel, Inc.*, 8 F. Supp. 3d 406 (S.D.N.Y. 2014) – Buyers who purchased the debtor's inventory at a liquidation sale at "closeout" prices did not qualify as buyers in ordinary course of business. The debtor's desire to be paid exclusively in cash for large sums was a red flag obligating the buyers to investigate further into the ownership of the goods and their failure to do so prevented them from qualifying as buyers in ordinary course. However, the creditor with a perfected security interest in the goods purchased was not entitled to summary judgment on its conversion and replevin claims because it was unclear that it had made a demand for the goods.
- *Farmers-Merchants Bank & Trust Co. v. Southern Structures, LLC*, 134 So. 3d 142 (La. Ct. App. 2014) – Sale of collateralized goods was made by the debtor, not the broker, and because it involved the debtor's equipment, not inventory, the sale was

not in ordinary course of business and the buyer did not take free of the perfected security interest.

- *Guaranty Bank & Trust Co. v. FGDI Division of Agrex, Inc.*, 2014 WL 1289466 (N.D. Miss. 2014) – Because two buyers of grain purchased not from a person engaged in farming operations, but from the farmer's buyer, they took free of any security interest in the grain held by the farmer's lender and thus the lender's joinder of the subsequent buyers was without basis and would not be considered in determining whether there was diversity jurisdiction in the lender's action against the initial buyer.
- *Financial Federal Credit, Inc. v. Crane Consultants, LLC*, 2014 U.S. Dist. LEXIS 65125 (W.D.N.Y. 2014) – Court concludes buyer was a buyer in the ordinary course in spite of trade in and buyback provisions in the sale agreement that competing secured creditor argued could not be in the ordinary course.
- *In re Provider Meds, LP*, 2014 WL 4162870 (Bankr. N.D. Tex. 2014) – Secured party with a security interest in the debtor's IP, including source code, was not entitled to rescind or terminate the debtor's licenses of the source code even though the licenses were allegedly perpetual, royalty-free, and permitted the licensees to modify the code, thus greatly reducing the code's value as collateral. The secured party had no claim for fraudulent inducement because the debtor made no false representation to the secured party (the term sheet contained no representations and the separate purchase and sale agreement, which did contain representations, related only to the debtor's patents and patent-related rights), the debtor's promise to provide a "senior security interest" was not breached by the license, and in any event a valid fraudulent inducement claim would not warrant rescission of the licenses, at most it might lead to rescission of the secured party's contracts with the debtor. Even if the license agreements were executed after the security agreement, and backdated to before the before the date of the security agreement, that does not

render them fraudulent or forgeries. The signatories had authority to act and their signatures were authentic. The licensee were not liable for tortious interference with contract because even though the licensees might have known that the secured party's consent was needed to encumber the source code, the licenses were not an encumbrance.

- *Farm Credit Services of America, PCA v. Cargill, Inc.*, 750 F.3d 965 (8th Cir. 2014) – Secured party with a perfected security interest in a farmer's corn crop, and which filed in compliance with the Food Security Act, had priority in the corn over the buyer to whom the corn had been delivered – and was entitled to possession thereof – even though the buyer had setoff rights against the debtor and defenses to payment under § 9-404. Section 9-404 was irrelevant to the parties' relative interests in the corn.
- *Farmers-Merchants Bank & Trust Co. v. Southern Structures, LLC*, 134 So. 3d 142(La. Ct. App. 2014) – Because the buyer of equipment had knowledge of the perfected security interest in the equipment, knew that the security agreement required the secured party's consent to a sale, and knew that the seller was either out of business or going out of business, the buyer did not act in good faith for the purposes of a non-uniform Louisiana rule that exempts a good faith buyer of collateral from personal liability.
- *Wise v. SR Dallas, LLC*, 436 S.W.3d 402 (Tex. Ct. App. 2014) – There was no basis for the jury's finding that the buyer of the debtor's furniture, fixtures, and equipment was liable in conversion to the secured party because there was no proof that the secured party made a demand for the property. Even if the buyer was liable, the jury erred in awarding damages equal to the amount of the debt owed to the secured party rather than the value of the property at the time of the alleged conversion, as to which no evidence was presented.

3. *Statutory Liens; Forfeiture*
    - *Farmers-Merchants Bank & Trust Co. v. Southern Structures, LLC.*, 134 So.3d 142 (La. App. 2014) – Third party purchaser of collateral could be held personally liable under 9-315 where it acted in bad faith; court notes conspiracy with debtor is not required under current La 9-315. Court seems to muddle some of its security interest analysis, including citing cases from 1940 and 1963 in struggling to determine the validity of a security interest in movable goods.
4. *Subordination and Subrogation*
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5. *Equitable Claims*
    - *Robertson v. Robertson*, 2014 WL 6610040 (N.Y. Sup. Ct. 2014) – Individual who received specific bequest of stock from his mother, who had pledged the stock to secure a debt guaranteed by the individual's brother, was subrogated to the secured party's rights against the brother when the executor of the mother's estate allowed the stock to be sold to satisfy the debt to the secured party.
6. *Set Off*
    - *InfinaQuest, LLC v. DirectBuy, Inc.*, 83 U.C.C. Rep. Serv. 2d 549 (N.D. Ind. 2014) – Even if lender's security interest in the debtor's accounts was perfected by the financing statement filed by the lender's affiliate, which also had a security interest, the lender had no claim against either the debtor's franchisor or another financier whose contracts with the debtor expressly gave the franchisor and financier setoff rights. The franchisor and financier were "account debtors" to the extent they owed contractual obligations to the debtor and the lender was an "assignee" whose rights were, pursuant to § 9-404(a), subject to all the terms in the agreements between the debtor and the account debtors.

- *Catskill Hudson Bank v. A & J Hometown Oil, Inc.*, 982 N.Y.S.2d 592 (N.Y. App. Div. 2014) – Buyer of debtor's oil business – other than existing accounts – that received instruction to pay secured party all collections on accounts generated before the sale and knew of the debtor's promise not to modify the purchase agreement without the secured party's consent could setoff overpayment of purchase price against its obligation to pay future gallonage fees but not against its collections of pre-sale accounts, which it did not acquire.
- *Colony Flooring & Design, Inc. v. Regions Bank*, 2014 WL 2021823 (Tex. Ct. App. 2014) – Account debtor submitted sufficient evidence of uncredited returns and setoff rights to avoid summary judgment in the secured party's action to collect the account.

7. *Priority — Competing Security Interests*
   - *Feresi v. The Livery, LLC*, 182 Cal.Rptr.3d 169 (Cal. Ct. App. 2015) (as revised) – Perfected security interest of the manager of an LLC in the debtor's membership interest in the LLC was equitably subordinated to the previously created but unperfected security interest of the debtor's ex-wife, who was also a member of the LLC, because the manager breached his LLC fiduciary duty to the ex-wife by destroying the value of her security interest. The manager, knowing of the ex-wife's security interest and that the debtor was in default on his obligations to his ex-wife, loaned money to the debtor, created a conflicting security interest, and then surreptitiously perfected it to gain an advantage over the ex-wife.
   - *Sturtz Machinery, Inc. v. Dove's Industries, Inc.*, 83 U.C.C. Rep. Serv. 2d 425 (N.D. Ohio 2014) – Lender perfected its security interest in the debtor's fixtures by filing a financing statement in Pennsylvania, where the debtor was located, even though the fixtures were located in Virginia. The lender's security interest had priority over the seller's security interest that was later perfected by a fixture filing in Virginia, almost a year after delivery of the goods to the debtor.

- *Colbert v. First NBC Bank*, 2014 WL 1329834 (E.D. La. 2014) – The debtor was not a necessary party in one secured creditor's declaratory judgment action against another secured party to determine the validity and priority of the latter's security interest in a commercial tort claim.
- *Amegy Bank v. DB Private Wealth Mortgage, Ltd.*, 2014 WL 791503 (M.D. Fla. 2014) – Secured party with a perfected security interest in corporate stock that the debtor then sold and placed in a deposit account was not entitled to summary judgment against another bank that received some the sale proceeds on the basis that the recipient acted in collusion with the debtor to violate the secured party's rights. The evidence of collusion was circumstantial and did not eliminate all material factual disputes.
- *Heartland Bank & Trust Co. v. Leiter Group*, 18 N.E. 3d 558 (Ill.App.3d 2014) – Law firm converted checks subject to competing security interest when it deposited the checks to its IOLTA account.
- *Prairie State Bank & Trust v. Deere Park Associates*, 84 U.C.C. Rep. Serv. 2d 644 (Ill. Ct. App. 2014) – Bank with a perfected security interest in debtor's inventory and proceeds had no conversion claim against subsequent lender that, in facilitating the debtor's liquidation sales, retained commissions, paid itself, and paid unsecured creditors because the bank had waived its security interest during the course of its relationship with the debtor by making loans without sufficient inventory collateral, renewing at least one of the loans when it knew of the going-out-of-business and inventory-reduction sales, failing to require the debtor to keep its business accounts on deposit with the secured party, failing to communicate with the defendant after receiving its purchase-money notice and obtaining knowledge of the sales, failing to take any action other than "rolling over notes" after the debtor issued bad checks, and failing to obtain recent income and asset statements from the debtor.

8. *Purchase-Money Security Interests*

   - *Financial Federal Credit, Inc. v. Crane Consultants, LLC*, 2014 WL 1883811 (W.D.N.Y. 2014) – Agreement providing for buyer of new crane to trade in an old crane to the seller was to be regarded as two independent transactions because neither was conditioned on the other, the buyer paid cash for the new crane while the seller provided a note for the old crane, the seller never paid any part of the price, and the buyer never delivered the old crane. The seller's secured party was also not entitled to the old crane because the trade-in was never consummated and thus the seller never acquired ownership rights in the old crane. Even if the seller did acquire rights in the old crane without possession, the buyer's retained PMSI in the old crane had priority over the security interest of the seller's secured party either under § 9-324(a), because the old crane never became inventory of the seller, or under § 9-324(b), because the notification requirement of § 9-324(b) never applied.
   - *In re Brady*, 508 B.R. 736 (Bankr. E.D. Wash. 2014) – Because § 9-335(d) made a tire seller's purchase-money security interest in tires sold to individual subordinate to another lender's perfected security interest in the debtor's car, pursuant to § 9-335(e) the tire seller did not have a right to repossess the tires and thus the debtor's reaffirmation agreement with the seller would not be approved.
   - *T. Gluck & Co., Inc. v. Craig Drake Manufacturing* (NY Sup. Ct 2013) – PMSI secured party did not renew PMSI notice to existing inventory lender and did not have PMSI priority for new shipments.

9. *Proceeds*

   - *1st Source Bank v. Wilson Bank & Trust*, 735 F.3d 500 (6th Cir. 2013) –Accounts are not 'proceeds' of rigs used to generate accounts.
   - *BOKF, N.A. v JPMorgan Chase Bank, N.A.* (*In re MPM Silicones, LLC*), 518 B.R. 740, 2014 Bankr. LEXIS 4353 (Bankr SDNY 2014)

– Amounts distributed to secured party pursuant to Chapter 11 plan are not Article 9 "proceeds" of collateral held by secured party.

F. Default and Foreclosure

1. Default

- *GMAC v. Everett Chevrolet, Inc.*, 317 P.3d 1074 (Wash. Ct. App. 2014) – Security agreement between car dealership and floor plan financier that provided that the secured obligation was due "on demand" was a demand obligation even though another provision required faithful and prompt payment after a sale of each vehicle and even though there was no secured obligation when the dealership executed the agreement. Because the secured obligation was due on demand, the secured party had no duty of good faith to avoid exercising the right to demand payment.
- *Trejo de Zamora v. Auto Gallery, Inc.*, 2014 WL 1685925 (D. Nev. 2014) – Because the seller of a vehicle violated the Nevada Retail Installment Sales Act, and was therefore not permitted to recover any finance charge or fees, the buyer could not have been in default when repossession occurred and thus had a valid claim for conversion.
- *TTO Drilling Co. v. Hopkinson*, 2014 WL 5314770 (S.D.N.Y. 2014) – Secured party with a security interest in promissory notes had no right to collect them absent some default by the debtor.
- *Moniuszko v. Karuntzos*, 2014 WL 4657134 (Ill. Ct. App. 2014) – Because the parties' lease agreement expressly required the landlord to release its security interest in the tenant's equipment on a specified date unless, prior to that date, the tenant "was found to be in default of this Lease and failed to cure such default," and the landlord had not obtained by the specified date a court ruling that the tenant was in default, the landlord was required to release its security interest. It did not matter that the security agreement permitted the landlord to

declare a default in its sole discretion because such language was conspicuously absent from the lease.

- *Bayader Fooder Trading, LLC v. Wright*, 2014 WL 5369420 (W.D. Tenn. 2014) – Buyer of alfalfa hay that had security interest in farmer's equipment to secure farmer's obligations under the sales agreement was entitled to emergency order for immediate possession of the collateral because the farmer had failed to deliver the hay by the date provided for in their contract and was not entitled to a defense based on the force majeure clause because the weather conditions were not significantly impacting other nearby growers and were not so severe as to be unforeseeable and the farmer did not take action to mitigate the effects of the poor weather conditions.
- *RTP LLC v. Orix Real Estate Capital, Inc.*, 2014 U.S. Dist. LEXIS 12454 (N.D. Ill. 2014) – SPE real estate borrower; evaluates whether various defaults occurred.
- *Spellman v. Independent Bankers' Bank of Florida*, 2014 WL 3871264 (Fla. Ct. App. 2014) – Bank that, after default, had the collateralized shares of stock reissued in the name of the bank's subsidiary and then tried but failed to sell the stock at a public sale was entitled to a judgment against the debtor for the full amount of the secured obligation. A secured party does not dispose of the collateral merely by having it re-titled in its own name and there is no reason not to apply that rule to a re-titling in a subsidiary's name.

2. *Repossession of Collateral*
   - *Duke v. Garcia*, 2014 WL 1318646 (D.N.M. 2014) – Repossession agent intentionally trespassed on the debtor's property and violated § 9-609 by remaining on the property and continuing repossession efforts after the debtor repeatedly protested and a physical altercation between the agent and the debtor occurred. The repossession agent also violated the state UDAP law by falsely representing, though its actions, that it was entitled to

proceed with repossession on the debtor's property, over her protest, and with police assistance.

- *Duke v. Garcia*, 2014 WL 1333182 (D.N.M. 2014) – While officers involved in repossession that breached the peace might be liable for damages under § 1983, the junior officer was not liable for punitive damages given his limited involvement in and lack of control during the incident.
- *Thompson-Young v. Wells Fargo Dealer Services, Inc.*, 84 U.C.C Rep. Serv. 2d 200 (Ill. Ct. App. 2014) – Debtors' failed to raise a claim for breach of the peace by alleging that: (i) two repossession agents came to their apartment building at 4:00 a.m.; (ii) one remained outside the building ringing their buzzer and the other went inside and "banged loudly" on their apartment door for an "extended" period of time; (iii) they "yelled loudly" and identified themselves as agents there to repossess the car; and (iv) they put a club on the car, left, and returned later and repossessed the car.
- *Davis v. Toyota Motor Credit*, 2014 WL 1653230 (S.D. Tex. 2014) – Summary judgment denied on debtor's claim for damages resulting from repossession that allegedly resulted in a breach of the peace when the debtor tried to access the trunk of her vehicle as the repossession agent was hooking the car up to the tow truck, causing her to be lifted up with the car, and then injuring her ankle when she jumped down.
- *Aviles v. Wayside Auto Body, Inc.*, 2014 WL 4932993 (D. Conn. 2014) – Summary judgment denied on whether secured party and its repossession agent breached the peace in repossessing the debtor's vehicle over the debtor's oral protects, even though there was no physical contact, the police were not called, the agent did not use trickery, and the debtor was permitted to remove his personal belongings.
- *Golden v. Prosser*, 2014 WL 4626489 (D. Minn. 2014) – Debtor had no cause of action under § 9-609 for secured party's letter threatening repossession because repossession never occurred.

- *Goldenstein v. Repossessors, Inc.*, 2014 WL 3535112 (E.D. Pa. 2014) – Debtor had no cause of action under either the Fair Debt Collection Practices Act or RICO against company that repossessed her vehicle, even if the secured loan was usurious, because the security interest was nevertheless enforceable and the debtor was in default. The debtor's redemption of the vehicle by paying the usurious interest was not actionable because it was voluntary.
- *Binion v. Fletcher Jones of Chi., LTD., LLC*, Ill. App. Unpub. LEXIS 1369 (Ill. App. 1st 2014) – Court concludes embarrassing conduct by independent agent of SP did not constitute breach of peace.
- *Thompson-Young v. Wells Fargo Dealer Servs., Inc.*, 2014 Ill. App. Unpub. 1610) (Ill. App. 1st 2014) – No breach of peace in repossession even though auction house employees caused a noisy scene by knocking on debtor's door at 4 AM.
- *Duke v. Garcia*, 2014 WL 1333182 (D.N.M. 2014) – Because there was sufficient evidence for the debtor's claim for punitive damages against the repossession agent to survive a motion for summary judgment, the debtor's claim for such damages against the secured party also survived, even though the secured party might not have known of or ratified the agent's wrongful conduct.
- *Duke v. Garcia*, 2014 WL 1318647 (D.N.M. 2014) – Secured party's text messages to the debtor prior to repossession violated the state UDAP law by falsely representing that it had filed a warrant for the debtor's arrest. The secured party might also have violated the act by failing for four months to notify the debtor of the surplus resulting from its disposition of the collateral. The secured party violated § 9-615 by failing to pay the entire amount of the surplus. The secured party violated § 9-616 by sending an explanation of the surplus that did not substantially comply with the requirements. Finally, because the duty not to breach the peace during repossession is

nondelegable, the secured party was liable for the repossession agent's breach of the peace.

- *Irwin v. West Gate Bank*, 848 N.W.2d 605 (Neb. 2014) – Because the secured party had a right but no duty to take possession of the collateral, there was no consideration for the secured party's abandonment of the debtor's collateral to the debtor's landlord and thus the secured party could not be liable for breach of the abandonment agreement by asserting its rights in the collateral and receiving payment in the debtor's bankruptcy.
- *Dove East Estates v. Green Tree Servicing, LLC*, 2014 WL 4050591 (Del. Ct. Com. Pl. 2014) – Secured party that had a right to repossess the debtor's manufactured home but never did, and that never promised the landlord to pay storage fees, was not liable for those fees even if the secured party entered the premises to post a for sale sign.
- *Idaho Property Management Services, Inc. v. Macdonald*, 2014 WL 7096454 (Idaho Ct. App. 2014) – Individual who had a security interest in the debtors' abandoned mobile home was not liable for rent damages to the owner of the lot on which the mobile home was situated. Although the individual was listed as the "legal owner" on the certificate of title, under the labels used by the Idaho Department of Transportation, that simply meant that the individual was a lienor, and thus could not be liable for trespass. Although a state statute does impose liability for rent on lienors, the landlord had not complied with the notification requirements of that statute.
- *Allen v. Continental Western Ins. Co.*, 436 S.W.3d 548 (Mo. 2014) – Secured party had no cause of action against its liability insurer for failing to defend it against claim for wrongful repossession because the insurance policy excluded "property damage expected or intended from the standpoint of the insured" and although the insured may have been mistaken about the right to repossess, its actions were intentional.

3. *Notice of Foreclosure Sale*

   - *In re Inofin, Inc.*, 512 B.R. 19 (Bankr. D. Mass. 2014) – Secured party did not provide reasonable notification of its disposition of chattel paper because it sent notifications for three different dates and never informed any of the debtor's creditors with financing statements on file that the first notification was erroneous or that the last superseded the prior notifications.
   - *TCFIF Inventory Finance, Inc. v. Appliance Distributors, Inc.*, 82 U.C.C. Rep. Serv. 2d 836 (N.D. Ill. 2014) – Clause in guaranty agreement providing that "[a]ny notice of a disposition [of collateral] shall be deemed reasonably and properly given if given to the Guarantor at least 10 days before such disposition" did not impose an affirmative requirement on the creditor but merely provide a guideline for the reasonableness of notice required by the UCC. Hence, the creditor's failure to provide the guarantors with notice was not a breach of the guaranty. Although the failure to provide notice did result in a rebuttable presumption that there was no deficiency, the creditor rebutted the presumption by showing that most of the collateral was sold back to the manufacturer pursuant to repurchase agreements, the guaranty agreement declared that to be a commercially reasonable disposition, and the bulk of the secured obligation related to inventory that was apparently sold out of trust and hence never disposed of by the creditor.
   - *Wells Fargo Bank v. Witt*, 2014 WL 1373633 (N.D. Ala. 2014) – Because the debtor – not the secured party – sold the collateral, the secured party had no duty to provide notice of the sale to the guarantor and the requirement that the sale be conducted in a commercially reasonable manner did not apply.
   - *In re ProvideRx of Grapevine, LLC*, 507 B.R. 132 (Bankr. N.D. Tex. 2014) – Secured party's notification of disposition that referred only to the debtor's patent and patent-related rights must be read together with the letter accompanying the notification that referred to all the collateral, and thus the secured party disposed of all of the debtor's IP assets, not merely the patent

and patent-related rights as to which the security interest was perfected. Even if the notification was deficient, that did not invalidate the sale or render it voidable.

- *Newman v. Federal Nat'l Mort. Ass'n*, 2014 WL 7334192 (N.Y. Sup. Ct. 2014) – Because compliance with the non-uniform New York rule requiring notification 90 days in advance of a disposition of shares in a residential cooperative apartment is a condition to having an effective sale, secured party that purchased the shares at a disposition conducted without the proper notification would be enjoined from bringing an eviction action against the debtor.
- *John Deere Construction & Forestry Co. v. Parham*, 755 S.E.2d 825 (Ga. Ct. App. 2014) – Secured party that repossessed and sold farm equipment was entitled to a deficiency judgment because it complied with the notification rules of § 9-613. Although the secured party did not, pursuant to the Georgia Retail Installment Act, provide pre-sale notification of its intent to seek a deficiency, that act applies only to collateral purchased for personal, family, or household use and thus was inapplicable.
- *Gardner Ally Financial, Inc.*, 61 A.3d 817 (Md. 2013) – Discusses meaning of when the secured party conducts a "public" or "private" foreclosure sale.

4. *Commercial Reasonableness of Foreclosure Sale*

- *In re Adobe Trucking, Inc.*, 551 F. App'x 167 (5th Cir. 2014) – Bankruptcy court did not err in concluding that a public sale of collateralized drilling equipment, at which the secured party made the winning bid of $41 million, was commercially reasonable given that the price was higher than the amount of one appraisal, the other appraisal had to be discounted because it was prepared well before the market for such equipment was declined, and the secured party resold the equipment four months later for only $10 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 prepare the collateral for sale or have possession at the time of sale.

- *Keybank v. Hartmann*, 82 U.C.C. Rep. Serv. 2d 730 (E.D. Ky. 2014) – Private sale of encumbered boats that the secured party conducted through a broker, as the debtor suggested and later admitted would be commercially reasonable, merely with a different broker and for a higher price, was commercially reasonable.
- *GECC v. FPL Service Corp.*, 995 F. Supp. 2d 935 (N.D. Iowa 2014) – Secured party proved that it conducted a commercially reasonable disposition of the collateral – two copiers – by showing that: (i) it hired a remarking firm that emailed approximately 2500 potential buyers, which the firm had identified from past transactions and marketing efforts as those that customarily purchase this type of equipment for parts; (ii) the firm sold the copiers to the highest bidder; and (iii) this process conforms to that used by copier dealers who wish to maximize the price of used copiers.
- *Builders Development & Finance, Inc. v. Vern Reynolds Construction Company, Inc.*, 2014 WL 1875804 (Minn. Ct. App. 2014) – Trial court did not err in concluding that judicially approved sale of a minority interest in a limited liability company was commercially reasonable. The secured party did not procure the ruling through fraud merely because the secured party's appraiser misstated some facts and other appraisers disagreed with his methodology. The trial court did

err in refusing to award the secured party the attorney's fees it incurred post-judgment in defending the sale because the promissory note expressly provided for attorney's fees "incurred in protecting or preserving the security."

- *Jack in the Box, Inc. v. Mehta*, 2014 WL 2069530 (N.D. Cal. 2014) – Franchisor, in an action for breach against the franchisee, was entitled to an order authorizing the sale of the franchisee's collateralized equipment by the franchisee's secured party to the franchisor. The sale was negotiated at arms length and thus was commercially reasonable.
- *In re Sandpoint Cattle Co.*, 83 U.C.C. Rep. Serv. 2d 863 (D. Neb. 2014) – Secured party with a security interest in cattle gave the debtor a fair credit of $95,000 on the secured obligation for the 38 cattle he did not sell but simply retained. The secured party conducted a commercially reasonable disposition of 167 heifers because the evidence showed that these were the poorest quality of the abandoned cattle and the marginal increase in price that might have resulted from keeping and calving the heifers would not outweigh the increased costs of feeding and sheltering the animals. The secured party conducted a commercially reasonable public disposition of 509 cattle even though there was minimal advertising – some personal phone calls and online ads – and the sale was conducted at a commercial beef barn, not a registered Angus sale barn because the debtor insisted that the secured take possession on short notice and there were few or no other viable options for where to take the cattle and sell them from. The secured party's later sale of cattle at an annual bull sale was also commercially reasonable; the secured party had no duty to delay the sale in the hope that the collateral's value would rise. The secured party's final sale of 1210 cattle at a public sale was commercially reasonable even though made in December, at a barn predominantly used to auction commercial beef cattle, not purebred Angus, and advertised for only four months. The cattle were sold for more than their appraised value, the

secured party had no duty to delay the sale, and the sale was on a recognized market.

- *Harley-Davidson Credit Corp. v. Galvin*, 2014 WL 4384632 (D.N.H. 2014) – The guarantor of an airplane loan failed to raise a factual issue about the secured party's disposition of the collateral to avoid summary judgment on the secured party's claim for a deficiency. Even if the guarantor was correct in asserting that the airplane was missing components at the time of sale and this could have affected the sales price, he did not properly supported that contention. There was no evidence that the secured party's agent concealed the vandalism of the airplane from the guarantor or that knowledge of the vandalism would have changed the sale price. At its core, the guarantor's complaint was with the sale price, but there was no evidence that the sale process was commercially unreasonable.
- *FL Receivables Trust 2002-A v. Arizona Mills, LLC*, 82 U.C.C. Rep. Serv. 2d 764 (Ariz. Ct. App. 2014) – Creditor with a security interest in a restaurant building and fixtures that was contractually superior to the interest of the landlord lost its lien when it failed within a commercially reasonable time to find a suitable new tenant. The length of time between repossession and disposition is a factor in determining whether the disposition is commercially reasonable under § 9-610.
- *Provident Bank v. Steele*, 83 U.C.C. Rep. Serv. 2d 433 (S.D. Tex. 2014) – Debtor raised a colorable claim that the bank, which spent more than $50,000 to tow and repossess a boat that the bank sold for only $16,000, either incurred unreasonable expenses or conducted the sale in a commercially unreasonable manner.
- *Ross v. Rothstein*, 2014 WL 1385128 (D. Kan. 2014) – Summary judgment denied on the commercial reasonableness of the secured party's sale of stock on the OTCQB market because factual disputes about how that exchange operates left

unresolved whether it qualifies as a "recognized market" under § 9-627.

- *TAP Holdings, LLC v. Orix Finance Corp.*, 2014 WL 5900923 (N.Y. Sup. Ct. 2014) – Debtor's creditors raised a claim that the senior lenders failed to act in good faith by taking control of the debtor's board, acquiring all of the debtor's assets in satisfaction of the secured obligation, and then transferring those assets to a newly formed entity, all in a very quick process without involvement of the junior creditors or equity holders and without competitive dynamic.
- *Kinzel v. Bank of America*, 2014 WL 346293 (N.D. Ohio 2014) – Disputes about material facts prevented summary judgment on whether the secured party breached the duty of good faith in liquidating the shares of stock in which it had a security interest. While the secured party liquidated the stock after it fell below the designated floor price, on several prior occasions when the collateral fell below the designated floor price the secured party reduced the loan to maintenance ratio, accepted cash payments and collateral, and most importantly, adjusted the floor price, and yet the secured party offered no explanation of why on this occasion it liquidated the collateral. Moreover, the secured party had not shown that it acted reasonably in concluding that all the pledged collateral was insufficient to support the loan solely because the share price of this stock fell. The debtors, who had not bargained for an express restriction on the secured party's discretion, had not shown as a matter of law that the secured party acted unreasonably in refusing to make further accommodations before liquidating the collateral.
- *In re Inofin, Inc.*, 512 B.R. 19 (Bankr. D. Mass. 2014) – Secured party did not conduct a commercially reasonable sale of chattel paper because it made no reasonable efforts to market the loan portfolio, it provided limited and conflicting notification of the sales, the auctioneer made no effort to solicit bids from individuals or entities in the industry by placing ads in trade publications and instead merely placed ads in the Boston

Herald, which resulted in insignificant interest and a single bid from the secured party. However, this did not render the sale void and the debtor's bankruptcy trustee failed to prove that any damages resulted.

- *Adobe Trucking, Inc. v. PNC Bank* (In re Adobe Trucking, Inc.), 551 Fed. Appx. 167 (5th Cir. 2014) – Fifth Circuit upholds lower court determination that foreclosure sale of drilling rigs was commercially reasonable. Courts looked to "proceeds" test, giving deference to agreed upon foreclosure procedures contained in the original credit agreement.
- *GECC v. FPL Service Corp.*, 2014 WL 360114 (N.D. Iowa 2014) – Equipment lessor in a transaction that was really a sale with a retained security interest failed to send the debtor notification of the second disposition of equipment and thus there was a presumption that no deficiency was owing. However, the lessor rebutted that presumption by showing that the sale was conducted in a commercially reasonable manner and at the same price as the first sale, for which the lessor had sent notification to the debtor.
- *Topek, LLC v. W.H. Silverstein, Inc.*, 2014 WL 1124311 (D.N.H. 2014) – Entity that bought from a secured party virtually all of the assets of a builder of custom-designed post and beam homes, including the builder's intellectual property, trade names, design templates, and goodwill, and then hired most of the builder's employees, probably had the right to hold itself as the builder. Thus, another entity that had hoped to acquire the assets had no likelihood of success in its action against the buyer for a false advertising claim under either the Lanham Act or the New Hampshire Consumer Protection Act.

5. *Effect of Failure to Give Notice, Conduct Commercially Reasonable Foreclosure Sale, or Otherwise Comply with Part 6 of Article 9*
   - *EBC Asset Investment, Inc. v. Sullivan Auctioneers, LLC*, 2014 WL 675512 (C.D. Ill. 2014), 2014 WL 903955 (C.D. Ill. 2014) – Secured party's claim for conversion against auction house that sold

encumbered farming equipment on behalf of the debtors and without the secured party's permission was subject to the five-year limitations period for conversion, not the three-year period under § 3-118 for conversion of an instrument.

- *Mahanna v. U.S. Bank*, 747 F.3d 998 (8th Cir. 2014) – Debtors who in 1986 gave possession of gold coins to a bank to secure a loan from the bank and who in 1997, after a series of bank mergers, began inquiring as to the location of the coins, was on notice at least by 2001 that the bank's successor could not locate the coins and thus the debtors' 2011 action against the successor was barred by the 10-year statute of limitations.
- *Huffman v. Credit Union of Texas*, 758 F.3d 963 (8th Cir. 2014) – Debtor's action for failure to send the proper notification of disposition under § 9-614 was barred by either the Missouri 5-year limitations period for actions created by statute other than for a penalty or by the 3-year limitations period for statutory penalties. The 6-year limitations period for actions against a moneyed corporation was not applicable.
- *SECC v. Deer Valley Trucking, Inc.*, 2014 WL 6686731 (D.N.D. 2014) – Secured party with a security interest in mobile tanker-trailers was entitled to an order, without prior notice to the debtor, temporarily restraining the debtor from moving, sequestering, or using collateral. The secured party had demonstrated a strong likelihood of success on the merits based on the debtor's default, a threat of irreparable harm given the potential for depreciation and deterioration that will occur with continued use of the collateral coupled with the debtor's likely inability to satisfy a money judgment, and while the debtor might suffer some harm to its business operations, it was a harm that was bargained for in the loan documents.
- *Flanders Corp. v. EMI Filtration Products LLC*, 2014 WL 1608359 (E.D.N.C. 2014) – Secured party that had provided evidence of default by debtors who were no longer represented by counsel in the case and who had not filed responsive pleadings was

entitled to a preliminary injunction enjoining the debtors from disposing of any of the collateral and from withholding the collateral from the secured party. The secured party was required to post a nominal bond of only $1,000.

- *395 Lampe, LLC v. Kawish, LLC*, 2014 WL 221814 (W.D. Wash. 2014), *subsequent proceeding* 2015 U.S. Dist. LEXIS 46035 (2015) – A secured party with a security interest in the debtor's one-third ownership of an LLC did not, merely by transferring to itself after default title to that ownership interest, effect a disposition or an acceptance of the collateral. There was no disposition because a secured party cannot buy at a private sale and there was no public sale. There was no acceptance because there was no proposal therefor and the debtor had objected. As a result, there was no reason to determine the value of the LLC interest to determine what deficiency or surplus existed.
- *Jode Investments LLC v. Burning Tree Properties, LLC*, 2014 WL 1515267 (Mich. Ct. App. 2014) – Entity formed by some guarantors and which claimed to have acquired the debtor's personal property collateral in a disposition conducted by the secured party had not in fact done so because the documents indicated merely that, in return for payment, the secured party: (i) would transfer the real property collateral; (ii) would file a termination statement with respect to its security interest in the personal property collateral; and (iii) was releasing its claims against those guarantors. The documents lacked any indication that the secured party was transferring the personal property collateral.
- *3455 LLC v. NP Properties, Inc.*, 2014 WL 3845696 (N.D. Ga. 2014) – Landlord that had a security interest in the tenant's equipment to secure the obligation to pay rent was entitled to simply retain the equipment remaining on the leased premises because the lease also provided that upon being dispossessed, the tenant's "equipment shall be deemed conclusively to be abandoned and may be appropriated, sold, stored, destroyed or otherwise disposed of by Landlord without written notice . . .

and without obligation to account for them," and such a term is enforceable under Georgia law.

- *Skaff v. Progress International, LLC*, 2014 WL 5454825 (S.D.N.Y. 2014) – Secured party's collateral was not limited to deposit accounts, which were the only collateral described in the security agreement, but included the additional collateral described in the parties' merger agreement, which also granted a security interest. A receiver appointed by the court after the secured party obtained a default judgment would be authorized to take control of and preserve the debtor's assets and conduct an accounting – broader authority than what the security agreement provided – but would not be authorized to liquidate the assets and apply the proceeds to satisfy the judgment debt.
- *Lefkowitz v. Quality Labor Management, LLC*, 2014 WL 5877850 (Fla. Dist. Ct. App. 2014) – Trial court erred in denying secured party's request to intervene in action in which creditor obtained a charging order on the debtor's ownership interests in limited partnerships and LLC, which constituted the secured party's collateral.
- *Peoples Bank v. Bluewater Cruising LLC*, 2014 U.S. Dist. LEXIS 6428 (W.D. Wash. 2014) – After a finding that a secured party did not comply with the UCC foreclosure requirements, the court found the secured party also failed to establish the value of the collateral to overcome the presumption that the collateral was valued at the amount of the debt.
- *General Electric Capital Corporation v. FPL Service Corp*, 995 F.Supp.2d 935 (N.D.Iowa 2014) – Court evaluates both the Article 9 commercial reasonableness standard and the presumptions rules for deficiency judgments.
- *EBC Asset Investment, Inc. v. Sullivan Auctioneers, LLC*, 2014 U.S. Dist. LEXIS 21724 (C.D.Ill. 2014) – Where auction house allegedly auctioned off secured party's collateral without consent, five year statute of limitations for converting a secured

party's collateral, not three year statute of limitations for instruments under Article 3, applied. Illinois law specifically provides that an auctioneer that auctions pledged property without consent of the secured party is liable for conversion.

- *Adame v. Vista Bank*, 2014 WL 5839893 (Tex. Ct. App. 2014) – By answering with a general denial the secured party's complaint in an action for a deficiency, the debtor failed to place the commercial reasonableness of the disposition of limousines at issue.
- *Gwinnett Community Bank v. Arlington Capital, LLC*, 757 S.E.2d 239 (Ga. Ct. App. 2014) – Because the trial court's ruling that the bank that sold a promissory note was barred from seeking a deficiency by either § 9-608(b) or § 9-615(e) was law of the case (even though those provisions apply when the underlying transaction is a sale of a promissory note, not when the security interest is foreclosed by selling a promissory note), the ruling bound the debtor as well as the bank, and the debtor had no cause of action against the bank for lost surplus.
- *Security Alarm Financing Enterprises, Inc. v. Parmer*, 2014 WL 1478840 (N.D.W. Va. 2014) – Debtor's owner, whose aunt purchased secured notes and foreclosed by acquiring the collateral at a foreclosure sale by credit bid, allegedly as part of the owner's scheme to avoid payment to a judgment creditor who had agreed to halt a sheriff's sale pending settlement negotiations, was not entitled to summary judgment, even if the aunt was not aware of all aspects of the alleged fraudulent conspiracy. Summary judgment also denied on whether the aunt took free of the judgment lien because her good faith was in dispute.
- *Opportunity Fund, LLC v. Savana, Inc.*, 2014 WL 4079974 (S.D. Ohio 2014) – Summary judgment denied on whether entity formed by passive investor who owned 0.01% of the debtor and which acquired the bulk of the debtor's assets at a public foreclosure sale conducted by the debtor's secured lender had

successor liability as the survivor in a de facto merger or as a mere continuation of the debtor.

- *Agit Global, Inc. v. Wham-O, Inc.*, 2014 WL 1365200 (S.D. Cal. 2014) – Two entities that acquired the assets of business from a secured party – who itself had acquired them at a foreclosure sale – and who then operated the same business from the same location with the same employees did not have successor liability for the debtor's debts as a mere continuation because the buyers did not acquire the assets directly from the predecessor (the debtor). However, the buyers did have successor liability on that grounds that the transfers were a fraudulent scheme to escape liability for the debts in part because the assets were worth $31 million while the secured debt was only $13.6 million and the secured party resold them shortly thereafter for half their value.
- *BRS-Tustin Safeguard Associates II, LLC v. iTherX Pharma, Inc.*, 2014 WL 2621117 (Cal. Ct. App. 2014) – The entity newly formed by lenders who, after a landlord obtained a writ of attachment for the debtor's property, conducted a strict foreclosure and transferred all of the debtor's assets to the entity, had successor liability as a mere continuation of the debtor because the new entity had a name very similar to the debtor's name, possessed all of the debtor's assets, continued to conduct the same clinical trials of the same drugs, operated under a manufacturing contract without any modification (i.e., it did not make itself a party to the agreement), and shared many of the same key personnel, including the chief executive officer, chief scientist, and several board members.
- *Amegy Bank v. DB Private Wealth Mortgage, Ltd.*, 83 U.C.C. Rep. Serv. 2d 720 (M.D. Fla. 2014) – Entity that was liable to the secured party for colluding with the debtor in converting the collateral was not liable for the secured party's attorney's fees incurred in obtaining the declaratory judgment. Under § 9-607(d), attorney's fees may be deducted from the amounts of a collection but may not be added to the award. Although the

security agreement provided for recovery of attorney's fees, and § 9-201(a) makes the security agreement effective against creditors, the defendant was not a creditor of the debtor.

- *Automotive Innovations v. J.P. Morgan Chase Bank*, _ N.J. Super. _ (App. Div. 2015) – Article 9 foreclosure sale does not insulate buyer from 'successor liability' claim.*Automotive Innovations v. J.P. Morgan Chase Bank*, _ N.J. Super. _ (App. Div. 2015) – Article 9 foreclosure sale does not insulate buyer from 'successor liability' claim.
- *Automotive Innovations v. J.P. Morgan Chase Bank,* _ N.J. Super. _ (App. Div. 2015) – Article 9 foreclosure sale does not insulate buyer from 'successor liability' claim.
- *Tap Holdings, LLC v. Orix Finance Corp*., _ NY_ _ (NY Sup. Ct. 2015) – Buyer from foreclosure sale buyer has 'successor liability' where 'essentially' the same entity.

G. Collection

- *ImagePoint, Inc. v. JPMorgan Chase Bank*, 84 U.C.C. Rep. Serv. 2d 36 (S.D.N.Y. 2014), 2014 WL 3891326 (S.D.N.Y. 2014) – Assignee of original secured party had standing to bring collection action against account debtor despite a prohibition against assignment in the account debtor's agreement with the debtor because § 9-406(d) rendered the prohibition ineffective. The assignment was not excluded from the scope of Article 9 by § 9-109(d)(5) or (7) and even if the assignee is subject to all claims and defenses of the account debtor, that does not make the prohibition on assignment effective. The fact the assignee never perfected the security interest or provided notification of the assignment to the account debtor did not undermine the assignee's right to collect.
- *In re Duckworth*, 2014 WL 690553 (Bankr. C.D. Ill. 2014) – Grain buyer had claim for recoupment for partial breach of contract under which the debtor had made partial delivery and setoff claim for debtor's breach of second, unrelated contract. The grain buyer could use the recoupment claim under § 9-404(a)(1) to reduce its liability to the secured party with a security interest in the debtor's

grain and the proceeds thereof. Whether the grain buyer could use its setoff rights to reduce its liability depended on whether the secured party's notice of its interest in the debtor's crop – which was deficient under the Food Security Act – nevertheless satisfied the requirements of § 9-404(a)(2).

- *Vinings Bank v. Brasfield & Gorrie, LLC*, 759 S.E.2d 886 (Ga. Ct. App. 2014) – Bank with a security interest in the accounts of a subcontractor that had gone out of business was not entitled to summary judgment on the bank's collection action against the general contractor because the subcontracts entitled the contractor to withhold or deduct from any payment the amounts necessary to protect the contractor if the subcontractor failed to complete the work or failed to pay its suppliers, and those amounts were not yet determined. The bank was also not entitled to summary judgment on the contractor's claim against the bank for debiting the subcontractor's deposit accounts because some of the deposited funds might have been held in constructive trust for the subcontractor's suppliers who had filed liens or had the right to file liens.
- *First Trinity Capital Corp. v. Canal Indemnity Insurance Co.*, 2014 WL 460894 (S.D. Miss. 2014) – Insurance premium financier had no cause of action against insurer for return of unearned insurance premiums because, due to the fraud of the independent broker, the insurer never received payment and never issued a policy. The broker had neither actual nor apparent authority to act on behalf of the insurer.
- *First Trinity Capital Corp. v. Western World Ins. Group, Inc.*, 2014 WL 460887 (S.D. Miss. 2014) – Insurance premium financier had no cause of action against insurer for return of unearned insurance premiums because, due to the fraud of the independent broker, the insurer never received payment and never issued a policy. The broker had neither actual nor apparent authority to act on behalf of the insurer.

H. Retention of collateral

- *Blanken v. Kentucky Highlands Investment Corp.*, 82 U.C.C. Rep. Serv. 2d 815 (E.D. Ky. 2014) – The assignee of a secured party in a transaction structured as a lease of equipment but which was really a sale with a retained security interest, who, after the debtor's default, entered into an agreement with the debtor to reduce the debtor's monthly payments and eliminate the debtor's purchase rights did not, thereby, accept the collateral in full satisfaction of the secured obligation because the debtor thought it was merely a lessee, not the owner, and thus could not have consented to an acceptance of the collateral. Whether the assignment was a disposition and whether the assignee acted in good faith so as to cut off a junior security interest were questions that could not be resolved prior to discovery.
- *Born v. Born*, 320 P.3d 449 (Kan. Ct. App. 2014) – Creditor with a security interest in stock adequately proposed to accept the stock in satisfaction of the secured obligation even though the creditor's post-default letters to the debtor did not state that the debtor had the right to object or indicate either the amount due or a means of calculating that amount. Although the debtor timely objected to the proposal, because the security agreement limited the secured party's rights after default to acceptance of the collateral, and thus the secured party could not conduct a disposition, the debtor had to redeem the collateral within a timely manner. Because the debtor did not do so, the secured party became the owner of the stock.
- *TAP Holdings, LLC v. Orix Finance Corp.*, 2014 WL 5900923 (N.Y. Sup. Ct. 2014) – Senior lenders who, after taking control of the debtor's board, acquired all of the debtor's assets in satisfaction of the secured obligation and then transferred those assets to a newly formed entity did not conduct an acceptance of the collateral. The Foreclosure Agreement stated that the debtor agrees to "sell, assign and transfer the Subject Assets" to the newly formed entity and that the "Buyer wishes to purchase the Subject Assets and assume certain liabilities" of the debtor. The terms of the

Foreclosure Agreement therefore suggest, in substance, a private sale of an entire business as a going concern, rather than the simple taking of collateral by a secured party.

- *In re Crane*, 742 F. 3d 702 (7th Cir. 2014) – Illinois mortgage may require maturity date and interest rate on face of mortgage.

III. GUARANTIES

- *Hawkins v. Community Bank of Raymore*, 2014 U.S. App. Lexis 15006 (8th Cir. 2014), [petition for cert. granted, 2014] – Equal Credit Opportunity Act [applies to spousal guarantor].
- *Faunus Group International, Inc. v. Ramsoondar*, 2014 U.S. Dist. LEXIS 67838 (S.D.N.Y. 2014) – A guaranty that does not include a waiver of defenses is subject to a claim of lack of consideration.
- *First Merit Bank, N.A. v. Frasca*, 2014, U.S. Dist. LEXIS 55662 (N.D. Ill. 2014) – Evaluating language in limited guaranty.
- *TCFIF Inventory Finance, Inc. v. Appliance Distributors, Inc.*, 2014 U.S. Dist. LEXIS 26550 (N.D. Ill. 2014) –A guaranty contained two "term" limitations in a guaranty – one provided that the guaranty would not extend to liabilities incurred after a specific date and another that the guaranty term extended for ten years. The court concluded that these provisions were not in conflict. The court also concluded that consideration for the guaranty existed even where the guarantied obligation arose prior to the execution of the guaranty.
- *California Bank & Trust v Del Ponti*, __ Cal.App.4th __ (2014) – Waiver of guarantor defenses must be specific.
- *Cooperative Centrale Raiffeisen Boerenleenbank, B.A. v. Navarro*, 978 NYS2d 186 (NY Sup Ct App Div. 2014 – Waivers of guarantor defenses may be broadly stated.
- *JPMorgan Chase Bank v. Winget*, 2015 WL 728060 (6th Cir. 2015) – Guaranty would not be reformed in absence of mistake of fact or scrivener's error.

- *Priestley v. Panmedix Inc.*, 2014 U.S. Dist. LEXIS 60833 (S.D.N.Y. 2014) – A grant of a security interest could be a fraudulent transfer where the benefits received by the debtor were disproportionately small.
- *In re Equipment Acquisition Resources, Inc.*, 742 F.3d 743 (7th Cir. 2014) – [Illinois fraudulent transfer action per BK Section 544 to recover tax payment from IRS – concludes can't be done.]
- *In re Lyondell Chemical*, 503 B.R. 348 (Bkrtcy. S.D.N.Y. 2014) – Bankruptcy Code § 546(e) safe harbor does not bar state law fraudulent transfer claims.
- *Priestley v. Panmedix Inc.*, 2014 WL 1760049 (S.D.N.Y. 2014) – The security interest of a lender who failed to file a continuation statement before obtaining a judgment against the debtor was junior to the security interest granted post-judgment by the debtor to a group of 20 existing creditors – mostly insiders – after the debtor learned of the lapse of perfection. However, the senior security interest was an avoidable constructively fraudulent transfer because the existing creditors' promise to forebear for four months was not reasonably equivalent value consideration for the transfer of the security interest and because the transfer gave preferential treatment to controlling shareholders. The transfer was also an avoidable transfer made with intent to hinder, delay or defraud because it was made to controlling shareholders, made for inadequate consideration, made with knowledge of the lender's unpaid claim and judgment, and to allow the debtor to retain use of the collateral.
- *Phillips v. Phillips*, 2014 WL 902683 (Minn. Ct. App. 2014) – Although the enforcement of a security interest is insulated from avoidance under Uniform Fraudulent Transfer Act § 8(e), the grant of a security interest to an insider on account of an

antecedent debt while the debtor is insolvent can be an avoidable fraudulent transfer under § 5(b), if the insider had reasonable cause to know of the debtor's insolvency.

- *Lake Treasure Holdings, Ltd. v. Foundry Hill GP LLC*, 2014 WL 5192179 (Del. Ch. Ct. 2014) – An owner of software transferred the software to an entity controlled by a long-time friend of the transferor. The transferee paid for the software with loan proceeds representing a small fraction of what the owner thought the software was worth. The loan was secured by a security interest in the software. The transferor then amicably surrendered the software to the secured party. The original transfer was an avoidable fraudulent transfer made with actual intent to hinder, delay or defraud the investors who were seeking to dissolve the debtor. Although a transfer would not be avoidable against a person who took in good faith and for a reasonably equivalent value, the secured party did not act in good faith because it conspired with the owner to circumvent the owner's lack of authority to sell the software and because it did not give reasonably equivalent value.
- *CNH Capital America LLC v. Hunt Tractor, Inc.*, 568 F. App'x 461 (6th Cir. 2014) – A secured party could have a conversion claim against a minority shareholder of the corporate debtor and the father-in-law of principal owner. The minority shareholder's guarantee of *unsecured* debt was discharged when the debtor sold the collateral and used the proceeds to pay *that* debt. The conversion claim would depend on whether the guarantor exercised dominion and control over the proceeds of the collateral. The secured party did not have a fraudulent transfer claim because recovery of a fraudulent transfer is available only from a transferor or transferee, not a third party who benefitted from the transfer. [copy to secured transactions]
- *In re Coudert Bros* (2d Cir. Sept 2, 2014) – Unfinished hourly business is not an asset of a dissolved law firm

- *In re Thelen III* (NY Ct App July 1, 2014)) – Status of unfinished business as "asset" of closed law firm.
- *Lyondell* (Bankruptcy SDNY Jan 14 2014): Bankruptcy Code § 546(e) does not preempt state fraudulent transfer law.
- *Trustco Bank v. Mathews*, _ A.2d _ (Del Ch 2015) – Court determines that place of harm determines law applicable to a fraudulent transfer.

V. LENDER AND BORROWER LIABILITY

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

- *Callaway Bank v. Bank of West*, 2014 WL 293823 (W.D. Mo. 2014) – A refinancing bank's action against a prior lender for fraud and other torts in connection with loan as to which the debtor fraudulently claimed to own the cattle purporting to secure the debt depended in part on the prior Lender's knowledge about the facts.
- *Hibbs v. Berger*, 430 S.W.3d 296 (Mo. Ct. App. 2014) – An insider secured party that foreclosed on the assets of closely-held business did not have liability to another insider that was an unpaid unsecured creditor. There was no basis for piercing the corporate veil against the secured party.
- *Blixseth v. Credit Suisse AG*, 2014 WL 4799066 (D. Colo. 2014) – An individual debtor stated a claim against secured party that, in connection with a corporate bankruptcy case, joined a plan of reorganization pursuant to which the secured party would forego recourse to its collateral and instead proceed as an unsecured claimant, while here, formerly secured creditor knew that repayment was likely to come from the individual debtor whom the secured party had released from personal liability.
- *First Hill Partners, LLC v. Bluecrest Capital Management Ltd.*, 2014 WL 4928987 (S.D.N.Y. 2014) – A debtor hired an advisor to find a buyer of its assets and negotiate a sale in return for a monthly retainer, a success fee, and reimbursement of expenses. After the advisor located a buyer and negotiated a transaction, the secured party foreclosed and sold the assets to the identified buyer on substantially the same terms. The advisor sufficiently asserted a claim against the debtor's secured party for unjust enrichment and tortious interference.

- *Anthony Marano Co. v. J & S Produce Corp.*, 2014 WL 4922324 (N.D. Ill. 2014) – Banks that received payment on their secured loans from the debtor's PACA trust funds may not be entitled to a *bona fide* purchaser defense if the banks had notice that the debtor was in breach of its duties with respect to the PACA trust. The debtor was profitable through 2010 and occasionally maintained cash reserves far in excess of its accounts payable. However, it also had cash-flow problems and overdrew its deposit accounts. In addition, although the debtor historically paid all but a few of its PACA creditors, it often paid them late. Although the bank that received $565,000 in payment on a line of credit re-advanced $582,000, that created no defense to disgorgement for violation of the PACA trust.
- *MSMTBR, Inc. v. Mid-Atlantic Finance Co.*, 2014 WL 953499 (Tex. Ct. App. 2014) – 2014 WL 3697736 (Tex Ct. App. 2014) (revised opinion) – A debtor sold chattel paper to a financier and gave the financier the certificates of title to the underlying collateral. The debtor then applied for substitute certificates of title by falsely certifying that the certificates had been lost or destroyed and sold many of the vehicles. The debtor could be liable in tort for its actions even though it might also be liable for breach of contract.
- *Stancil v. First Mount Vernon Industrial Loan Association*, 2014 D.C. App. LEXIS 59 (D.C. Ct. App. 2014) – Court enforced an oral forbearance agreement.
- *In re Prince Frederick Investment, LLC*, 2014 Bankr. LEXIS 3839 (Bkrtcy. D. Md. 2014) – Other creditors could not obtain equitable subordination against a lender that exercised contractual rights. The lender did not owe a fiduciary duty to the other creditors nor did it engage in egregious conduct.
- *Arias v. Elite Mortgage Group*, _ N.J. Super. _ (App. Div. 2015) – Lender does not breach duty of good faith when terminating loan forbearance agreement when borrower defaults.

- *In re TPOP, LLC*, _ B.R. _ (Bankr. D. Del. 2015) – Creditor does not have to forgive debt when debtor breaches forgiveness agreement.
- *Arias v. Elite Mortgage Group,* _ N.J. Super. _ (App. Div. 2015) – Lender does not breach duty of good faith when terminating loan forbearance agreement when borrower defaults.
- *In re TPOP, LLC*, _ B.R. _ (Bankr. D. Del. 2015) – Creditor does not have to forgive debt when debtor breaches forgiveness agreement.

B. Obligations Under Corporate and Securities Laws

- *Petroleum Enhancer, LLC v. Woodward*, 558 F. App'x 569 (6th Cir. 2014) – A director of a company breached his fiduciary duty to the company by forming a new entity to acquire a secured obligation of the company and then foreclosing on the collateral. The director's actions were not the proximate cause of the company's failure. While there was some evidence that, because the secured party did not know how to deal with the collateral, the director's action may have hastened both foreclosure and the company's bankruptcy, there was no evidence that the company could have avoided these fates or had any source of alternative financing.
- *Yates v. United States*, 135 S.Ct. 1074 (2015) – Knowingly disposing of undersized fish in order to prevent government from taking lawful custody and control of them did not violate Sarbanes–Oxley Act (SOX) by destroying or concealing a "tangible object" with the intent to impede, obstruct, or influence government's investigation into harvesting undersized grouper because "tangible object," within meaning of SOX, covers objects that one can use to record or preserve information, and disposal of undersized fish did not involve a tangible object for purposes of SOX.

C. Borrower Liability

- *State v. Johnson*, 140 So. 3d 854 (La. Ct. App. 2014) – Debtor who sold collateral after default was not guilty of violating La. Stat. § 14.201, which criminalizes the sale of collateral "pledged" to a

bank. While the debtor had granted a bank a security interest in the collateral, he had not "pledged" it because he never gave the bank possession.

- *State v. Collyns*, 99 A.3d 300 (N.H. 2014) – A debtor attempted to sell restaurant equipment that the debtor had purchased on credit. The debtor was not guilty of attempted theft by unauthorized taking. Even though the sales agreement expressly stated that the seller remained the owner of the equipment until the debtor paid in full, the UCC limited that language to the retention of a security interest. The theft statute does not criminalize the sale of property subject to a security interest.
- *Wells Fargo Equipment Finance, Inc. v. Titan Leasing, Inc.*, 768 F.3d 741 (7th Cir. 2014) – An equipment lessor used its rights under the lease to secure a *nonrecourse* loan. The lessor warranted to the secured party that the equipment had been delivered and accepted by the lessee and that the lessee has acknowledged receipt and acceptance. The lessor breached those warranties because even if, under the terms of the lease, the lessee had accepted the equipment when it was shipped, the lessee never acknowledged receipt or acceptance and in fact never received the equipment or paid any rent under the lease.

D. Disputes Among Creditors and Intercreditor Issues

- *Millennium Bank v. UPS Capital Business Credit*, 327 P.3d 335 (Colo. Ct. App. 2014) – A secured party pursuant to intercreditor agreement had priority in a subcontractor's general intangibles but not accounts. The secured party had priority in the subcontractor's breach of warranty claim against a paint seller even though the damages were measured by the cost of the extra services provided by the subcontractor to the contractor in several repainting efforts, for which the contractor did not pay the subcontractor. The subcontractor did not render any services to the paint seller and the contractor was not liable for the cost of the extra services. Thus hence the claim was not an "account."

- *Co-Alliance, LLP v. Monticello Farm Service, Inc.*, 7 N.E.3d 355 (Ind. Ct. App. 2014) – A secured party in first priority position agreed to subordinate its interest to a secured party in third priority position. This did not result in "complete subordination" to the benefit of the intermediate secured party, and instead resulted in "partial subordination." This effectively left the intermediate secured party unaffected. The junior secured party steps into the shoes of the senior secured party only to the extent of the lesser of: (i) the amount owed to the senior secured party; or (ii) the amount owed to the junior secured party.

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

A. Scope

1. General

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2. Software and Other Intangibles

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

1. General

-

2. Battle of the Forms

-

C. Warranties and Products Liability

1. Warranties

- *Source One Financial Corp. v. Road Ready Used Cars, Inc.*, 2014 WL 1013121 (Conn. Super. Ct. 2014) – A chattel paper financier acquired a secured car loan from the car seller had no liability to the used car dealership that purchased the car from the individual buyer as part of a trade in for breach of the implied warranty of merchantability. The buyer made no such warranty in the trade in and the used car dealer had no privity of contract with the financier.
- *VFS US, LLC v. Southwinds Express Construction, LLC*, 2014 WL 2979035 (E.D. La. 2014) – Secured party was entitled to judgment on three of five secured promissory notes issued in connection with the purchase of construction equipment even though the debtors claimed that one of the items was defective. While the debtors might have a counterclaim for recoupment or

breach of warranty to reduce the amount owing on one note, they must bring such a claim in a timely manner.

- *Deere & Co. v. Cabelka*, 84 U.C.C. Rep. Serv. 2d 705 (W.D. Okla. 2014) – An entity that sold a combine to a buyer without disclosing the existence of a perfected security interest in the combine and without providing for payment of the secured obligation. The Seller was liable to the buyer for breach of the warranty of title for the amount that the buyer settled with the secured party.
- *Lyon Financial Services, Inc. v. Illinois Paper and Copier Company* (732 F.3d 755 (7th Cir. 2013), certified question answered by 848 N.W.2d 539 (Minn. 2014), reversed by and remanded by 577 Fed. Appx. 606 (7th Cir. 2014) – Breach of a *contractual* representation of law is actionable without proof of reliance.

2. *Limitation of Liability*

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3. *"Economic Loss" Doctrine*

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D. *Performance, Breach and Damages*

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E. *Personal Property Leasing*

- *Pacific Space Design Corp. v. PNC Equipment Finance, LLC*, 2014 WL 6603288 (S.D. Ohio 2014) – A lessee, at the end of the lease term, had the option to return the equipment, buy the equipment for $17,000, or, if it failed to do either of those, continue to rent the equipment on a month-to-month basis. The lessee did not have a claim against the lessor for unjust enrichment after the lessee paid over $100,000 to continue leasing the equipment for 34 months. The lessee's failure to exercise its rights did not make the lessor's retention of the rent unjust.
- *Rentrak Corp. v. Handsman*, 2014 WL 1342960 (E.D.N.Y. 2014) – An individual owner of a business rented video game equipment.

The individual was personally liable to the lessor even though the owner did not guaranty the lease obligations because the owner orchestrated a sale of the equipment and used the proceeds – along with sublease revenue held in trust for the lessor – to pay debts that the owner had guaranteed, pay himself, and pay his expenses.

VII. COMMERCIAL PAPER AND ELECTRONIC FUNDS TRANSFERS

A. Negotiable Instruments and Holder in Due Course

- *Bank of New York v. Romero*, 2014-NMSC-007, 82 U.C.C. Rep Serv 2d 716 (N.M. 2014) – A bank did not become the "holder" of a note under UCC Article 3 where note was not endorsed to the bank but was instead specially endorsed to the initial lender. UCC § 1-201(b)(__)
- *Coastal Agricultural Supply Incorporated v. JPMorgan Chase Bank N.A.*, 759 F.3d 498 (5th Cir. 2014) – [Evaluating Bank's Article 3 liability for fraudulent indorsement by employee bookkeeper.]
- *Alpacas of America, LLC v. Groome*, 317 P.3d 1103, 82 U.C.C. Rep Serv 2d 649 (Wash. Ct. App. Div. 2 2014) – Notes signed by buyers representing the purchase price of goods were negotiable instruments and that the failure to pay the notes resulted in separate claims under the notes and sales contract.
- *U.S. Bank N.A. v. Yashouafar*, __ Cal.App.4th __ (Cal.Ct. App. 2015) – No prepayment fee due until defendants actually prepaid the note's indebtedness.
- *Charles R. Tips Family Trust v. PB Commercial LLC*, 2015 WL 730481 (Ct App Texas 2015) – Note that misstated in words the amount loaned could not be reformed because of pleading error.
- *Rajamin v. Deutsche Bank National Trust Company*, __ F.3d __ (2d Cir.. 2014) – Transfer of note automatically transfers related mortgage and obligor under the note does not have standing to challenge failure to comply with trust agreement.
- *In re Energy Futures Holding Co*, _ B.R. _ (Bankr. D. Del. July 8, 2015) – Make-whole premium provision interpreted not to apply as a matter of contract law as a result of filing of bankruptcy.
- *Aurora Loan Services, LLC v. Taylor*, 2015 WL 3616293 (NY June 11, 2015) – As a matter of common law (not UCC Articles 3 and 9) the person in possession of a note has the right to enforce it and the related mortgage follows the note.

B. Electronic Funds Transfer

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

A. Letters of Credit

- *CVD Equipment Corp. v. Taiwan Industrial Glass Corp.*, 2014 U.S. Dist. LEXIS 20838 (S.D.N.Y. 2014) – [Two letters of credit: one cancelled and one where draw was correctly dishonored.]

B. Investment Securities

IX. CONTRACTS

A. Formation, Scope, and Meaning of Agreement

- *Cobb v. Ironwood Country Club*, _ Cal.App.4th _ (2015) – Good faith makes contract with unilateral modification right not illusory.
- *Parapluie* (9th Cir. 2014): Status of claim for promissory fraud.
- *Legras v Aetna Life Insurance Company*, _ F.3d _ (9th Cir. 2015) – As a matter of Federal common law, when counting days within which an act must occur, if the last day falls on a weekend the act may be performed on the next weekday.

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

- *Express Working Capital, LLC v. Starving Students, Inc.*, 2014 WL 2862310 (Tex. Ct. App. 2014) – A seller of future accounts receivable would not raise a usury defense against the buyer because the defense applies only to "loan" transactions, not to sales of accounts. Despite the buyer's recourse against the seller, the transaction was a sale because there was no specified amount or due date and, more importantly, that is what the transaction purported to be. Pursuant to a non-uniform provision in Texas version of UCC § 9-109, the parties' characterization of the transaction is binding.
- *In re Doctors Hospital of Hyde Park, Inc.*, 508 B.R. 697 (Bkrtcy. N.D. Ill. 2014) – [Addressing yield maintenance premium.]
- *Quadrant Structured Products v. Vertin*, 23 N.Y. 3d 549 (C.A.N.Y. 2014) – A no-action clause in an indenture is to be strictly construed.
- *In re Denver Merchandise Mart*, 740 F.3d 1052 (5th Cir. 2014) – Creditor could not collect a prepayment premium on debt accelerated but not prepaid, pursuant to the terms of the agreement.
- *Marblegate Asset Management v. Education Management Corp.*, Case No. 14 Civ. 8584(KPF), 2014 WL 7399041 (S.D.N.Y. Dec. 30, 2014) –

Trust Indenture Act § 316(b) requires unanimous consent to as protection of each noteholder's right to obtain payment.

- *MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entertainment Corp.*, No. 14-CV-7091 SAS, 2015 WL 221055 (S.D.N.Y. Jan. 15, 2015) – Trust Indenture Act § 316(b) requires unanimous consent to as protection of each noteholder's right to obtain payment.
- *Mahlum v. Adobe Systems Incorporated*, _ F.Supp.2d _ (N.D. Calif. 2015) – Early termination fee is not liquidated damages and thus not analyzed to determinte if it's a 'penalty'.
- *Jade Fashion v Harkham Industries* (Cal.Ct.App. September 4, 2014) – Consideration of whether discount for early payment should be analyzed as "liquidated damages."
- *Le Metier Beauty Investment Partners LLC v. Metier Tribeca, LLC*, NYLJ 1202719289123 (Sup.Ct. App/ Div. 2015) – Enforceability of defective non-reliance clause evaluated as a 'general disclaimer'.
- *Grand Prospect Partners, L.P. v. Ross Dress For Less, Inc.*, _ Cal.App.4th _ (2015) – No procedural unconscionability where party refuses to negotiate with respect to a particular term.
- *In re Residential Capital, LLC*, 2015 WL 2226232 (Bankr. SDNY 2015) – Depositary bank may use 'change of terms' provision to make depositor into guarantor of debts of affiliates of depositor owed to bank.
- *Cobb v. Ironwood Country Club*, _ Cal.App.4th _ (2015) – Good faith makes contract with unilateral modification right *not* illusory.
- *Mahlum v. Adobe Systems Incorporated*, _ F.Supp.2d _ (N.D. Calif. 2015) – Early termination fee is not 'liquidated damages' and thus not analyzed to determine if it's a 'penalty'.
- *Grand Prospect Partners, L.P. v. Ross Dress For Less, Inc.*, _ Cal.App.4th _ (2015) – No procedural unconscionability where party refuses to negotiate with respect to a particular term.

C. Choice of Law

- *Roberts Holdings, Inc. v. Becca's Bakery, Inc.*, 423 S.W.3d 920 (Mo. Ct. App. 2014) – A lessee of bakery equipment contributed the equipment to a joint venture. The lessee was a necessary party in the lessor's replevin action against the joint venture. Because that party was not joined and both the lease and the joint venture agreement required litigation to occur in superior court in Spokane, the Missouri court correctly dismissed the action.
- *Amegy Bank v. DB Private Wealth Mortgage, Ltd.*, 2014 WL 791503 (M.D. Fla. 2014) – Because UCC § 9-201 provides that a security agreement is effective against creditors of the debtor, the choice-of-law clause in the security agreement governed the secured party's declaratory judgment action against a third party in which the secured party sought an equitable lien to the extent that the proceeds from the sale of the collateral were used to benefit the third party. The chosen law did not govern the secured party's tort claims against the third party. Those claims were governed by the law of the jurisdiction with the most significant relationship to the particular issues.

  Comment: UCC § 9-201 makes the security *interest*, not the security *agreement* effective against third parties.

- *Carmen Group, Inc. v. Xavier University of Louisiana*, 2014 U.S. Dist. LEXIS 61883 (D. D.C. 2014) – Enforcing choice of forum clause in contract over objection that it was included due to mistake or error.
- In re Nelson, _ B.R. _ (Bankr.D.S.C. 2014) – Enforces choice of law clause, which gives secured party greater rights.

D. Arbitration

- *Martin v. Cavalry SPV I, LLC*, 2014 WL 1338702 (E.D. Ky. 2014) – A buyer of a credit card account could enforce an arbitration clause in the credit card agreement.

- *U.S. ex rel. Brickhead Electric, Inc. v. James W. Ancel, Inc.*, 2014 WL 2574529 (D. Md. 2014) (Under Maryland law, arbitration clause needs separate consideration).
- *Lexel Imaging Systems, Inc. v. Video Display Corp*, 2015 WL 403140 (E.D.Ky. 2015) – Scope of arbitration clause does not require arbitration to determine if 'default' exists before secured party exercises self help.

X. OTHER LAWS AFFECTING COMMERCIAL TRANSACTIONS

A. Bankruptcy

- *In re 35th and Morgan Development Corp.*, 510 B.R. 832 (Bkrtcy. N.D. Ill. 2014) – Evaluating claims of multiple parties to loan agreement.
- *In re NNN 123 North Wacker, LLC*, 510 B.R. 854 (Bkrtcy. N.D. Ill. 2014) – Evaluating the ability of an LLC to file for bankruptcy.
- *In re TMT Procurement Corp.*, 764 F.3d 512 (5th Cir. 2014) – Vacating DIP financing order because DIP Lender knew of adverse claim against collateral.
- *In re Peregrine Financial Group, Inc.*, 2014 Bankr. LEXIS 2328 (Bkrtcy. N.D. Ill. 2014) – [CFTC and purchase money trust.]

1. Automatic Stay

- *N. Am. Banking Co. v. Leonard (In re WEB2B Payment Solutions, Inc.)*, 488 B.R. 387, 393-394 (B.A.P. 8th Cir.2013) – Under Bankruptcy Code § 542's turnover requirement is self-effectuating and party wishing to preserve its lien has burden of asking the Court to adequately protect its possessory lien.

2. Substantive Consolidation

3. Claims

4. Bankruptcy Estate

5. Secured Parties, Set Off, Leases

6. Avoidance Actions

7. Executory Contract

8. Plan

9. Other

B. Consumer Law

- *Hayes v. Find Track Locate, Inc.*, 2014 WL 5111587 (D. Kan. 2014) – A company that finds, tracks, and locates property to be repossessed is not a "debt collector" within the meaning of the Fair Debt

Collection Practices Act. Thus it did not have liability under the Act for the phone calls it made to locate the debtor's vehicle.

- *Costin v. Ally Bank Corp.*, 2014 WL 130527 (E.D.N.C. 2014) – A bank repossessed a debtor's vehicle after allegedly stating that it would not do so if the debtor made a payment. The debtor made the payment. The lender was liable for violation of the North Carolina Debt Collection Act. At most the claim stated a cause of action for breach of contract, which cannot serve as a basis for a claim under the NCDCA. The bank was also not liable for intentional infliction of emotional distress in repossessing the vehicle because such action was not extreme and outrageous conduct. It was also not liable for negligent infliction of emotional distress because the debtor had not alleged that bank's negligence was the proximate and foreseeable cause of his distress _____ and foreseeable result of the _____ .
- *Patton v. Wells Fargo Financial Maryland, Inc.*, 85 A.3d 167 (Md. 2014) – Debtor's claim for violation of the Maryland Credit Grantor Closed End Credit Law must be brought no later than six months after satisfaction of the loan. Because the loan was not satisfied and the debtor remained liable for a deficiency, the debtor's claim was not barred.
- *Davidson v. Capital One Bank (USA)*, 2014 WL 4071891 (N.D. Ga. 2014) – An entity that bought credit card receivables was not a debt collector for the purposes of the Fair Debt Collection Practices Act even if the cardholders were in default at the time the receivables were purchased. The buyer was admittedly not in a business the principal purpose of which was to collect debts and it was not regularly collecting debts owed to another. The statutory language creating an exception to the second prong of the definition if the debt was not in default when assigned does not mean that an assignee of a debt in default is a "debt collections" if the debt was in default, if the assignee is not collecting for another.
- *Lankhorst v. Independent Savings Plan Co.*, 2014 WL 4101199 (M.D. Fla. 2014) – A lender provided purchase-money financing for the

debtors' water treatment equipment, which was installed as a fixture outside their home. The lender did not have liability under the Truth in Lending Act for failing to disclose examples of the minimum payments or for failing to provide a three-day rescission period because the collateral for the transaction was the fixtures, not the borrowers' home. The agreement described the collateral as "any purchases you charge to your account," which was limited to the fixtures. It did not matter that the agreement also stated that the security interest could be enforced "similarly as liens on the house" or that the lender made a fixture filing.

- *Shannon v. Windsor Equity Group, Inc.*, 2014 WL 977899 (S.D. Cal. 2014) – A company provided skip tracing services in connection with consumer automobile loans. The company was a debt collector for the purposes of both the Fair Debt Collection Practices Act and the California Rosenthal Act. Therefore it could be liable to a third party whom is the company harassed at his place of work with numerous phone calls.
- *RL BB Acquisition, LLC v. Bridgemill Commons Development Group, LLC*, 754 F.3d 380 (6th Cir 2014) – Guarantor has its own claim for violation of Equal Credit Opportunity Act.
- *Hawkins v. Community Bank of Raymore*, 2014 WL 3826820 (8th Cir 2014), *cert granted* – Guarantor does not have its own claim for violation of Equal Credit Opportunity Act.

C. *Professional Liability*

- *FDIC v. Lowis & Gellen LLP*, 2014 U.S. Dist. LEXIS 21022 (N.D. Ill. 2014) – A lender could bring a legal malpractice claim for faultily documenting a loan claim based don the failure to file a financing statement.
- *Heartland Bank and Trust Company v. The Leiter Group*, 2014 Ill. App. LEXIS 662 (Ill. App. Ct. 2014) – [Court evaluates whether law firm converted IOLTA check.]
- *Jennings v. Shuler*, 147 So. 3d 847 (Miss. Ct. App. 2014) – Lawyer did not file a financing statement to perfect his client's security interest. Whether that failure constituted negligence is a case-by-

case, fact-intensive question. However, the lawyer was nevertheless not liable because the client could not show that the failure to perfect caused injury or that her claim was brought within the limitations period.

- *Fjellin ex rel. Leonard Van Liew Living Trust v. Penning*, 2014 WL 4298053 (D. Neb. 2014) – Secured parties had no cause of action under UCC § 9-625 against the law firm representing the debtor for filing an unauthorized termination statement. UCC § 9-625 deals with the liability of the secured party, not others. The secured parties also had no cause of action for negligence because the unauthorized termination statement was ineffective – the security interest remained perfected and continued to encumber the collateral, even after the debtor sold it – and thus the act of filing it did not cause any damages.
- *DLA Piper US, LLP v. Linegar*, 2014 WL 3698289 (Tex. Ct. App. 2014) – An individual's Australian retirement fund – a separate legal entity – made a $1.75 million loan to company in which the individual held an interest. The individual did not have standing to bring a malpractice claim against the borrower's law firm for failure to perfect the security interest because even though the individual might have suffered a loss, the fund was the real party in interest.
- *American Asset Finance, LLC v. Trustees of Client Protection Fund of Bar of Maryland*, 86 A.3d 73 (Md. Ct. App. 2014) – A financier purchased portions of lawyer's right to attorney's fees in four cases. The financier did not have standing to bring a claim against the Client Protection Fund of the Bar of Maryland after the lawyer received the attorney's fees, deposited them into his IOLTA account, and then misappropriated them. The financier was not a client of the lawyer and, despite language in the financing agreement by which the lawyer promised to hold funds received as the financier's "fiduciary," the lawyer did not have fiduciary duties to the financier arising from his role as a lawyer.
- *In re Fish & Fisher, Inc.*, 557 F. App'x 259 (5th Cir. 2014) – Bank with a security interest in borrower's accounts had no cause of action

against law firm that, after being notified of the security interest, obtained and collected a judgment against a client of the borrower and remitted the proceeds to the borrower. The law firm was not liable in negligence because it owed no duty to the bank. There was no constructive trust absent unconscionable conduct, fraud, or unjust enrichment. There was no claim for conversion because perfecting a security interest is insufficient to establish ownership. While a claim for conversion might exist if the disbursement violated a court order, the complaint lacked specific allegations about what order might have been violated.

- *Fulbright & Jaworski LLP v. Verano Land Group*, LP, 2015 WL 481177 (Nev 2015) (No personal jurisdiciton over out-of-state law firm).
- *CVR Energy v. Wachtell, Lipton* (DC Kan Aug 14 2014) – Court did not have personal jurisdiction over out-of-state law firm.
- *Nomura v. Cadwalader* (NY, Feb 13 2014): Effect of lawyer opinion letter to client.

D. Other