

Commercial Law Developments

2015

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SECURED TRANSACTIONS*Scope Issues*

1. *In re Montreal, Maine & Atlantic Railway, Ltd.*,
[799 F.3d 1](#) (1st Cir. 2015)
A creditor's security interest in the debtor's accounts and payment intangibles did not extend to the debtor's right to payment under its business interruption insurance policy because Article 9 does not apply to an interest in or a claim under an insurance policy and to have a perfected security interest under Maine common law some step, beyond the mere execution of a security agreement, designed to furnish fair notice to other creditors is required, but the creditor did not take any such action.
2. *Lili Collections, LLC v. Terrebonne Parish Consolidated Government*,
[175 So. 3d 434](#) (La. Ct. App. 2015)
Because Article 9 does not apply to the extent that other state law expressly governs the creation, perfection, priority, or enforcement of a security interest created by this State or a governmental unit of this State, and provisions of the Louisiana Constitution and Revised Statutes restrict the ability of state agencies to borrow funds and pledge assets, Article 9 does not apply to a contractor's assignment of its right to payment from a state agency. Accordingly, Article 9's anti-assignment rules did not render ineffective the clause in the contractor's agreement with the agency prohibiting assignment.
3. *In re Gutierrez*,
[526 B.R. 449](#) (D.P.R. 2015)
Because an automobile lease agreement stated that it was a lease, not a secured sale, and would be governed by the Puerto Rico Act to Regulate Personal Property Contracts, the lessee had waived the right to have the lease treated under the UCC as a secured sale even though the lessor retained no residual interest in the automobile because the agreement was not subject to termination by the lessee and the agreement provided that the lessee would become the owner of the automobile at the end of the lease term.
4. *In re Johnson*,
[2015 WL 1508460](#) (Bankr. S.D. Miss. 2015)
A four-year lease of a truck with an option to purchase at the end for \$8,500 was a true lease. The lessee did not show that the option price was nominal in relation to the anticipated fair market value of the truck at the end of the lease term or the lessee's costs of performing under the agreement.

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5. *In re Wells*,
[2015 WL 3862969](#) (N.D. Ala. 2015)
A 91-month lease of a two-year old vehicle with an option to purchase at the end for \$3,444 was a true lease because the term was not for the remaining economic life of the vehicle and, regardless of whether the option price was equal to 20% or 38.8% of the vehicle's original value, it was not nominal.
 6. *GEO Finance, LLC v. University Square 2751, LLC*,
[2015 WL 1637310](#) (E.D. Mich. 2015)
A 10-year lease of a geothermal water supply system with an option to purchase at any time for approximately \$300,000 and an option to renew for eight consecutive 5-year terms was a true lease because the system had a useful life of 50 years and the option price was not nominal. Consequently, the lessor did not need to file a financing statement and a buyer of the property in which the system was installed took subject to the lease and was liable in unjust enrichment for continuing to use the system without paying the monthly metered usage fee.
 7. *CD Construction, LLC v. Hard Hat Industries, Inc.*,
[2015 WL 6509507](#) (Iowa Ct. App. 2015)
A sale-leaseback transaction for an excavator created a true 18-month lease, not a security interest, even though the lessee had a purchase option any time after the six month because the lease term was for less than the economic life of the excavator, there was no obligation or option to renew the lease, and the purchase option price was not nominal, and thus the transaction failed the bright-line test of § 1-203(b). No discussion of the general test of subsection (a), the fact that the parties did not discuss the value of the excavator, or that its value apparently exceeded all the consideration due under the lease.
 8. *In re Heien*,
[528 B.R. 901](#) (E.D. Mo. 2015)
Even if the Bailment Contract that a vehicle buyer signed and which provided that the purchase was conditioned on approval of the buyer's financing and, until then, the vehicle remained the seller's property, was contemporaneous with the purchase agreement, because the buyer obtained delivery of the vehicle and § 2-401 provides that retention of title by the seller of delivered goods is limited to a security interest, the vehicle was the buyer's property and came into the buyer's bankruptcy estate.
 9. *In re Davis*,
[528 B.R. 757](#) (Bankr. E.D. Tenn. 2015)
The right of the holder of a deed of trust to the proceeds of a settlement of an action for damage to the real property was substitute collateral covered by the lien created by the deed of trust, not a general intangible under the UCC.

10. *In re Endresen*,
[530 B.R. 856](#) (Bankr. D. Or. 2015)
The liens created by deeds of trust on real property extended to the postpetition settlement of a construction defect claim. The lien was not covered by Article 9 of the UCC, was perfected, and was not cut off by § 552(a) of the Bankruptcy Code.
11. *Merrillville 2548, Inc. v. BMO Harris Bank*,
[39 N.E.3d 382](#) (Ind. Ct. App. 2015)
A bank's security interest in a borrower's lease of real property was not governed by Article 9 of the state commercial code. Thus, the bank was not entitled to an order of possession prior to a sheriff's sale of the leasehold.
12. *Etzler v. Indiana Dept. of Revenue*,
[2015 WL 5093451](#) (Ind. Ct. App. 2015)
A secured party's security interest in breeder's award owed by the Indiana Horse Racing Commission was not excluded from Article 9 by Indiana's non-uniform § 9-104(d)(14), which refers to "the creation, perfection, priority, or enforcement of a security interest created by . . . a governmental unit of the state," because that provision deals with government debtors, not government account debtors. The Indiana Department of Revenue did not have priority over the secured party under § 9-317(a) because it was not a lien creditor.

Attachment Issues

– Existence of Security Agreement

13. *Marhaba Partners LP v. Kindron Holdings, LLC*,
[457 S.W.3d 208](#) (Tex. Ct. App. 2015)
A document entitled "Assignment of Right to Reimbursement," which stated that a developer "hereby grants to [its lender] a security interest in" a specified receivable from the local utility district to secure a loan did grant a security interest even though another agreement between the parties provided that the developer "will prepare, execute, and forward all such additional documents and other instruments as may reasonably be required in order to have the [receivables] paid directly to" the lender. Creating a direct-pay mechanism with a receivable is not incompatible with having the receivables serve as security for a debt.
14. *Korea Trade Insurance Corp. v. Neema Clothing, Ltd.*,
[2015 WL 363569](#) (S.D.N.Y. 2015)
Several signed notes and two unsigned security agreements were sufficient, when read together, to create a triable issue of fact as to whether they constituted an enforceable security agreement.

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15. *In re Brannan*,
[532 B.R. 834](#) (Bankr. D. Kan. 2015)
Even if the binding nature of the debtor's confirmed Chapter 13 plan did not prevent the trustee from challenging a creditor's security interest, the security interest did attach. Although there was no separate, authenticated security agreement containing granting language, the Weekly Payment Agreement and the Bill of Sale show that the parties intended to enter into a sale agreement for the two used trucks. The debtor signed and acknowledged on the reverse side of the title certificates that she was the buyer of the trucks and that they each were subject to the seller's lien. She also signed an application for title indicating that the seller was a "1st Lienholder." Finally, the seller is identified on the Title and Registration Receipts as a lienholder. The sum of these documents, along with the seller's credible testimony as to the custom and usages of its long-standing financing program, were sufficient.

 16. *In re Brown*,
[2015 WL 2123819](#) (Bankr. N.D. Ga. 2015)
The letter that the debtor signed granting her former romantic partner the right to drive her vehicle until the debtor paid a \$3,000 debt (unless the partner earlier allowed any female in the vehicle), did not create a security interest because it provided only the right to drive the vehicle, not to repossess or sell the car in the event of a default.

 17. *Royal Jewelers Inc. v. Light*,
[859 N.W.2d 921](#) (N.D. 2015)
Although the debtor must authenticate the security agreement, there is no requirement that the debtor separately authenticate or sign an exhibit that the security agreement references, even though that exhibit contains the description of the collateral.

 18. *Hepp v. Ultra Green Energy Services, LLC*,
[2015 WL 1952685](#) (N.D. Ill. 2015)
The managing member of a LLC did not have actual authority to bind the LLC to a note and security agreement and might not have had apparent authority, which requires conduct by the principal that causes a third party to believe that the agent is authorized.

 19. *In re Floyd*,
[540 B.R. 747](#) (Bankr. D. Id. 2015)
Individuals, the sole members of a limited liability, granted a security interest in a vehicle owned by them personally when one of them signed a note and security agreement on behalf of the LLC and had the creditor's interest noted on the certificate of title for the vehicle, because the written and parol evidence demonstrated their intent to grant a security interest.

20. *United Bank v. Expressway Auto Parts, Ltd.*,
[2015 WL 6697469](#) (Ohio Ct. App. 2015)

Even if the individual who signed the security agreement on behalf of the debtor, a limited liability company of which he identified himself as a member, was neither a member nor a manager of the LLC, and thus lacked actual authority to bind the LLC, he had apparent authority and the LLC ratified his action by reporting the secured obligation as a liability on its federal income tax returns and making monthly payments for eight years.

21. *Old Battleground Properties, Inc. v. Central Carolina Surgical Eye Associates, P.A.*,
[2015 WL 846697](#) (N.C. Super. Ct. 2015)

Creditor was not entitled to an order temporarily restraining the debtor from transferring artwork because it had not shown a likelihood of success on its claim of a security interest in the artwork. One portion of the art was expressly excluded from the collateral description in the creditor's financing statement and the creditor sent a letter to another secured party denying that the creditor had a security interest in that art. The remaining art was described in a security agreement purportedly executed by the debtor's husband on the debtor's behalf, but the debtor alleged that her husband was not so authorized to sign on her behalf and that his signature was a forgery.

22. *Martino v. American Airlines Credit Union*,
[2015 WL 4920015](#) (D. Mass. 2015)

A credit union violated the Truth in Lending Act by debiting a cardholder's deposit account to cover indebtedness arising from a consumer credit transaction because the credit union did not satisfy the higher standards under 12 C.F.R. § 226.12(d)(2) and the Official Staff Commentary thereon for obtaining consensual security interest in the deposit account. The language in the credit card agreement purporting to grant the credit union a security interest was not separately signed and did not reference a specific amount of deposited funds or a specific deposit account number. The placement of the relevant language of the agreement in a box with bolded text was insufficient to establish that the cardholder had affirmatively agreed to the security interest.

23. *In re Hadley*,
[2015 WL 7455630](#) (Bankr. N.D. Ohio 2015)

The debtor's lawyer, to whom the debtor had given possession of the certificates of title to two of the debtor's vehicles, had no security interest in the vehicles because there was no authenticated security agreement. The lawyer had neither a common-law charging lien on the vehicles because such a lien encumbers only a judgment or other proceeds awarded to a client nor a common-law retaining lien because such a lien would conflict with the state's Certificate of Motor Vehicle Title Law.

24. *In re Cable's Enterprises, LLC*,
[2015 WL 9412805](#) (M.D.N.C. 2015)

A lender to whom the debtor had, at the time the loan was made, given possession of an excavator as security for the loan had a valid security interest despite the absence of an authenticated agreement.

– Description of the Collateral

25. *In re Hintze*,
[525 B.R. 780](#) (Bankr. N.D. Fla. 2015)

A promissory note that included language granting a security interest in “all of Maker’s assets” was an insufficient description of the collateral and could not be remedied through admission of parol evidence or by reading it in conjunction with an unsigned financing statement filed more than eighteen months later.

26. *In re Gracy*,
[522 B.R. 686](#) (Bankr. D. Kan. 2015), *vacated sub nom.*,
Morris v. Ark Valley Credit Union,
[536 B.R. 887](#) (D. Kan. 2015),

In re Gracy,
[2015 WL 5552651](#) (Bankr. D. Kan. 2015) (on remand)

A mortgage that purported to encumber “fixtures” on the real estate did not create a security interest in the debtor’s mobile home – even if the mobile home was a fixture – because under § 9-108(e)(2) a description of collateral only by type is inadequate for consumer goods in a consumer transaction.

Because the mortgage described the collateral not merely as “fixtures,” but as fixtures attached to specified real property, the description was not merely by type collateral of collateral and hence the security interest could attach to the mobile home if it was a fixture.

The home was a fixture – and hence the security interest attached – because, even though the home retained its rail framework and could be removed from the ground without significant damage to either, the debtor placed the home on his land and inhabited it as his homestead for nearly 20 years, the home added considerable value to the homestead property, and the debtor surrounded the home with brick skirting, built a porch and a back patio adjacent to it, and erected a large garage just by it. All this demonstrated that the debtor intended the home to be permanently affixed to the land.

27. *2513-2515 South Holt Road Holdings, LLC v. Holt Road, LLC*,
[40 N.E.3d 859](#) (Ind. Ct. App. 2015)

A mortgage and security agreement that described the collateral to include all funds, claims, and general intangibles arising from any transaction related to the real property covered property tax refunds because the refunds are “funds” and the payment of real estate taxes is a “transaction.”

28. *In re Smith*,
[2015 WL 4594096](#) (Bankr. E.D.N.C. 2015)
A bank that refinanced the debtor's manufactured home loan and obtained a deed of trust that described the collateral as the property listed on the prior *deed*, not the property listed on the prior *deed of trust*, has a lien only on the debtor's real property, not the debtor's manufactured home, because the home was not a fixture. The manufactured home does not have a permanent foundation, has no block or curtain wall (only a faux stone curtain wall applied to wire mesh around its base), and is still registered with the state Division of Motor Vehicles as a motor vehicle.
29. *In re Modern Plastics Corp.*,
[534 B.R. 723](#) (Bankr. W.D. Mich. 2015)
Although a security agreement purported to grant a security interest in "commercial tort claims," that covered claims by the debtor, not against the debtor, and in any event the description was inadequate and the security interest could not extend to after-acquired commercial tort claims.

– Obligations Secured

30. *Citigroup Global Markets, Inc. v. KLCC Investments, LLC*,
[2015 WL 5853916](#) (S.D.N.Y. 2015)
The consideration necessary to support attachment of a security interest need not flow directly from the secured party to the debtor; the requirement that "value has been given" is written in the passive. Accordingly, an LLC's security interest could attach even though the funds for the loan came from the personal account of the LLC's owner.
31. *In re DigitalBridge Holdings, Inc.*,
[2015 WL 5766761](#) (Bankr. D. Utah 2015)
Even though the funds loaned to the debtor came from an affiliate of the secured party, rather than the secured party itself, the security interest attached. The debtor authenticated a promissory note payable to the secured party and no other party claimed a right to collect the debt.

– Rights in the Collateral

32. *Edward Gillen Co. v. Insurance Co. of the State of Pennsylvania*,
[2015 WL 347954](#) (E.D. Wis. 2015)

Whereas the proceeds of a life or fire insurance policy belong to the owner of the policy, the proceeds of a liability policy, which protects the insured from suit, belong not to the policy owner but to the person harmed by the insured. Accordingly, a bank's security interest in the debtor's personal property did not attach to the proceeds of the debtor's liability policy to the extent necessary to pay the judgment against the debtor giving rise to the insurance claim. However, the portion of the debtor's settlement with its insurer that exceeded the amount owed to the judgment creditor (attributable to the fact that the insurer refused to provide a defense, forcing the debtor to incur additional costs and fees), does belong to the debtor and the bank's security interest did attach to those funds.

33. *In re 11 East 36th, LLC*,
[2015 WL 397799](#) (Bankr. S.D.N.Y. 2015)

Pledge agreement by which a limited liability company purported to grant a security interest in its "right, title, and interest . . . in and to its membership interest" in a subsidiary LLC that owned several condominium units did not give the secured party a security interest in the condominium units even though the security agreement purported to exclude some but, not all, of the subsidiary's condominium units and the secured party filed a financing statement against the debtor identifying the collateral as the other units owned by the subsidiary. The limited liability company that authenticated the security agreement did not have property rights in the condominium units owned by its subsidiary. The secured party therefore had merely an unperfected security interest in the debtor's interest in its subsidiary.

34. *ACF 2006 Corp. v. William F. Conour Clerk's Entry of Default Entered 11/18/2013*,
[2015 WL 417553](#) (S.D. Ind. 2015)

A lender with a perfected security interest in a law firm's accounts, which included the firm's rights under contingent fee agreements with clients, did not encumber all the fees recovered upon resolution of the cases after the representation was switched to another firm, but only the *quantum meruit* portion of the fees to which the debtor was entitled.

35. *Tokles v. Black Swamp Customs, LLC*,
[2015 WL 2329244](#) (Ohio Ct. App. 2015)

The debtor had sufficient rights in the restaurant equipment acquired by the debtor's management consultant for the security interest of the debtor's lender to attach even though the consultant claimed to be the owner of the goods because the management agreement provided that expenditures made by the consultant on behalf of the debtor were to be made "in the name of and on account of, and upon the credit of" the debtor.

36. *United States v. One 2006 Lamborghini Murcielago*,
[2015 WL 3752338](#) (C.D. Cal. 2015)

A floor plan financier that had a security interest in an antique car dealer's inventory did not have a security interest in a Lamborghini that an individual purchased with 17 separate cash payments, using the car dealer's name and information to avoid sales taxes, because the car dealer did not pay for the vehicle, never attempted to sell the vehicle, never treated the vehicle as part of its business assets, and hence had no rights in the vehicle. Consequently the financier had no defense to the forfeiture of the vehicle due to the violation of 31 U.S.C. § 5324.

37. *Allstate Ins. Co. v. Posnien, Inc.*,
[352 P.3d 1](#) (Mont. 2015)

An insurance agent's grant of a security interest in its "book of business" encompassed more than the right to receive commissions and the option to receive a termination payment – both of which ended upon termination of the agency agreement – because nothing in the agency contract indicated that this broader right ended upon termination of the agency. Consequently, the secured party had a claim for conversion against the insurance company for exercising control over the book of business after the agent's default.

38. *Rubenstein v. Smith*,
[2015 WL 5445994](#) (C.D. Cal. 2015)

Because a claim under § 16(b) of the Securities Exchange Act against an insider for short-swing profits is owned by the corporation and that claim is assignable, a corporation could and did grant a security interest in such a claim because its security agreement covered "choses in action" and "commercial tort claims." The fact that a company owned by one of the insider defendants later acquired the claim after the corporation defaulted and the collateral was sold was not a problem.

– Other

39. *SEC v. Helms*,
[2015 WL 1040443](#) (W.D. Tex. 2015)

Investor in Ponzi scheme partnership who had no knowledge of the fraud did not have a security interest to secure its investment because the Side Letter Agreement purporting to grant a security interest was void because it contradicted the Partnership Agreement and its execution was a breach of the general partner's fiduciary duty to the partnership and the limited partners. Moreover, even if the security interest had attached, its creation was an avoidable fraudulent transfer because it was made with fraudulent intent and the investor's attorney failed to conduct adequate due diligence, preventing the investor from qualifying as a good faith transferee.

40. *Schaumburg Bank & Trust Co. v. Alsterda*,
[2015 WL 1502927](#) (N.D. Ill. 2015)

The bank with a perfected security interest in an LLC's assets did not show that all the funds that the LLC's bankruptcy trustee received from an insider in settlement of a fraudulent transfer claim were proceeds of the bank's collateral. Although the funds transferred to the insider were the bank's collateral, they were commingled with other funds credited to the insider's deposit account and thus the bank's collateral was limited to "identifiable" proceeds, using the lowest-intermediate-balance rule.

41. *Clark v. Missouri Lottery Commission*,
[463 S.W.3d 843](#) (Mo. Ct. App. 2015)

A bank obtained a security interest in a lottery winner's right to future distributions despite a state statute prohibiting the assignment of lottery proceeds because § 9-406 provides otherwise, expressly purports to prevail in the event of conflict with other law, and thus overrides that statute.

42. *In re Parkview Adventist Medical Center*,
[2015 WL 4692538](#) (Bankr. D. Me. 2015)

Although the president of the debtor did not obtain advance approval from the board of directors to grant a security interest in substantially all of its assets, as state law requires for a not-for-profit corporation, the security interest nevertheless attached because another state statute provides that no transfer of corporate personal property "shall be invalid by reason of the fact that the corporation was without capacity or power to . . . make . . . such a . . . transfer." Although 42 U.S.C. §§ 1395g(c) and 1396a(a)(32) prohibit direct payment of Medicare and Medicaid receivables to anyone but the provider, they do not prohibit the grant of a security interest in those receivables.

43. *Sirazi v. General Mediterranean Holding, SA*,
[2015 WL 1541087](#) (N.D. Ill. 2015)

Although the creditors' security interest in the debtor's right to the proceeds of a sale of his membership interest in a limited liability company might have been unperfected – because the collateral description in the filed financing statement referenced an exhibit that was apparently not attached – the security interest was nevertheless enforceable.

44. *Allstate Insurance Company v. Medical Lien Management, Inc.*,
[348 P.3d 943](#) (Colo. 2015)

The victim of a motor vehicle accident did not validly assign to a medical debt company the victim's right to recover from the tortfeasor's insurer pursuant to a later settlement. Under the common law, contingent contract rights are assignable but future contract rights are not. Consequently, the medical debt company had no cause of action against the insurer for paying the victim after the company notified the insurer of the purported assignment. Although the victim's agreement with the medical debt company also purported to assign the victim's personal injury claim, the company did not base its claim on that portion of the agreement.

45. *Lankhorst v. Independent Savings Plan Co.*,
[787 F.3d 1100](#) (11th Cir. 2015)

Even if the water treatment system installed in the buyers' home was a fixture, because the credit agreement provided the seller with a purchase money security interest in "any purchases made to the account," which meant the water treatment system itself, and § 9-604(c) permits a secured party with a security interest in fixtures to remove the fixtures from the real property, the seller did not have a security interest in the residence. Thus, the seller could not have violated provisions of the Truth in Lending Act that apply to credit secured by a residence.

46. *FirstMerit Bank v. Antioch Bowling Lanes, Inc.*,
[2015 WL 3545412](#) (N.D. Ill. 2015)

Under Illinois law, the test for determining whether property constitutes fixtures is whether the property is essential to the use to which the real estate is put; removability and anticipated life expectancy are not the operative considerations. Under this test, the debtor's bowling lanes, lane gutters, bowling ball return system, pin setting machines, and scoring consoles, were fixtures and therefore subject to a real property mortgage. In contrast, the laneside tables and chairs were not fixtures, were not subject to the mortgage, and thus could be removed and sold by the insider with a security interest in them.

47. *Lyon Financial Services, Inc. v. Illinois Paper and Copier Co.*,
[2015 WL 9268207](#) (N.D. Ill. 2015)

Because factual issues remained was to whether a six-year lease of office equipment to a village was a lease or a sale with a retained security interest, and if the latter it violated state law that limits leases of personal property to five years, summary judgment had to be denied on both the lessor's claim against the village for repudiating the lease and the lessor's alternative claim against the seller for breach of a warranty that the lease was enforceable.

48. *Citigroup Global Markets, Inc. v. KLCC Investments, LLC*,
[2015 WL 5853916](#) (S.D.N.Y. 2015)

Even if the debtor defrauded the secured party about the purpose of the loan, that did not render the security interest void, it merely rendered the transaction voidable at the option of the secured party.

Perfection Issues**– Method of Perfection**

49. *In re SemCrude, L.P.*,
[2015 WL 4594516](#) (D. Del. 2013)
The security interests of the debtor's oil suppliers were unperfected because even though the law of the suppliers' states created an automatically perfected security interest, the law of the jurisdiction where the debtor was located governs, it did not provide for automatic perfection, and the suppliers did not file a financing statement in the state where the debtor is located.
50. *In re University General Hospital System, Inc.*,
[2015 WL 3879484](#) (Bankr. S.D. Tex. 2015)
A landlord's consensual lien on the tenant's personal property located at the leased premises was not perfected because there was no filed financing statement.

– Adequacy of Financing Statement

51. *In re Oak Rock Financial, LLC*,
[527 B.R. 105](#) (Bankr. E.D.N.Y. 2015)
The security interest of a bank, as administrative agent, was perfected by the financing statement the bank filed in its individual capacity in 2001 and later assigned to itself as administrative agent. The fact that the loan to the bank in its individual capacity was or might have been paid off is immaterial because the financing statement never lapsed and therefore is effective to perfect the later security interest, even if the subsequent security interest was not contemplated when the financing statement was filed. The fact that the bank and the debtor expected the security interest to the bank as administrative agent be perfected by a financing statement filed in 2006 but which later lapsed is also immaterial because perfection is based on the public record, not the subjective intent of the parties. The assignment did not make the 2001 financing statement seriously misleading because a search conducted under the debtor's name would have disclosed the financing statement. Finally, no new filing was needed in Utah, the location of a creditor that purchased a loan participation from the debtor, because that creditor was not the debtor.
52. *In re The Adoni Group, Inc.*,
[530 B.R. 592](#) (Bankr. S.D.N.Y. 2015)
The financing statement that a secured party filed one day before the debtor authenticated the security agreement, and hence was not authorized when filed but became authorized the following day, was effective to perfect.

53. *In re Sterling United, Inc.*,
[2015 WL 7573240](#) (W.D.N.Y. 2015)

Financing statements describing the collateral as “[a]ll assets of the Debtor including, but not limited to, any and all equipment, fixtures, inventory, accounts, chattel paper, documents, instruments, investment property, general intangibles, letter-of-credit rights and deposit accounts . . . and located at or relating to the operation of the premises at 100 River Rock Drive, Suite 304, Buffalo, New York” were effective despite the fact that the stated location of the collateral was incorrect because the language specifying the location modified the clause beginning “including, but not limited to,” not the opening phrase “[a]ll assets of the Debtor,” and even if the description was ambiguous, the purpose of filing is to provide inquiry notice and thus a searcher should investigate further.

– **Authorization or Effect of Termination Statement**

54. *In re Motors Liquidation Co.*,
[777 F.3d 100](#) (2d Cir. 2015)

Because 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, the termination statements prepared by debtor’s counsel in connection with the payoff of a \$300 million lease transaction and which were reviewed and approved by the secured party and its counsel were effective. As a result, the financing statement relating to a \$1.5 billion term loan was terminated.

– **Control**

55. *Sign Builders, Inc. v. SVI Themed Construction Solutions, Inc.*,
[30 N.E.3d 475](#) (Ill. Ct. App. 2015)

Creditors with a security agreement in a borrower’s “inventory, chattel paper, accounts, equipment and general intangibles” failed to demonstrate that they had a perfected security interest in the borrower’s deposit account over which they had no control, and hence had not demonstrated priority over the rights of a judgment creditor that had attempted to garnish the deposit account.

56. *In re Southeastern Stud and Components, Inc.*,
[2015 WL 7750209](#) (Bankr. M.D. Ala. 2015)

A deposit account control agreement need not specify the accounts subjected to control. Discrepancies between the account numbers referenced in the control agreement and those actually maintained by the debtor at the bank did not undermine control, given that the debtor and the bank were aware of the accounts to which the control agreement applied and, because a financing statement filed by the secured party identified deposit accounts as the collateral, a third party would have inquiry notice regarding secured party’s security interest.

– Collateral Covered by a Certificate of Title

57. *Hyden v. AmeriCredit Financial Services, Inc.*,
[2015 WL 1949747](#) (Bankr. D. Ariz. 2015)

Pursuant to a 2013 amendment to the Arizona certificate of title statute, if an application for a certificate showing a security interest is delivered to the registering office within thirty days after the interest is created, perfection relates back to time the interest is created. Accordingly, a pre-amendment ruling that perfection dates as of the time the certificate is issued was no longer good law.

58. *In re Hadley*,
[2015 WL 7455630](#) (Bankr. N.D. Ohio 2015)

Even if the debtor's lawyer, to whom the debtor had given possession of the certificates of title to two of the debtor's vehicles, had a security interest in or retaining lien on the vehicles, that lien was unperfected because the attorney had not complied with the state's Certificate of Motor Vehicle Title Law by getting the interest noted on the certificates.

– Other

59. *Korea Trade Insurance Corp. v. Neema Clothing, Ltd.*,
[2015 WL 363569](#) (S.D.N.Y. 2015)

A financing statement need not describe the secured obligation.

60. *In re Parkview Adventist Medical Center*,
[2015 WL 4692538](#) (Bankr. D. Me. 2015)

A secured party's security interest in the proceeds of accounts did not become unperfected when the proceeds were deposited into a bank account over which the secured party did not have control. The secured party was not required to separately identify and differentiate among the proceeds of its receivables in order to preserve the perfection of its security interest.

61. *In re Petersburg Regency LLC*,
[540 B.R. 508](#) (Bankr. D.N.J. 2015)

Even though a secured party's financing statement lapsed, the security interest – in the debtor's right to insurance proceeds arising from the destruction of its hotel – remained. The security interest was re-perfected by the filing of a new financing statement and was perfected by a properly recorded deed of trust.

– **Bogus Filings**

62. *United States v. James*,
[2015 WL 7351394](#) (M.D. Fla. 2015)

The financing statements filed by an inmate against judges and prosecutors were fraudulent and thus would be declared null and void.

PMSI Status

63. *In re Bibbs*,
[2015 WL 1843252](#) (Bankr. D. Kan. 2015)

The fact that the debtor refinanced the PMSI in her automobile less than 910 days before she filed her Chapter 13 bankruptcy petition did not alter the purchase-money nature of the security interest. However, refinancing did also not alter the date when the PMSI was granted, and because that was more than 910 days before the petition, the hanging paragraph of § 1325(a) did not apply.

Priority Issues

– **Tax Liens**

64. *In re Craft-Latimer*,
[2015 WL 5042108](#) (Bankr. N.D. Ga. 2015)

The IRS, which had filed a notice of federal tax lien before a lender obtained and perfected a security interest in the taxpayer's motor vehicle, had priority even though the certificate of title for the vehicle did not indicate the tax lien.

– **Buyers**

65. *The Four County Bank v. Tidewater Equipment Co.*,
[771 S.E.2d 437](#) (Ga. Ct. App. 2015)

Bank that had filed financing statements to perfect its security interest in two items of equipment before the debtor sold the equipment, but which failed to file continuation statements until after the financing statements had lapsed, became unperfected and was deemed never to have been perfected against the buyer. As a result, the buyer, which had no knowledge of the security interest when it took delivery of the equipment, took free of the bank's security interest. The buyer was not obligated by the duty of good faith to search for filed financing statements.

66. *In re SemCrude, L.P.*,

[2015 WL 4594516](#) (D. Del. 2013)

Downstream buyers of oil and gas from the debtors were buyers for value who took free of the unperfected security interests of the debtors' suppliers under § 9-317(b) because they gave value and lacked knowledge of the security interests. Although the buyers allegedly knew of: (i) the state lien laws that created the security interests, (ii) the identities of some of the suppliers, and (iii) the fact that the suppliers were unpaid, that was insufficient proof of knowledge of the security interests, especially since it is customary for payment not to be made until the month following delivery. Presumed or actual knowledge of the state lien laws created at most inquiry notice, not knowledge, of the security interests, especially since the debtors warranted good title. None of the buyers admitted to knowing the supplier's asserted liens, the suppliers did not provide any direct evidence that the buyers did know, and the suppliers did not directly inform the buyers of their alleged security interests or give them notice of any kind.

The buyers were also buyers in ordinary course of business who took free of the supplier's liens under § 9-320(a) even though the volume sold was abnormally large during the time in question and the buyers partially purchased on credit and partially paid in kind through cross-product netting arrangements prevalent in the oil and gas markets.

67. *Los Angeles Federal Credit Union v. CarMax Auto Superstores California, LLC*,

[2015 WL 1524455](#) (Cal. Ct. App. 2015)

A used car dealer that purchased a vehicle after a fraudulent sale by a towing company that cleared a perfected security interest from the vehicle's certificate of title was a bona fide purchaser under the state's "full title" doctrine and a good faith purchaser for value under § 2-403 (which is an exception to § 9-315(a)(1)), and thereby acquired good title to the vehicle. As a result, the dealer did not breach the warranty of title when it resold the vehicle and was not liable for unjust enrichment.

68. *Mahdavi v. NextGear Capital, Inc.*,

[2015 WL 1526538](#) (E.D. Va. 2015)

Neither the buyer of a vehicle nor the secured party with a security interest in the vehicle were entitled to summary judgment on whether the buyer qualified as a buyer in ordinary course of business. The buyer presented some evidence that she was, including a signed Retail Purchase Agreement, evidence of a \$23,000 down payment, and evidence of a credit union loan for the remainder of the purchase price. The secured party presented some evidence that she was not, including that the test drive of the vehicle did not follow the standard procedure of most test drives, that the sale did not take place at the dealership, and that the buyer did not negotiate the terms of the sale.

69. *Credit Union Auto Buying Service, Inc. v. Burkshire Properties Group Corp.*,
[776 S.E.2d 737](#) (N.C. Ct. App. 2015)
Secured party located in New York and that acquired its security interest in New York from a debtor located in New York could be forced to litigate in North Carolina the priority claims of a buyer in North Carolina because the collateral had been delivered to the buyer in North Carolina and the state had *quasi in rem* jurisdiction over the controversy.
70. *DZ Bank AG Deutsche Zentral-Genossenschaftsbank v. Connect Ins. Agency, Inc.*,
[2015 WL 3797162](#) (W.D. Wash. 2015)
The buyer of collateral was not an account debtor and thus even if it had a claim against the debtor, the buyer could not use § 9-404 to assert that claim against the secured party for conversion.

– Competing Security Interests

71. *In re Shafer Brothers Construction Inc.*,
[525 B.R. 607](#) (Bankr. N.D.W. Va. 2015)
Creditor with an unperfected security interest in the debtor's deposit accounts lost priority to the debtor's lawyer, to whom the debtor paid a retainer that the lawyer deposited into an account the lawyer controlled, to the extent that the debtor owed funds to the lawyer.
72. *Bayer Cropscience LP v. Texana Rice Mill Ltd*,
[2015 WL 1474393](#) (E.D. Mo. 2015)
The bank with a perfected security interest in the debtor's commercial tort claim had priority in the debtor's rights under an agreement settling that claim over another lender with an earlier security interest in the debtor's existing and after-acquired general intangibles because even if the security interest in general intangibles attached to the debtor's rights under the settlement agreement, it was not perfected until the debtor entered into the settlement agreement, and thus the bank's interest was perfected first. To the extent that the debtor's right to payment under the settlement agreement was for damage to equipment – in which the lender also had a security interest – the lender did not have priority because it had already foreclosed its security interest and sold such equipment, thereby discharging its security interest.
on rehearing, [2015 WL 3843804](#) (E.D. Mo. 2015)
Priority is based on first to file or perfect, not first to perfect, but this does not alter the prior conclusion because the lender foreclosed prior to execution of the settlement agreement and thus before its security interest attached to the debtor's rights thereunder.

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73. *HSBC Bank USA v. Perez*,
[165 So. 3d 696](#) (Fla. Ct. App. 2015)
The relative priority of two banks that each acquired an original promissory note for the same mortgage loan was based not on the order in which they filed an assignment of the mortgage but pursuant to the first-to-file-or-perfect rule of Article 9. Accordingly, the bank that took possession of its note first had priority with respect to the mortgage.
74. *Citigroup Global Markets, Inc. v. KLCC Investments, LLC*,
[2015 WL 5853916](#) (S.D.N.Y. 2015)
Even if the first security interest to attach to the debtor's investment property was not perfected – because there was no filed financing statement and the only control agreement had a different date than the control agreement referenced in the security agreement and it referred to a different loan – it had priority over another security interest that, if it attached at all, attached subsequently, because that second security interest was not perfected by a filed financing statement that described the collateral as consisting of an securities account that was empty.
75. *First Financial Bank v. Bosgraaf*,
[2015 WL 4751190](#) (Mich. Ct. App. 2015)
The debtor has no standing to object to a settlement between secured parties that resolves whose security interest has priority. No discussion of the relative interest rates on the secured obligations.

– Other

76. *In re Purdy*,
[2015 WL 5176580](#) (Bankr. W.D. Ky. 2015)
Because: (i) the debtor used one bank account to conduct its dairy operations, commingling proceeds of owned cattle with proceeds of leased cattle, and then using those commingled proceeds to acquire replacements for leased cattle culled from the herd; (ii) the lessor knew that the debtor was not complying with the terms of the lease obligating the debtor to notify the lessor of any sales and remit the proceeds to the lessor; (iii) the lessor paid for the cattle after they were delivered to the debtor; and (iv) the debtor put the lessor's brand on cattle regardless of whether the cattle were acquired with funds from the commingled account or from suppliers paid by the lessor, the lessor could not prove that the cattle were its property. In contrast, the bank's security interest in the debtor's existing and after-acquired cattle did attach to all the cattle because the debtor used the commingled funds – which were part of the bank's collateral – to acquire the cattle, even though the lessor reimbursed the debtor for those payments. Consequently, the bank, not the lessor, was entitled to the proceeds of the cattle.

77. *In re C.W. Mining Company*,
[531 B.R. 862](#) (D. Utah 2014)

Regardless of whether the agreement by which a mining company assigned its accounts to a coal broker was an outright sale or was security for a loan, the transaction was governed by Article 9 and, because the broker failed to properly perfect its interest, the broker's security interest in the accounts was avoidable by the mining company's bankruptcy trustee.

78. *Cyber Solutions International, LLC v. Priva Security Corp.*,
[2015 WL 852354](#) (W.D. Mich. 2015)

A secured party with a perfected security interest in the debtor's intellectual property – including the copyrights associated with a specific semiconductor chip – and which security interest had priority over the rights of a subsequent exclusive licensee, also had priority over derivative products developed by the licensee even though the license agreement purported to grant the licensee “the right to pursue improvements to the Licensed Technology” and “exclusive title to improvements.” Even if the secured party acted with unclean hands in getting the debtor to terminate the license, that did not affect the secured party's right to foreclose its security interest.

79. *MemoryTen, Inc. v. Silicon Mountain Holdings*,
[92 F. Supp. 3d 176](#) (S.D.N.Y. 2015)

A supplier that entered into a Subscription Agreement with its customer, which gave the supplier an option to acquire a portion the customer's distribution business under certain circumstances but which was expressly “[s]ubject to the rights of” the customer's secured lenders, effectively lost those rights when the secured lenders foreclosed and sold the business to a buyer.

80. *Selective Insurance Co. of America v. Environmental, Safety & Health, Inc.*,
[2015 WL 914824](#) (E.D. Tenn. 2015)

Because the indemnity agreement between a contractor and the surety that issued bonds for construction projects expressly provided that “all funds paid, due or to become due . . . under any contract in connection with which Surety shall have issued a Bond . . . shall be impressed with a trust in favor of and for the benefit of . . . Surety,” the surety stated a cause of action against the contractor's secured lender for conversion based on the secured lender's receipt and retention of the proceeds of construction contracts. The surety was entitled to a preliminary injunction requiring the contractor to have all proceeds of its bonded contracts paid to the surety.

81. *Inwood National Bank v. Wells Fargo Bank*,
[463 S.W.3d 228](#) (Tex. Ct. App. 2015)

The bank with a perfected security interest in the debtor's investment account had priority over the rights of a garnishing judgment creditor even though the debtor, more than 45 days after the writ of garnishment was served, signed a new note extending the maturity date. The new note, which expressly stated that it was not a novation, was not an “advance” within the meaning of § 9-323(b) because no additional funds were loaned.

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82. *American Home Assurance Co. v. Weaver Aggregate Transport, Inc.*,
[84 F. Supp. 3d 1314](#) (M.D. Fla. 2015)
A garnishee bank that had a perfected security interest in a deposit account it maintained for the debtor did not have setoff rights sufficient to defeat the rights of the garnishing judgment creditor because the bank failed to declare the debtor in default before service of the writ of garnishment. Thus, while the bank had a prior perfected security interest in the deposit account and the debtor technically defaulted on the loan, because the bank did not declare the loan in default or follow procedures to enforce its rights, the bank did not have a present right to the funds or a basis on which to object to their release.
83. *ACF 2006 Corp. v. William F. Conour Clerk's Entry of Default Entered 11/18/2013*,
[2015 WL 417553](#) (S.D. Ind. 2015)
A lender's perfected security interest in a law firm's accounts had priority over a subsequent judgment lien and over the government's subsequent restitution lien.
84. *Minnesota Lawyers Mutual Insurance v. Conour*,
[2015 WL 2095344](#) (S.D. Ind. 2015)
The secured party with a perfected security interest in the debtor's accounts and general intangibles, which included refunded insurance premiums, had priority over the lien created under 18 U.S.C. § 3613(c) by a judicial restitution order in favor of the United States because the security interest was perfected before the restitution order was issued or recorded.
85. *SEC v. Spongetech Delivery Systems, Inc.*,
[98 F. Supp. 3d 530](#) (E.D.N.Y. 2015)
The creditor with a perfected security interest in the assets of a debtor against whom the SEC obtained a disgorgement judgment had priority over the SEC's unsecured claim. While the SEC's distribution of the proceeds of a disgorgement action must be fair and reasonable – and thus can be affected by equitable factors – that standard does not apply to the relative priority of the SEC's disgorgement claim and a creditor's security interest.
86. *PNC Bank v. Creative Cabinet Systems, Inc.*,
[2015 WL 4171968](#) (Ohio Ct. App. 2015)
The secured party with a perfected security interest in the debtor's assets was not entitled to the escrowed funds paid by the buyer of the debtor's assets to the receiver for the debtor because the funds were contractually set aside for collected but unpaid sales taxes. Even though the receiver submitted evidence that the debtor owed use taxes, not sales taxes, the agreement with the buyer provided that any remaining escrowed funds were to be returned to the buyer if there were any unpaid and unwaived sales taxes and the evidence failed to establish that no sales taxes were owing. The debtor's customers had been billed for and paid sales taxes and, even if such amounts were improperly collected, the debtor had a statutory duty to remit them to the state.

87. *Consumers Produce Co., Inc. of Pittsburgh v. Fredericktown Produce Co.*,
[2015 WL 728488](#) (W.D. Pa. 2015)

The statutory trust imposed by PACA encompasses the proceeds of a life insurance policy that a produce broker paid for with the proceeds from the sale of produce. Therefore, the bank that received a security interest in the policy had to disgorge to the PACA claimants the policy proceeds received upon the death of the insured.

88. *Classic Harvest LLC v. Freshworks LLC*,
[2015 WL 9593621](#) (N.D. Ga. 2015)

Although a commercially reasonable true sale of accounts by a produce buyer does not violate the PACA statutory trust, and removes the accounts from the trust, the factoring arrangement in this case was not a true sale because the produce buyer continued to bear the risk of its customers' non-payment or underpayment of the factored accounts and the factor's risk was limited to certain narrow circumstances under which a customer was financially unable to pay or was not creditworthy. Accordingly, the accounts and their proceeds remained trust assets and the factor was not entitled to priority over the PACA claimants.

89. *Brinager v. JAO Distributors, Inc.*,
[2015 WL 4910970](#) (S.D. Ohio 2015)

Produce supplier whose PACA license lapsed but was then retroactively reinstated by the USDA could assert a claim against the buyer's secured party for violation of the PACA trust. The buyer believed that the supplier was a PACA licensee at the time of the purchases, the buyer did not discover the lapse in the supplier's license until after its liquidation commenced, and the payments that the supplier seeks to disgorge were made prior to the secured party becoming aware of the absence of a license. Factual issues remained as to whether the secured party qualified for the bona fide purchaser defense.

90. *In re Bissett Produce, Inc.*,
[2015 WL 868029](#) (E.D.N.C. 2015)

Growers that provided sweet potatoes to their own agent for storage, curing, packaging, and sale were not exempt from the PACA notice requirements and, because they did not comply with those requirements, were not entitled to the benefits of a PACA trust against either the agent or its secured lender.

91. *Spada Properties, Inc. v. Unified Grocers, Inc.*,
[2015 WL 4662930](#) (D. Or. 2015)

A produce supplier to a supermarket had no claim against the market's secured creditor for violation of the PACA trust by withdrawing payment from the market's deposit accounts because even though the supplier had provided the requisite PACA notices, its course of conduct with the market – in particular, their agreement that payments would be applied to the oldest invoices first – meant that their agreements did not in fact require payment within 30 days. Hence, the supplier had waived its PACA rights.

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92. *Guaranty Bank & Trust Co. v. Agrex, Inc.*,
[2015 WL 2453232](#) (N.D. Miss. 2015)
Even if the debtor’s commodity contracts were validly assigned, the buyer – which had taken the crops from two grain terminals that qualified as buyers in ordinary course of business – could not offset its damages for non-delivery under one contract against its obligation to pay the price under the other contracts because the debtor’s lender had a perfected production-money security interest in the crops. The priority of the lender’s security interest prevented the buyer from exercising its setoff rights under § 9-404.
93. *Green River Marina, LLC v. Meredith*,
[2015 WL 1273887](#) (W.D. Ky. 2015)
A bank’s preferred ship mortgage on the debtor’s vessel had priority over a marina’s subsequent maritime lien for moorage fees.
94. *Citizens Banking Co. v. Ott’s Body Shop*,
[2015 WL 1125045](#) (Ohio Ct. App. 2015)
The artisan lien of an auto body shop that restored vintage car was subordinate to a preexisting security interest in the car even though the security interest was perfected after the shop performed the services giving rise to its lien because state law expressly excludes such liens from the UCC.
95. *C.R. Meyer and Sons Co. v. Custom Mechanical CSRA, LLC*,
[773 S.E.2d 361](#) (S.C. Ct. App. 2015)
Two lenders’ perfected security interests in a subcontractor’s accounts were subordinate to the statutory lien of the workers who provided services on the project. It did not matter that the workers were employed by the subcontractor’s subsidiary, rather than by the subcontractor, because the statute makes no such distinction. Although the statutory lien applies to “money received,” that did not prevent the workers from asserting a claim against the proceeds of an arbitration award, which had been deposited in the trust account maintained by the subcontractor’s attorneys, because the subcontractor owned the funds that the attorneys held on the subcontractor’s behalf.
96. *Kentucky Petroleum Operating Ltd. v. Golden*,
[2015 WL 927358](#) (E.D. Ky. 2015)
The recipient of an arbitration award was entitled to avoid the mortgage and security interest granted by the arbitration defendants to related parties after the arbitrator closed the hearing but before the arbitration award. The timing of the grant of the security interest was a classic badge of fraud and the debtors submitted no evidence of good faith. Moreover, the corporate veil among the debtors and the secured party would be pierced because all were under common ownership and control, none observed corporate formalities, and continued recognition of their supposedly separate corporate forms would sanction injustice.

97. *Iowa Department of Human Services v. Community Care, Inc.*,
[861 N.W.2d 868](#) (Iowa 2015)

The expenses of a receiver appointed to manage a residential, long-term care facility may be charged against a secured party's collateral only if the secured party consented to the appointment or to the extent the secured party benefits from the receiver's services.

98. *Chen v. New Trend Apparel, Inc.*,
[2015 WL 4199117](#) (S.D.N.Y. 2015)

Because the court had previously determined that a factor had a first-priority security interest in the debtor's inventory and accounts, the court would not approve a settlement between the debtor and its judgment creditor that provided for the debtor to assign to the judgment creditor its claim against an account debtor for delivered but unpaid inventory.

Enforcement Issues

– Default

99. *Royal Jewelers Inc. v. Light*,
[859 N.W.2d 921](#) (N.D. 2015)

Although a debtor may designate, either in the security agreement or at the time of payment, to what obligation payments are to be applied, the evidence did not establish that the debtors in this case designated that their payments were to go first to their obligation secured by a wedding ring. As a result, that obligation was not satisfied and the secured party's assignee was entitled to enforce the security interest in the ring.

– Waiver, Estoppel & Other Defenses

100. *Beneficial Mutual Savings Bank v. Kwasnik*,
[2015 WL 6457843](#) (Pa. Super. Ct. 2015)

A secured party that obtained a consent judgment for the debtor to surrender 9,000 shares of bank stock in satisfaction of the secured obligation was entitled to submit evidence that the number of shares was a unilateral mistake for which relief was appropriate, and that the correct number was 132,383 shares.

101. *Reile v. Live Stores, Inc.*,
[2015 WL 6438352](#) (Cal. Ct. App. 2015)

A secured party that first accelerated the debt but later sought and obtained ex parte a judgment for the missed installments was barred by res judicata from seeking to collect the remainder of the debt or to foreclose the security interest.

– **Replevin & Repossession**

102. *PNC Bank v. Nature's Pearl Corp.*,
[2015 WL 1189599](#) (M.D.N.C. 2015)
A secured party with a perfected security interest in all the debtor's inventory, equipment, and accounts was entitled, after default, to an order granting it immediate possession of the inventory and equipment. Although North Carolina civil procedure requires that the property be "particularly described," and that statute does not adopt the UCC's rules for describing collateral, the term "inventory" has a common accepted meaning, is not ambiguous, and satisfies the requirement.
103. *Mahdavi v. NextGear Capital, Inc.*,
[2015 WL 1526538](#) (E.D. Va. 2015)
Repossession agents did not breach the peace by going to the debtor's home address at 1:00 am, hooking the debtor's car up to the tow truck, thereby gaining dominion and control over the car, knocking on the front door of the residence and asking for the keys, and then leaving after the debtor refused to give the agents her keys. The agents did not use any force, violence, threats, or fraud to obtain control over the vehicle.
104. *Daniel v. Morris*,
[2015 WL 7782828](#) (Fla. Ct. App. 2015)
An individual who co-owned and operated the debtor and who entered into a settlement agreement with the secured party pursuant to which the individual released her claims relating to an alleged breach of the peace during repossession could still pursue her claims against the repossession company and its agent. The company and its agent were not subsequent tortfeasors; they were jointly liable with the secured party for all the alleged injuries.
105. *Axis Capital, Inc. v. Jaina Systems Network Inc.*,
[13 N.Y.S.3d 860](#) (N.Y. Sup. Ct. 2015)
An equipment lessor with a security interest in the leased equipment was not entitled to a temporary restraining order prohibiting the defaulting lessee from moving or transferring the equipment because such an order may be issued only if immediate and irreparable injury would otherwise result and the lessor's alleged injury would be compensable by money damages.
106. *Nelson v. BMW Financial Services NA, LLC*,
[2015 WL 8328073](#) (D. Minn. 2015)
A repossession agent that repossessed the debtor's car when the debtor was arguably not in default – because the secured party had accepted late payments and not provided notification that strict compliance with the payment schedule was required going forward – could be liable for violation of § 9-609. However, because the agent is not a secured party, the agent could not be liable for statutory damages under § 9-625(c).

107. *LNV Corp. v. Harrison Family Business, LLC*,
[2015 WL 5553701](#) (D. Md. 2015)

The secured party was entitled to have a receiver appointed to take control of the debtor – a real estate holding company – because the debtor had defaulted on the loans and had allowed affiliates to lease the property for no rent. A receiver would not be appointed to take control of the vessel in which the secured party had a preferred ship mortgage because, even though the mortgage purported to give the secured party the right to the appointment of a receiver after default, there was no evidence that the vessel was being mismanaged or operated differently from when the lien was created.

– **Notification of Disposition**

108. *Ross v. Rothstein*,
[92 F. Supp. 3d 1041](#) (D. Kan. 2015)

The debtor was not entitled to notification of the sale of stock pledged as collateral because the debtor acknowledged his default and waived the right to notification in a superceding Pledge Agreement and even though the secured party agreed in the Forbearance Agreement not to take remedial action for a specified period of time, that did not eliminate the default by extending the time for payment.

109. *Key Equipment Finance v. Southwest Contracting, Inc.*,
[2015 WL 5159073](#) (D. Colo. 2015)

The debtor and the guarantors had waived the right to notification of a disposition of the collateral – a dredge – by signing an agreement, after default, that upon breach of a workout agreement, the total indebtedness then outstanding would be due and owing without “any other notice to [the debtor or the guarantors] whatsoever.” Even if the secured party failed to comply with Article 9 by not providing notification of the sale, the debtor and guarantors presented no evidence that they could have paid the debt or produced a buyer who would have purchased the dredge at a higher price, and thus the presumption of no deficiency was rebutted. The debtor’s principal had looked for a buyer for approximately two years after he abandoned the dredge, but received had no offers.

110. *In re Godfrey*,
[537 B.R. 271](#) (Bankr. N.D.W. Va. 2015)

Although both the parties’ security agreement and § 9-611 required the secured party to send notification of a disposition of collateral to the debtor and the secondary obligor, the secured party complied with that duty by sending notification to the attorney for the debtor and secondary obligor, who was representing both of them with regard to the subject matter of the notification. However, the reasonableness of the notification remained in dispute because the secured party sent imprecise and varying communications regarding the proposed disposition and may have actually sold the collateral before the date specified in the notification.

– **Conducting a Commercially Reasonable Disposition**

111. *Ross v. Rothstein*,

[92 F. Supp. 3d 1041](#) (D. Kan. 2015)

The secured party's sale of stock on the over-the-counter QB tier market ("OTCQB") was conducted in a commercially reasonable manner because the stock was sold at standardized prices that were not the subject of individual negotiation, and thus the OTCQB is a "recognized market" within the meaning of § 9-627(b). Although a sale a few hours later would have generated several thousand dollars more, the secured party had at the time no benefit of hindsight and the fact that a greater amount could have been obtained by disposition at a different time is not sufficient to show that the disposition was unreasonable.

112. *In re Estate of Nardoni*,

[2015 WL 1514908](#) (Ill. Ct. App. 2015)

A bank that, after default, received certificates in its own name for the pledged stock, placed the certificates in a vault, and for three years refused to either sell the stock or permit the debtor to sell the stock to pay off the secured obligation, acted in a commercially unreasonable manner. This discharged the guarantors from any further liability.

113. *Harley Davidson Credit Corp. v. Galvin*,

[807 F.3d 407](#) (1st Cir. 2015)

Although the secured party's sale of a repossessed aircraft through a dealer specializing in the sale of repossessed aircraft, if fairly conducted, is commercially reasonable, it is the secured party's obligation to show that the sale was fairly conducted, which the secured party had not done when it moved for summary judgment, particularly given that the plane was vandalized while in the secured party's possession, and sold without repair while the plane could not be flown.

114. *Tafel v. Lion Antique Cars & Investments, Inc.*,

[773 S.E.2d 743](#) (Ga. 2015)

Even if Article 9 applied to the parties' transaction and continued to apply after the buyer turned over two automobiles to the seller pursuant to court order, and even if the seller acted in a commercially unreasonable manner in not promptly selling the cars as the court had directed, the seller would not be barred from pursuing the buyer for a deficiency. Instead, the rebuttable presumption rule applies. The trial court did not err in treating the amount for which the cars were insured as their value and crediting the buyer's having paid that amount toward the secured obligation.

115. *Bank of America v. Dello Russo*,
[610 F. App'x 848](#) (11th Cir. 2015)

The secured party acted in a commercially reasonable manner when it relied on an investment broker hired by the debtor to market the collateral and find a buyer. The broker used a national marketing campaign to identify prospective purchasers for the assets. The secured party then negotiated with the only potential buyer expressing interest in an effort to increase the purchase price. There was no conflict of interest merely because one of the debtor's executives was hired by the buyer following the acquisition nor was there any inference of collusion to sell the collateral for less than its value given that the secured obligation exceeded \$17 million, the purchase price was \$1.5 million, and the guaranty was capped at \$5.95 million, so that the secured party was not able to collect the full amount owed.

116. *Key Equipment Finance v. Southwest Contracting, Inc.*
[2015 WL 5159073](#) (D. Colo. 2015)

The secured party's sale of a dredge for \$75,000 was commercially reasonable. It engaged a company with experience in inspecting and evaluating commercial equipment, including dredges, to assess the condition of the dredge. That company hired a local individual who had knowledge and experience with dredges to assist in the process. After the company assessed the condition of the dredge and made a rough estimate of its value, the company tried to find a buyer both on the internet and by having its sales people directly contact possible buyers. These efforts continued for approximately one and a half years without success. Meanwhile, the dredge was again flooded when the Missouri River overflowed. Eventually, the secured party sold the dredge for a price significantly less than the originally estimated fair market value but in line with a revised estimate. The fact that the buyer was able to resell the dredge for \$185,000 does not make secured party's sale commercially unreasonable.

117. *Wells Fargo Bank, N.A. v. Bivona & Cohen, P.C.*,
[2015 WL 5752595](#) (S.D.N.Y. 2015)

Although a guarantor had not waived a defense based on the secured party's allegedly commercially unreasonable disposition of collateral, the secured party was nevertheless entitled to summary judgment on the issue because, with respect to accounts receivable, the commercially reasonable standard applies only when the secured party has taken possession or control so as to remove the debtor's ability to collect, and in this case the secured party allowed the debtor's agent – another guarantor – to collect and simply remit proceeds to the secured party. Although the secured party discharged the agent from her guaranty upon collection of \$700,000, there was no evidence to suggest that her collection efforts were inconsistent with the debtor's interests at any point.

118. *In re Godfrey*,
[537 B.R. 271](#) (Bankr. N.D.W. Va. 2015)
Summary judgment could not be issued on the commercial reasonableness of the secured party's private disposition of equipment because the secured party: (i) did not respond to other potential purchasers who had expressed interest; (ii) sold the equipment to an auctioneer, who two days later resold the equipment at a previously noticed public auction; and (iii) might not have provided the debtor an opportunity to arrange for friendly or competitive bidders and was not responsive to the debtor's request for the details of the sale.
119. *In re Karsten Gering, LLC*,
[2015 WL 7961937](#) (Bankr. D. Neb. 2015)
The managing member of the debtor raised a factual issue about whether the secured party conducted a disposition in a commercially reasonable manner by alleging that he offered to pay \$5,000 more than the amount for which the secured party sold the collateral, but that the secured party rejected his offer.

– Collecting on Collateral

120. *In re Brican America LLC Equipment Lease Litigation*,
[2015 WL 235409](#) (S.D. Fla. 2015)
A buyer of equipment leases was not a holder in due course – and therefore took subject to the fraud defenses of the lessees – because: (i) the originator intended to defraud the lessees; (ii) the buyer knew that the originator (a) was marketing the lease transactions as “risk free,” and (b) promised to buy back the leases if the advertiser stopped making the payments that were supposed to offset the rent due; and (iii) as the buyer learned more about the originator's promises, it responded not with caution but by increasing its financing ten fold.
121. *Nisbet, Inc. v. Wells Fargo Bank*,
[2015 WL 1408839](#) (W.D. Tex. 2015)
The bank with a security interest in a cabinet manufacturer's accounts was an “assignee” of those accounts so that an account debtor could raise defenses and claims in recoupment against the bank, even though the account debtor could not obtain any affirmative recovery against the bank.
122. *Garrison Special Opportunities Fund LP v. Fidelity National Card Services, Inc.*,
[15 N.Y.S.3d 7](#) (N.Y. Sup. Ct. 2015)
The credit card processor whose contract with the debtor entitled the processor to setoff from the proceeds of processed charges the card processing fees, servicing fees, and subservicing fees was entitled to exercise setoff before remitting the balance to the debtor's secured party.

123. *Swift Energy Operating, L.L.C. v. Plemco-South, Inc.*,
[157 So. 3d 1154](#) (La. Ct. App. 2015)

The factor that bought some accounts from the debtor and which obtained a security interest in the accounts that the debtor had not sold was an “assignee” of such unsold accounts within the meaning of § 9-406. Although the account debtor paid the debtor after receiving an e-mail message from the factor instructing the account debtor to pay the factor, the account debtor had no liability to the factor because the employee of the account debtor who received the message (along with contrary information from the debtor) informed the factor (and the debtor) that she was not the individual responsible for making payment decisions and informed the factor to whom it should send the assignment information. Consequently, the factor had not provided proper notification to the account debtor prior to the time the account debtor paid the debtor.

124. *Forest Capital LLC v. BlackRock, Inc.*,
[2015 WL 874611](#) (D. Md. 2015)

Putative secured party had no cause of action against account debtor for making payments totaling \$1,050,000 directly to the debtor because: (i) the factoring agreement between the debtor and the secured party expressly excluded “prepayments to third parties for energy purchases,” which is what the payments at issue were for; (ii) those payments were made pursuant to a contract which the debtor could not assign without third-party consent but the secured party never alleged that such consent was provided so it is unclear whether the secured party could have acquired a right to payment under it; and (iii) the secured party never notified the account debtor of its security interest; although the debtor provided such a notification, that communication was vague and did not “reasonably identify the rights assigned.”

125. *Wheeling & Lake Erie Railway Co. v. Maine Northern Railway Co.*,
[2015 WL 5440787](#) (D. Me. 2015)

An account debtor could exercise against the secured party with a security interest in the debtor’s accounts setoff rights that accrued after the account debtor obtained the debtor’s credit reports, which indicated the security interest, because those credit reports were not authenticated by the debtor or the secured party and thus were not operative under § 9-404(a) to cut off later accruing setoff rights.

126. *Vinings Bank v. Brasfield & Gorrie, LLC*,
[774 S.E.2d 701](#) (Ga. 2015)

The bank with a security interest in the accounts of a subcontractor that had gone out of business, and which had brought a collection action against the general contractor, was entitled to summary judgment on the contractor’s counterclaim for conversion based on the bank’s debit of the subcontractor’s deposit account because, even if some of the deposited funds were held in constructive trust for the subcontractor’s suppliers, whom the general contractor had voluntarily paid, the general contractor had no assignment of the suppliers’ rights and no standing to raise their claim.

127. *Durham Commercial Capital Corp. v. Ocwen Loan Servicing, LLC*,
[2015 WL 4164780](#) (S.D. Fla. 2015)

The claim of a factor against an account debtor for wrongfully paying the debtor after receiving instructions to pay the factor would not be dismissed merely because the debtor was now in bankruptcy and the bankruptcy trustee might commence an adversary proceeding to avoid the factoring agreement. The trustee is not a necessary party to the action.

128. *DZ Bank AG Deutsche Zentral-Genossenschaftsbank v. McCranie*,
[2015 WL 5234569](#) (M.D. Fla. 2015)

The bank with possession of a negotiable promissory note properly endorsed to it was a holder in due course despite the fact that the original payee had sold a participation interest in the note to another entity that did not file a financing statement or take possession of the note, because the bank had no notice of any claim to the note. Accordingly, the bank could enforce the note against the maker and, even if the maker had defenses to payment against the original payee for breach of contract, those defenses were not effective against the bank.

– Acceptance of Collateral

129. *March v. Linn*,
[865 N.W.2d 885](#) (Wis. Ct. App. 2015)

The seller of a restaurant, which retained a security interest in the assets sold, was entitled after the buyer's default to an order granting the seller possession of the collateral but because the buyer's agreement in the security agreement to a strict foreclosure was ineffective, the seller had to dispose of the collateral in a commercially reasonable manner.

130. *John Hancock Insurance Co. (U.S.A.) v. Goss*,
[2015 WL 5569150](#) (N.D. Cal. 2015)
[2015 WL 9303987](#) (N.D. Cal. 2015)

Although a premium financing agreement purported to give a life insurance financier the right, after default, to require the policy owner to make a full assignment of the policy, and after default the owner signed an assignment purporting to transfer the title to the policy to the financier, the financier did not have the right to retain the portion of the policy proceeds that exceeded the amount the financier had advanced because the assignment did not indicate that it was in satisfaction of the secured obligation and hence there was no "agreement" after default, as required by § 9-620.

A letter sent by the financier to the owner after the assignment indicating that the assignment "constitute[d] a complete satisfaction and discharge of the loan" also did not satisfy § 9-620 because it was after the fact and thus could not be a "proposal" to accept the collateral.

131. *Pacific Life Insurance Co. v. Gordillo*,
[2015 WL 5569432](#) (N.C. Cal. 2015)
[2015 WL 9303986](#) (N.D. Cal. 2015)

Although a premium financing agreement purported to give a life insurance financier the right, after default, to require the policy owner to make a full assignment of the policy, and after default the owner signed an assignment purporting to transfer the title to the policy to the financier, the financier did not have the right to retain the portion of the policy proceeds that exceeded the amount the financier had advanced because the assignment did not indicate that it was in satisfaction of the secured obligation and hence there was no “agreement” after default, as required by § 9-620.

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– **Statute of Limitations**

132. *Venable v. Suntrust Bank*,
[2015 WL 7356300](#) (Ga. Ct. App. 2015)

A lender’s claim for a deficiency following a sale of the collateral purchased under a conditional sales contract was governed by the four-year statute of limitations under Article 2, not the six-year period governing breaches of contract generally, and began running when the buyer defaulted. Although the contract granted a security interest in the vehicle, it was not intended to operate only as a secured transaction.

– **Other**

133. *3455, LLC v. ND Properties, Inc.*,
[2015 WL 6951506](#) (11th Cir. 2015)

A commercial lease that provided that personal property of the tenant remaining on the premises after surrender is abandoned to the landlord was enforceable even though the lease also gave the landlord a security interest in the tenant's equipment and fixtures. The landlord therefore did not have to comply with Article 9 with respect to personal property of the tenant that remained after surrender of the premises.

134. *Joy Group Oy v. Supreme Brands LLC*,
[2015 WL 8492041](#) (D. Minn. 2015)

The buyer of trademarks that filed an assignment in the Patent and Trademark Office was not entitled to a temporary restraining order prohibiting interference with its rights against a secured party that previously filed a financing statement against the seller’s general intangibles and subsequently filed an assignment in the PTO. The buyer had not demonstrated a likelihood of success on the merits.

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135. *Lexel Imaging Systems, Inc. v. Video Display Corp.*,
[2015 WL 403140](#) (E.D. Ky. 2015)
Even though the buyer and seller of all the stock in a corporate entity agreed to arbitrate disputes, the buyer was not entitled to a preliminary injunction ordering the seller to restore control of the entity to the buyer pending resolution of the arbitration because the seller retained a security interest in the stock and had an irrevocable power of attorney permitting it to exercise “any and all powers which may be exercised by the owners of said stock.”
136. *Swan v. Santander Consumer USA*,
[2015 WL 1242767](#) (D. Md. 2015)
The debtors on a car loan were required to arbitrate, on a non-class basis, their claims against the secured party for violation of the Credit Grantor Closed End Credit provisions of the Maryland Commercial Law Code because the arbitration clause in the security agreement gives each party the right to impose arbitration and thus is not substantively unconscionable.
137. *Taylor v. Santander Consumer USA, Inc.*,
[2015 WL 5178018](#) (D. Md. 2015)
The debtors on a car loan were required to arbitrate their claims against the secured party for violating the Maryland Commercial Law Code in repossessing their vehicles because the debtor’s purchase orders, which contained the arbitration clause, had to be read together with simultaneously executed retail installment contracts. Although the arbitration allows the secured party to bring some claims in court, those exceptions did not invalidate the clause.
138. *New Earthshell Corp. v. Lycos Internet Ltd.*,
[2015 WL 170564](#) (D.N.J. 2015)
A secured party that had a pending action in New York against the debtor, a Delaware entity with its principal place of business in California, and several foreign entities was not entitled to a preliminary injunction in a New Jersey action against commingling or transferring any portion of the collateral with other revenues, accounts receivable or the proceeds because it was not clear that the court had personal jurisdiction over the defendants. There was no allegation that the defendants knew that the secured party’s principal place of business was in New Jersey or that they made any contact with the secured party in New Jersey. The allegation that defendants improperly took possession of the collateral arises out of transactions among the defendants, Israeli and Indian entities, that did not involve the secured party, were negotiated and executed in Israel, are governed by Israeli law, and are subject to the jurisdiction of Israeli courts.
139. *Banner Bank v. Russell*,
[2015 WL 128044](#) (D. Or. 2015)
A bank with a security interest in crops, farm products, inventory, accounts, and equipment and that alleged that the debtors were in default and that the debt had been accelerated was entitled to a temporary restraining order preventing the debtors from disposing of any collateral outside the ordinary course of business, pending adjudication of the bank’s request for the appointment of a receiver.

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140. *Mossman v. Banatex, LLC*,
[2015 WL 2343538](#) (Tex. Ct. App. 2015)
The lender that provided financing for vehicle car repairs and received from the mechanic an assignment of the receivable from the consumer and the supporting mechanic's lien on the repaired vehicle was entitled to an order requiring the tax assessor-collector's office to file and serve the statutorily required notice of sale because the documents presented showed the lender not as an assignee of the mechanic's lien but as the mechanic's attorney in fact and, in any event, nothing in the statute prohibits a mechanic's lien from being assigned.
141. *Valley Commercial Capital, LLC v. Rader Aviation, Inc.*,
[2015 WL 106162](#) (S.D. Va. 2015)
A secured party was entitled to summary judgment in its action on the secured obligation even though it had not sold the collateral, an aircraft.
142. *Eastman Credit Union v. Hodges*,
[2015 WL 557061](#) (Tenn. Ct. App. 2015)
A secured party was entitled to a judgment in its action against the debtor on the secured obligation even though the secured party had not repossessed or foreclosed upon the collateral.
143. *Unum Life Insurance of America v. Witt*,
[83 F. Supp. 3d 687](#) (W.D. Va. 2015)
The bank that received an assignment of a life insurance policy as security for a loan, not the listed beneficiaries, was entitled to the proceeds of the policy even though the bank did not provide a copy of the assignment to the insurer prior to the insured's death, as required by the policy. That requirement is solely for the benefit of the insurer and, because the insurer did not insist on compliance, the beneficiaries could not complain about it.
144. *In re NMFC, LLC*,
[522 B.R. 820](#) (Bankr. D.S.C. 2015)
The entity that purchased at an Article 9 disposition all of the debtor's "general intangibles to include all Intellectual Property used . . . in the manufacture, sale or other commercialization of performance fibers" did not thereby acquire the debtor's trade secrets relating to battery separator technology that was never manufactured, sold or otherwise commercialized by the debtor.
145. *Chao Xia Zhang v. Layer Saver LLC*,
[2015 WL 4467063](#) (N.D. Ill. 2015)
The buyer of the debtor's "patent rights" at a public sale conducted by the debtor's secured party was not entitled to an injunction prohibiting the debtor from further use of those rights absent evidence that a patent had been issued on the patent application because an inventor's inchoate rights after making an application for a patent but before the patent is issued do not entitle the inventor to injunctive relief against an infringer.

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146. *In re Godfrey*,
[537 B.R. 271](#) (Bankr. N.D.W. Va. 2015)
The buyer of equipment at a private sale acted in good faith and therefore took title free of any claim or interest of the debtor even though the reasonableness of the disposition notification and the commercial reasonableness of the sale remained in dispute. The buyer had received the secured party's representation that it had provided reasonable notification and the buyer has no duty to request and review the notification.
147. *Moutopoulos v. 2075-2081 Wallace Ave. Owners Corp.*,
[10 N.Y.S.3d 823](#) (N.Y. City Civ. Ct. 2015)
A secured party disposing of shares in two cooperative apartments makes no warranty about the financial status of or liens against the cooperative – as distinguished from the shares of the apartments involved – and even if such a warranty would normally arise, it was properly disclaimed by language in the Terms of Sale providing that there was “no representation about either the title or any underlying mortgages on the premises or other obligations of the cooperative corporation.” Accordingly, the high bidder who refused to consummate the purchase was not entitled to return of the deposits paid.
148. *Vulcan Capital Corp. v. Miller Energy Resources, Inc.*,
[2015 WL 293839](#) (N.D. Tex. 2015)
The debtor stated sufficient facts to raise a defense of duress with respect to a pledge agreement by which the debtor provided replacement collateral for an outstanding indebtedness by alleging that the creditor threatened to have the debtor's owner arrested and prosecuted if the debtor refused to sign the pledge agreement. The debtor failed to raise a defense based on fraud or breach of contract by claiming that the creditor promised not to go after the collateral and failed to provide promised financing because the pledge agreement contained a merger clause and thus evidence of any such promises was inadmissible.
149. *Conway v. Done Rite Recovery Services, Inc.*,
[2015 WL 1989665](#) (N.D. Ill. 2015)
A debt collector that allegedly violated the Fair Debt Collection Practices Act and several state statutes could invoke the arbitration clause in agreement between the borrower and the lender because the clause covered “any third party providing any good or services in connection with the origination, servicing and collection of amount due under the Contract.”
150. *Evans v. Nielsen*,
[347 P.3d 32](#) (Utah Ct. App. 2015)
An arbitrator's decision that a contract allowed the creditor to “setoff” amounts due against the debtor's ownership interest in a business venture, and that such right was not a security interest subject to the enforcement rules of Article 9 was not without foundation in reason or fact – even if incorrect – so as to justify refusing to enforce the decision based on irrationality or manifest disregard for the law.

151. *EnviroFinance Group, LLC v. Environmental Barrier Co., LLC*,
[113 A.3d 775](#) (N.J. Super. Ct. 2015)

A lender with a security interest in developer's ground lease and in the ownership interests in the developer lacked standing to challenge a contractor's default judgment against the developer and its resulting construction liens on the ground lease because the Lender had declined to exercise its rights under the security agreement to essentially step into the developer's shoes.

152. *Pringle v. Garcia*,
[2015 WL 3606391](#) (N.D. Ind. 2015)

The jury waiver in the parties' Guaranty and Collateral Agreement was enforceable. The agreement was among sophisticated parties, the parties had the opportunity to read the agreement, and the waiver was printed in all capital letters and applied to all parties. As to the remaining defendants, there was no right to a jury with respect to the creditor's request for an appointment of a receiver for the collateral, because that is an equitable remedy, but there was a right to a jury with respect to the count seeking replevin and foreclosure because those are legal remedies.

153. *First American Bank v. Urbandale Laser Wash, LLC*,
[2015 WL 4642380](#) (Iowa Ct. App. 2015)

A bank did not breach a forbearance agreement with the debtor by freezing and then setting off deposit account without prior notice because the debtor had not accepted the forbearance agreement and instead had proposed changes to it. Even if the delay in effecting setoff constituted a breach of contract, the debtor had no damages because the bank made the setoff retroactive to the date the freeze was imposed.

Liability Issues

– of the Secured Party

154. *In re Lehman Brothers Holdings, Inc.*,
[541 B.R. 551](#) (S.D.N.Y. 2015)

A secured party that made loans due on demand and whose agreements with the debtor gave the secured party the right to demand additional collateral at any time cannot be liable for demanding additional collateral, even if the amount rendered the secured party overcollateralized, because the obligation of good faith and fair dealing does not impose duties inconsistent with the express terms of the parties' contractual relationship.

155. *In re Cable's Enterprises, LLC*,
[2015 WL 9412805](#) (M.D.N.C. 2015)

A secured party that used and negligently damaged the debtor's excavator, was liable for the damages caused thereby.

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156. *Crest Infiniti II, LP v. Texas RV Outlet*,
[2015 WL 350621](#) (Tex. Ct. App. 2015)
A secured party that repossessed the debtor's car from the mechanic who had repaired the car and who had a possessory lien with priority over the security interest, and that, over the mechanic's objection, sold the car, was liable to the mechanic for conversion.
157. *Macquarie Bank Ltd. v. Knickel*,
[793 F.3d 926](#) (8th Cir. 2015)
The secured party that, after it foreclosed on the debtor's oil and gas leases in apparent satisfaction of the secured obligation, used the debtor's trade secrets that had also been pledged as collateral, was liable for misappropriation of those trade secrets.
158. *Southern Audio Services, Inc. v. Carbon Audio, LLC*,
[2015 WL 6551820](#) (M.D. La. 2015)
A trademark licensor stated a claim against a secured party that, after allegedly accepting the licensee's rights in satisfaction of the secured obligation, violated the license agreement by not paying royalties and by granting an unauthorized license to another entity.
159. *Brackfield & Associates Partnership v. Branch Banking and Trust Co.*,
[2015 WL 5177737](#) (E.D. Tenn. 2015)
A secured party could not be liable under the Right to Financial Privacy Act for filing a financing statement containing a complete list of the debtor's assets and liabilities because the information was not provided to a government authority.
160. *Pierre v. Planet Automotive, Inc.*,
[2015 WL 5793316](#) (E.D. N.Y. 2015)
The voluntary assignee of a car loan from the dealership that sold the car could not be liable for the dealership's alleged violation of the Truth in Lending Act relating to the sale of extended warranty coverage because the alleged violation did not appear on the face of the disclosure statement.
161. *Cathama, LLC v. First Commonwealth Bank*,
[601 F. App'x 86](#) (3d Cir. 2015)
A bank's alleged oral promise to a debtor not to enforce its security interest in accounts receivable, which promise the debtor relayed to a factor, did not give the factor a cause of action against the bank for promissory estoppel or unjust enrichment because the factor did not confirm that the bank made the statement, never memorialized a written agreement with the bank, and acquired a security interest in the shares of the debtor rather than in the debtor's receivables.

162. *Brooklands, Inc. v. Sweeney*,
[2015 WL 1930239](#) (S.D. Fla. 2015)
A prospective debtor that paid a \$10,000 breakup fee and signed a release of liability when it cut off negotiations with a prospective lender, but then sued when the prospective lender failed to terminate its financing statements, could bring no claim under RICO or for fraudulent inducement or unjust enrichment because such claims related to conduct that predated the release and were therefore covered by it. However, the prospective debtor could bring claims for tortious interference with an advantageous business relationship and for slander of title based on the failure to terminate the financing statement.
163. *Kaveny v. OneMain Financial, Inc.*,
[2015 WL 3491528](#) (Ill. Ct. App. 2015)
An arbitrator should have decided whether the debtor's action against his secured party for violating the Illinois Vehicle Code by failing to release its lien and deliver a clean certificate of title within 21 days of when the secured obligation was paid off fell within the scope of the parties' arbitration clause, which exempted from its scope actions "to the extent necessary to obtain a judicial order for the purpose of . . . establishing, perfecting or clearing title, with respect to an interest in property." However, the court had to determine whether the defendant was covered by the arbitration clause, which extended to the initial lender and "its past, present or future respective parents, subsidiaries, affiliates, predecessors, assignees, [and] successors."
164. *Berent v. CMH Homes, Inc.*,
[466 S.W.3d 740](#) (Tenn. 2015)
While a one-side arbitration can be unconscionable, a clause that required arbitration of all claims except those falling within the jurisdiction of small claims court and the seller's claims to enforce its security interest or to seek preliminary relief was not unconscionable because the seller provided a business justification for the limited exception for foreclosure proceedings. Consequently, the debtor's claims against the seller for breach of contract, fraud, and violation of the Tennessee Consumer Protection Act were subject to arbitration.

– of the Debtor

165. *Ranes & Shine, LLC v. MacDonald Miller Alaska, Inc.*,
[355 P.3d 503](#) (Alaska 2015)
Although the statute of limitations had run on an equipment buyer's claim against the seller for breach of the warranty of title arising from a security interest that encumbered the equipment, the buyer could maintain a claim against the seller for misrepresentation. The fact that the secured party had filed a financing statement was insufficient to put the buyer on constructive notice of the elements of the misrepresentation.

166. *Harden v. Autovest, LLC*,
[2015 WL 4583276](#) (W.D. Mich. 2015)
The claim of the secured party's assignee against the debtor for a deficiency was barred by the UCC's 4-year statute of limitations because the debtor had defaulted and the secured party had foreclosed five years before. The 6-year limitations period for a claim for an account stated, a claim on open account, and a claim for unjust enrichment did not apply because those claims do not apply when there is a written agreement between the creditor and the debtor, as there was in this case.
167. *State v. Fay*,
[2015 WL 6113460](#) (Minn. Ct. App. 2015)
An individual who had contracted to board three of her horses was guilty of theft for retrieving two of them because state law criminalizes "intentionally and without consent, tak[ing] property out of the possession of a pledgee" and the person caring for the horses was a pledgee within the meaning of the statute because the agreement provided that "[n]o horse shall be released or leave until the complete bill for charges has been paid in full." It was immaterial whether the agreement created a security interest under Article 9.

– of Others

168. *BBC Restaurant LLC v. BDC Ltd. LLC*,
[2015 WL 2329064](#) (Mich. Ct. App. 2015)
Although the sole member of the debtor, which operated a restaurant, instructed the restaurant manager to remove equipment, the member was not liable in conversion to the secured party with a security interest in equipment because the member did not exercise dominion over the equipment and there was insufficient evidence that the member instructed the manager to remove the collateral.
169. *CNH Capital America LLC v. Hunt Tractor, Inc.*,
[2015 WL 5554020](#) (W.D. Ky. 2015)
A minority shareholder that allegedly controlled the debtor's decision to use proceeds of inventory to pay down a bank loan that the shareholder had guaranteed was not entitled to summary judgment on the inventory lender's conversion claim because even though the proceeds had been deposited into the bank, which had a security interest in deposits, the bank would not have had priority in the deposited funds or the right to engage in setoff unless the loan to the bank was in default, and that issue was the subject of a factual dispute.
170. *M & M Financial Services, Inc. v. Hayes*,
[174 So. 3d 1172](#) (La. Ct. App. 2015)
The secured party with a security interest in an uninsured vehicle had no claim against the motorist who damaged the vehicle or the motorist's insurer because the secured party's claim is derivative of the debtor's and, under the state's "No Pay, No Play" law, the owner of an uninsured vehicle has no claim for the first \$25,000 in property damage.

171. *Continental Western Ins. Co. v. Black*,
[361 P.3d 841](#) (Wyo. 2015)

The insurer of refrigerated trailer that was damaged in an accident after the insured had transferred possession of the trailer to a buyer was responsible for the damage because the purchase agreement expressly indicated that the insured remained the owner until the buyer paid in full. The purchase agreement was not a conditional sales contract because there was no intent to pass immediate ownership and the buyer was not obligated for the purchase price because, even though the buyer also signed a promissory note, the agreement gave the buyer a right to return the goods and relieve himself of further liability.

172. *Wolfe Automotive Group, LLC v. Universal Underwriters Insurance Co.*,
[2015 WL 8957856](#) (8th Cir. 2015)

An insurer that promised to defend and indemnify an automobile dealer against claims and liability arising from “wrongful repossession” of a vehicle, was not obligated to defend or indemnify the dealer from claims that the dealer provided inadequate notification of a disposition of a repossessed vehicle and failed to provide a required accounting of the secured obligation. Although the repossession of a vehicle and its subsequent disposition are constituent parts of a single collection effort, the claims did not relate to the repossession and thus were not covered by the policy.

173. *Becker v. Bar Plan Mutual Insurance Co.*,
[2015 WL 9459771](#) (Kan. Ct. App. 2015)

A malpractice insurer was not obligated to pay the claim against an insured lawyer who failed to conduct a proper UCC search or inform her client of a prior perfected security interest in the collateral because the policy provided coverage only for claims made and reported during the current policy period, not for claims as to which the insured had, in a prior policy period, knowledge of the act or omission constituting the basis of the claim but did not report the act or omission to the insurer. The client had, in a prior policy period, informed the lawyer of the lawyer’s error, stated that the lawyer had failed to comply with the applicable standard of care, claims damages in an unknown amount, and advised the lawyer to notify her insurance carrier.

174. *Sovereign Bank v. Integrated Machinery, Inc.*,
[2015 WL 4092871](#) (Ariz. Ct. App. 2015)

A junior secured party who entered into a forbearance agreement with the debtor and the debtor’s lessee, which required the lessee to either return the leased equipment or make payment if the debtor defaulted, had a claim for breach against the lessee after it purchased the leased equipment at a foreclosure sale conducted by the senior secured party and the debtor defaulted. Although the sale terminated the junior secured party’s security interest and right to replevy the equipment, the lessee remained liable for its breach of the forbearance agreement by failing to pay the amount promised.

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175. *Gregoria v. Total Asset Recovery, Inc.*,
[2015 WL 115501](#) (E.D. Pa. 2015)
A repossession agent could be liable under RICO – but not under the Fair Debt Collection Practices Act – for repossessing a car after default because the 150% interest rate on the secured obligation was usurious under Pennsylvania law. Even though the security agreement provided that it was governed by Delaware law – which has no prohibition on usury – Pennsylvania law governed because the car was brought into the state, the litigation occurred there, and Pennsylvania’s restrictions on usury are fundamental policy of the state.
176. *Vantu v. Echo Recovery, LLC*,
[85 F. Supp. 3d 939](#) (N.D. Ohio 2015)
A repossession company could be liable under the Fair Debt Collection Practices Act for the repossession of the debtor’s car at gunpoint because even though the enforcement of security interests generally does not constitute debt collection within the meaning of the act, a repossession company is a “debt collector” for the purposes of § 1692f(6), which prohibits taking of property when there is no present right to possession, and the enforcer of a security interest loses the right to present possession of the collateral by breaching the peace.
177. *Euro Motorcars Germantown, Inc. v. Manheim Remarketing, Inc.*,
[2015 WL 1057887](#) (E.D. Pa. 2015)
A used car dealership stated a cause of action for unjust enrichment against the auction house whose employees systematically understated losses and overstated gains in reporting vehicle auction sales to the dealership’s secured creditor in connection with floor-plan audits, causing the dealership to pay commissions that were never actually earned.
178. *Veleron Holding, B.V. v. Morgan Stanley*,
[2015 WL 4503580](#) (S.D.N.Y. 2015)
The investment bank that entered into an Agency Disposal Agreement with a secured party that authorized the investment bank to sell the publicly traded stock collateral in the event of default could be liable for insider trading – but not for market manipulation – for selling the stock short after learning of a default and the likelihood that the secured party would instruct it to sell the collateral, thereby causing the stock price to fall. Genuine issues of fact remained as to whether the information was non-public and confidential.
179. *Citigroup Global Markets, Inc. v. KLCC Investments, LLC*,
[2015 WL 5853916](#) (S.D.N.Y. 2015)
A securities intermediary could not be liable for damages resulting from its refusal to complete a transfer requested by the secured party with whom it had a control agreement because the intermediary initiated an interpleader action when faced with competing claims to the assets credited to the account, and all the claimed damages therefore arise from acts that were within the intermediary’s rights granted by law.

180. *Amegy Bank v. Deutsche Bank Alex. Brown*,
[619 F. App'x 923](#) (11th Cir. 2015)

Sufficient evidence supported the jury's verdict that a broker colluded with its customer to violate the rights of a lender with a security interest in the customer's stock, and hence was not shielded by § 8-115 from liability for conversion, because there was evidence from which the jury could infer that the broker knew that the customer's conduct – redeeming a partnership interest in exchange for stock in the corporate general partner and then immediately liquidating the stock – was an effort to violate the secured party's rights and there was evidence that the broker provided substantial assistance to the debtor by setting up a margin account, personally picking up the certificate from the debtor's office, selling the stock without reviewing the certificate, and wiring the proceeds to the debtor's bank account the next day.

181. *BancorpSouth Bank v. 51 Concrete, LLC*,
[2015 WL 340364](#) (Tenn. Ct. App. 2015), *appeal granted* (June 11, 2015)

A secured party that brought a conversion claim against the buyers of the debtor's equipment for failing to turn over the proceeds they received upon resale did not have a right to attorney's fees under § 9-607(d) because that provision merely allows a secured party to deduct attorney's fees from any collections made, it does not provide for attorney's fees in addition to other damages. The secured party was also not entitled to attorney's fees pursuant to the security agreement with the original debtor, even though that agreement became effective against the buyers under § 9-201(a), because the agreement stated merely that the secured party could "apply the proceeds of any collection or disposition first to . . . reasonable attorney's fees," and this case did not involve any collection or disposition. The trial court did not err in refusing to award the secured party punitive damages given that the buyers cooperated with the secured party by providing information about the collateral, did not deny that secured party had an interest in the collateral, attempted to resolve the secured party's claims and disputed only the amount they were required to pay.

182. *Wells Fargo Bank v. Jackson Jenkins Renstrom LLP*,
[2015 WL 1138419](#) (Cal. Ct. App. 2015)

The lender with a perfected security interest in a law firm's accounts was entitled to damages for breach of contract against a successor firm that took over some of the debtor's cases and refused to remit the portion of the fee attributable to the work performed by the debtor. The lender was a third-party beneficiary of the agreement between the debtor and the successor firm. It did not matter that the debtor breached the agreement with the successor by failing to provide tail insurance for professional liability because the agreement did not make the provision of such insurance a condition to the successor firm's duty to remit proceeds. The successor firm was also liable for conversion because the successor's unauthorized retention of fees due to the debtor constituted an impairment of the lender's security interest.

183. *Sirazi v. General Mediterranean Holding, SA*,
[2015 WL 6770537](#) (N.D. Ill. 2015)

A buyer that conspired to acquire the debtor's equity interest in an entity in violation of a settlement agreement of which the buyer was aware and under which the debtor had granted a security interest in those rights and promised not to sell them without notification to the secured party was liable for intentional interference with contract and civil conspiracy. The jury's finding of a civil conspiracy supported its imposition of modest punitive damages.

184. *Millbrook IV, LLC v. Production Services Associates, LLC*,
[2015 WL 1516531](#) (Ill. Ct. App. 2015)

The new entity formed to purchase the assets of the debtor at an Article 9 disposition was a mere continuation of the debtor because all four members of the board of managers were the same, the new entity voluntarily assumed the compensation and bonus agreements of the managers as well as specified debts to suppliers and vendors, and two of the three owners of the debtor owned a majority of the new entity. The court could ignore the fact that the effort of the previous majority owner of the debtor to abandon its interest might not have been effective under Delaware corporate law because that effort was de facto effective and the doctrine of successor liability is equitable in origin and nature.

185. *Automotive Innovations, Inc. v. J.P. Morgan Chase Bank*,
[2014 WL 7745773](#) (N.J. Super. Ct. 2015)

Because the trial court ruled that the entity that acquired the debtor's assets at an Article 9 disposition had successor liability for the debtor's obligations, a judgment creditor of the debtor could levy on the buyer's bank accounts. It did not matter that the disposition discharged junior liens because the judgment creditor had no lien at the time and, in any event, the buyer remained liable for the judgment debt.

186. *Celestica, LLC v. Communications Acquisitions Corp.*,
[2015 WL 5951451](#) (N.H. 2015)

The entity formed to buy the debtor's assets at a foreclosure sale did not have successor liability under the de facto merger doctrine. Although the buyer did initially conduct the same business from the same location with the same management, that was to preserve the value of the assets as a going concern and in the ensuing months the management, location, and nature of the business changed. Although the owners of the buyer collectively had owned 40.5% of the debtor, the majority owner of the debtor had no stake in the buyer and the buyers put up substantial cash. Although the buyer did assume selected liabilities of the debtor, it assumed only those necessary to ensure continued operation of the business and did not assume substantial debts to insiders, including the two individuals who owned the buyer and who lost millions of dollars.

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187. *Villaverde v. IP Acquisition VIII, LLC*,
[39 N.E.3d 144](#) (Ill. Ct. App. 2015)
A secured party's foreclosure sale, at which it acquired the debtor's only asset – intellectual property – through a credit bid could not be an avoidable fraudulent transfer because the intellectual property was fully encumbered, and thus not an “asset” under the Uniform Fraudulent Transfer Act. The secured party did not acquire successor liability under the theory that the foreclosure sale was an improper attempt to escape liability for the debtor's obligations because the only evidence of the collateral's current value was that it was worth substantially less than the secured obligation. The secured party was not a mere continuation of the debtor because there was no continuity of ownership, although the owner of the debtor did become an employee of the secured party.
188. *Sourcing Management, Inc. v. Simclar, Inc.*,
[2015 WL 4587974](#) (N.D. Tex. 2015)
A judgment creditor stated a cause of action that the transfer of all of the debtor's assets, allegedly valued at \$44 million, at a collusive private disposition under Article 9 with respect to a \$9 million secured obligation, was both an actually fraudulent and constructively fraudulent transfer. Because the complaint alleged that the property disposed of was worth substantially more than the secured obligation, it was not excluded from the definition of “assets” under the UFTA. The creditor also stated a claim against the buyer for successor liability as a mere continuation of the debtor by alleging that the buyer entered into a collusive agreement to avoid the debtor's debts, that the buyer informed the debtor's customers that it was merely operating under a “new legal name,” that the buyer retained many of the same employees, continued operations in the same location, and used the same telephone numbers, and that the debtor's shareholders became members of the buyer.
189. *Consolidated Electrical Contractors & Engineers, Inc. v. Center Stage/Country Crossing Project, LLC*, [175 So. 3d 642](#) (Ala. Ct. App. 2015)
The subcontractor that obtained a preliminary injunction prohibiting the owner from selling generators that the subcontractor had installed, based on an incorrect claim that it retained a security interest in the generators, could be liable for damages up to the amount of the \$15,000 bond it posted. However, because the subcontractor acted in good faith, it was not liable for additional damages.
190. *Peterson v. Katten Muchin Rosenman LLP*,
[792 F.3d 789](#) (7th Cir. 2015)
The bankruptcy trustee for some investor funds that made loans secured by nonexistent collateral stated a cause of action for malpractice against the law firm that failed to advise them that, by not confirming with the account debtor the existence of the accounts and structuring the transaction so that the funds putatively coming from the account debtor flowed through another entity owned and controlled by the borrower, there was a risk that the borrower was engaged in a massive Ponzi scheme.

191. *FDIC v. RLI Insurance Co.*

[784 F.3d 1104](#) (7th Cir. 2015)

The issuer of a financial institution bond was liable to the FDIC, as successor to the original beneficiary, for losses resulting from forged equipment leases because the bond covered any loss resulting from a forged “security agreement,” which it defined as “a written agreement which creates an interest in personal property or fixtures and which secures payment or performance of an obligation.” That the leases might not be security agreements under the UCC is immaterial because the bond did not specify what type of interest the agreement had to create. While the bond required the original beneficiary to have possession of the forged documents, that requirement was satisfied by the FDIC’s possession of the forged lease schedules purportedly issued under a master lease, even though neither the original beneficiary nor the FDIC had possession of the master lease.

192. *Elling v. Hauck,*

[2015 WL 5401653](#) (N.D. Ill. 2015)

The attorney for a corporate debtor, who prepared loan documentation and filed in the wrong jurisdictions financing statements intended to perfect a security interest in the debtor’s assets, owed no duty to the secured party – the chairman of the debtor’s board of directors – because there was no direct communication and no attorney-client relationship between the secured party and the attorney.

193. *Vossoughi v. Polaschek,*

[859 N.W.2d 643](#) (Iowa 2015)

Creditor’s malpractice action against his attorney for failing to obtain a mortgage lien on real property and a perfected security interest in personal property accrued, for the purpose of the statute of limitations, when the debtor stopped making payments even though the creditor had learned of the attorney’s failure previously.

194. *Rolnick v. Sight’s My Line, Inc.,*

[2015 WL 9436697](#) (Tex. Ct. App. 2015)

Texas courts did not have personal jurisdiction over the Florida lawyer who recommended Texas counsel to assist a client in selling a chain of Texas stores to a Delaware corporation – which involved perfecting a security interest in the assets sold – and which counsel failed to file a financing statement in Delaware. The Florida lawyer’s only contacts with the Texas counsel were a few phone calls and e-mail exchanges, and he necessarily exercised his legal judgment in Florida.

195. *Becker v. Elm City Food Co-op., Inc.,*

[2015 WL 830285](#) (Conn. Super. Ct. 2015)

A director of a corporate debtor, who had been seeking access to corporate records before the debtor’s assets were sold in an Article 9 sale, was entitled to an order requiring the buyer, which now claimed to be the owner of the records, to make the records available for inspection.

196. *Ameris Bank v. Lexington Insurance Co.*,
[2015 WL 5680377](#) (S.D. Ga. 2015)

An insurer that insured collateralized equipment was liable for paying the insured debtor for damage to the equipment, rather than the secured party as the insurance contract required, even though an unnamed representative of the secured party informed the adjuster that the debtor's payments were current and that there were no liens on the property. A single undocumented phone conversation with an unknown employee falls short of establishing that the insurer neither knew nor should have known that the secured party was due to receive the proceeds under the terms of the policy, and thus does not establish a basis for equitable estoppel.

BANKRUPTCY

Property of the Estate

197. *In re Treasures, Inc.*
[2015 WL 925957](#) (9th Cir. BAP 2015)

A deposit account in the name of and controlled by furniture retailer's consultant and secured lender, which contained proceeds of inventory bought in the retailer's name with financing provided by the lender, was property of the estate. Although the secured lender's possession and control of the deposit account are indicia of ownership, its possession and control was necessary to perfect its security interest. Moreover, the agreement expressly granted a security interest and it would be illogical for the lender to have a security interest in its own property.

198. *In re Morev*,
[2015 WL 9264937](#) (Bankr. S.D. Cal. 2015)

The debtor's prepetition assignment of his liquor license to a creditor for the purpose of sale was neither an outright assignment because it was not approved by the Department of Alcoholic Beverage Control, the power of attorney signed by the debtor would have been unnecessary, and the creditor established an escrow in the debtor's name. The transaction also did not create a security interest because it was not approved by the DABC and, in any event, the creditor took no effort to perfect. Accordingly, the proceeds of the license were property of the estate.

199. *In re CTLI, LLC*,
[528 B.R. 359](#) (S.D. Tex. 2015)

The business social media account maintained for a limited liability company by its former majority owner was property of the LLC's bankruptcy estate. Requiring the former owner to transfer administrative privileges over the account to debtor would not violate the privacy rights of the former owner.

200. *In re Alco Stores,*

[536 B.R. 383](#) (Bankr. N.D. Tex. 2015)

State money transmitter statutes, which impose an express trust in favor of the distributor of stored value cards on the sale proceeds attributable to the cards, result in a floating trust only on the proceeds and the assets commingled with the proceeds, not on all the assets of the retailer. Because the commingled assets of the retailer no longer exist – *i.e.*, the bank account into which the proceeds of stored value cards had been deposited was fully dissipated – the distributor’s trust corpus was exhausted. As a result, the distributor had no interest in the retailer’s other assets and had merely an unsecured claim against the retailer’s bankruptcy estate.

201. *In re C.W. Mining Co.,*

[530 B.R. 878](#) (Bankr. D. Utah 2015)

Accounts that the debtor sold prepetition were not property of the estate even though the buyer did not perfect its interest. U.C.C. § 9-318 empowers a seller of accounts whose buyer fails to perfect to transfer rights in the accounts to another buyer or secured party, but does not provide that the seller retains any interest in the accounts. However, the seller’s bankruptcy trustee could avoid the interest in the outstanding accounts of the buyer who failed to perfect under Bankruptcy Code § 544(a) and U.C.C. § 9-317. The trustee cannot avoid the prepetition payments made by account debtors to the buyer.

202. *In re Hunt,*

[540 B.R. 438](#) (Bankr. D. Id. 2015)

Plumbing equipment that the debtor acquired and possessed pursuant to an unwritten financing arrangement with a friend was property of the debtor’s bankruptcy estate. The debtor was listed as the owner on two certificates of title and claimed depreciation for the equipment on his federal tax returns. Even if the debtor had leased the equipment from the friend, the lease was not a true lease because both parties agreed that the debtor would become the owner after paying for the goods.

203. *In re Expert South Tulsa, LLC,*

[619 F. App’x 779](#) (10th Cir. 2015)

Funds put in escrow to compensate the debtor for improving real property, services that the debtor had not completed when it filed for bankruptcy protection, were not property of the debtor’s bankruptcy estate. Only the debtor’s contingent rights under the escrow agreement were property of the estate.

204. *In re Nageleisen,*

[527 B.R. 258](#) (Bankr. E.D. Ky. 2015)

A statutory right of redemption that arose post-petition after a mortgagee obtained relief from the stay and foreclosed on real property was proceeds of the real property and thus property of the estate.

205. *In re Dryden Advisory Group, LLC*,
534 B.R. 612 (Bankr. M.D. Pa. 2015)

The debtor's prepetition factoring of its accounts was a sale, not a loan, because: (i) the agreement described the transaction as a sale; (ii) the agreement required the debtor to hold proceeds of the factored accounts "in trust and safekeeping," indicating that the proceeds would not be commingled with the debtor's other assets; (iii) the agreement gave the factor the right to demand payment directly from the account debtor; and (iv) the factor had the risk that the account debtors would not be able to pay (although the debtor had the risk that the account debtors had a defense to payment). Accordingly, the accounts were not property of the debtor's bankruptcy estate. Whether the factor or one of the debtor's other creditors had priority was not an issue for the bankruptcy court to decide.

Claims & Expenses

206. *In re Alternate Fuels, Inc.*,
789 F.3d 1139 (10th Cir. 2015)

Funds that the sole owner advanced to a corporate debtor that no longer conducted its mining business but merely performed the reclamation work necessary to enable the owner to recover bonds that had been posted to ensure that reclamation work was performed, and which lacked any capital to repay these advances or ability to obtain loans from outside lenders, were not properly re-characterized as equity contributions. The transactions were labeled as debt and the advances were used to fund operating expenses rather than to purchase capital assets. Although advances that are made by stockholders in proportion to their respective ownership interests are suggestive of an equity contribution, that rationale does not apply when a sole shareholder is involved. Although the promissory notes provided that in the event of non-payment within five years, full repayment was due upon the release of the bonds, the fact remains that the notes had a fixed maturity date.

207. *In re Walston*,
606 F. App'x 543 (11th Cir. 2015)

Debtor's objection to proof of claim submitted by assignee of credit card debt was properly overruled because the proof of claim complied with Rule 3001 and therefore constitutes prima facie evidence of the validity and amount of the claim. The fact that the accompanying evidence was inadmissible hearsay under state law and, therefore, insufficient to establish that the claim was enforceable under state law, was immaterial because the proof of claim complied with Rule 3001 and the debtor had not submitted evidence to negate a fact set forth in the proof of claim.

208. *In re Connolly North America, LLC*,
[802 F.3d 810](#) (6th Cir. 2015)

A creditor that makes a substantial contribution to a Chapter 7 case can, like a creditor who makes a substantial contribution to a Chapter 11 or Chapter 9 case, receive an administrative expense claim for the cost of the contribution. Accordingly, three unsecured creditors that successfully removed a Chapter 7 trustee for malfeasance, which trustee then settled with his successor for the damages he caused, were entitled to an administrative expense claim.

209. *In re MSP Aviation, LLC*,
[531 B.R. 795](#) (Bankr. D. Minn. 2015)

A demand loan with a fixed interest rate made by an insider to the debtor, which was adequately capitalized, would not be re-characterized as equity merely because the debtor's outside accountant, who had not seen the loan documentation, treated it as a contribution of equity on some tax returns. The documents consistently treated the transaction as a loan, that was the parties' intention, and that was the understanding of the debtor's principal lender, with which the insider entered into a subordination agreement.

210. *In re Wigley*,
[533 B.R. 267](#) (8th Cir. BAP 2015)

The portion of a landlord's claim for unpaid rent, common area maintenance, and late fees accruing up to the eviction date, plus prepetition interest on and attorney's fees relating to those amounts, did not arise from termination of the lease and thus were not subject to the § 502(b)(6) cap. The portion of the landlord's claim for interest on post-eviction rent was subject to the cap.

211. *In re ADI Liquidation, Inc.*,
[2015 WL 4638605](#) (Bankr. D. Del. 2015)

The debtor could use its setoff rights against vendors – based on payments for goods that were not delivered and on various promotions, volume discounts, and rebates – against the vendors' § 503(b) claims for goods delivered in the 20 days preceding the petition. Nothing requires that the debtor's setoff rights be allocated first to the vendors' nonpriority claims.

212. *In re Great Atlantic & Pacific Tea Co.*,
[538 B.R. 666](#) (S.D.N.Y. 2015)

Electricity is not a good within the meaning of § 503(b)(9), and thus the provider of electricity was not entitled to administrative priority treatment for electricity provided to the debtor during the 20 days preceding the petition, because by the time meter records or displays the amount used, which is when the electricity is identified, it has already passed through the meter and been consumed by the user.

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213. *In re Domistyle, Inc.*,
[2015 WL 9487732](#) (5th Cir. 2015)
Expenses that the bankruptcy trustee incurred for mowing, landscaping, utilities, insurance premiums, and to repair the roof and electrical system of encumbered property, under the incorrect belief that there was equity for the bankruptcy estate, could be surcharged to the senior secured claimant, even though the trustee did not incur the expenses with the intent of benefitting the senior secured claimant.
214. *In re Tollenaar Holsteins*,
[538 B.R. 830](#) (Bankr. E.D. Cal. 2015)
The bankruptcy trustee in three consolidated Chapter 11 cases was entitled to surcharge secured claimants for expenses incurred in keeping the debtors' dairy herd "wet" before the herd was sold and the proceeds distributed to the secured claimants because the expenses were necessary to prevent the loss of valuable permits if the dairy ceased operations. The trustee was also entitled to surcharge secured claimants for previously approved expenses because the claimants orchestrated the preservation, liquidation, and recovery of their collateral through the trustee and the trustee's professionals, and in so doing, they consented to the resulting administrative expenses.
215. *In re Mac-Go Corp.*,
[541 B.R. 706](#) (Bankr. N.D. Cal. 2015)
A creditor that, after an involuntary petition was filed before the order for relief was entered, was paid in full and filed a termination statement, was not a secured creditor in the bankruptcy proceeding and thus was not entitled to a secured claim for attorney's fees in defending against the trustee's avoidance actions. Although the creditor successfully defended against \$900,000 in preference and fraudulent transfer claims – and was held liable for only \$25,300 in avoidable post-petition transfers – there was no prevailing party within the meaning of Cal. Civil Code § 1717, and thus the creditor had no claim at all for attorney's fees.
216. *In re Feggins*,
[540 B.R. 895](#) (Bankr. M.D. Ala. 2015)
Debt collectors violated the Fair Debt Collection Practices Act by filing proofs of claim for debts barred by the applicable statutes of limitation.
217. *In re Strick Chex Columbus Two, LLC*,
[2015 WL 9435280](#) (Bankr. N.D. Ga. 2015)
Although a lender had a perfected security interest in substantially all of the assets of the debtor, which operated a fast food restaurant, and that security interest extended to proceeds acquired post-petition, only the portion of the post-petition sales representing payment for inventory, not the portion representing payment for services, constitute "proceeds" within the meaning of § 552(b).

Automatic Stay & Injunctions

218. *McCarthy v. Ciano*,
[2015 WL 8353022](#) (N.Y. Sup. Ct. 2015)
A debtor who, prior to filing a bankruptcy petition, failed to comply with a court order requiring the debtor to deliver encumbered vehicles to the secured party could be held in criminal contempt despite the automatic stay because the stay does not enjoin criminal proceedings.
219. *In re Botson*,
[531 B.R. 719](#) (Bankr. N.D. Ohio 2015)
Chapter 7 debtors had no claim against their secured party for violation of the discharge injunction by filing a continuation statement or for refusing to file a termination statement even though the filed financing statement covered after-acquired property and the security interest in such collateral had been cut off by § 552(a). While a creditor might violate the discharge injunction by refusing to terminate a filing if there was no remaining property subject to the lien or all remaining collateral were valueless, no such facts were alleged in this case.
220. *In re Cowen*,
[2015 WL 5728809](#) (D. Colo. 2015)
A secured party that repossessed the debtor's truck prepetition and then, postpetition refused to return it, violated the automatic stay and was liable for extensive actual and punitive damages.
221. *In re Warren*,
[532 B.R. 655](#) (Bankr. D.S.C. 2015)
A secured party that postpetition repossessed the debtor's vehicle, initially refused to return it, and ultimately did return it only after requiring the debtor to make payment, was liable for wilfully violating the stay even though notification of the bankruptcy case was sent to the secured party's street address, not to the post office box that he maintains for receiving mail because the mailing presumptively provided notice and, in any event, the secured party had actual notice shortly after the repossession.
222. *In re Perry*,
[540 B.R. 710](#) (Bankr. C.D. Cal. 2015)
The debtor whose car was repossessed prepetition had no standing to bring a claim for violation of the stay imposed by § 363(a)(3) because prior to perfection of the debtor's claimed exemption, only the trustee may bring an actions under § 362(a)(3) and after the exemption becomes final and the car re-vests in the debtor, the car is no longer property of the estate and is unprotected by § 363(a)(3).

223. *Grapevine Diamond, L.P. v. City Bank*,
[2015 WL 8013401](#) (Tex. Ct. App. 2015)
A senior lienor's foreclosure did not violate the automatic stay imposed in the junior lienor's bankruptcy because, in the debtor's bankruptcy proceeding, the court had already concluded that the debt owed to the senior lienor exceeded the value of the collateral.
224. *In re Brines*,
[2015 WL 3476695](#) (Bankr. D. Kan. 2015)
The co-debtor stay provided by § 1301 protects only individuals, not the corporation of which the debtors were the sole shareholders. Even if the co-debtor stay did protect corporate entities, it applies only to "consumer debt," and the obligation in this case was not incurred primarily for personal, family, or household purposes.
225. *In re Giusto*,
[532 B.R. 760](#) (N.D. Cal. 2015)
A mortgagee's unsuccessful effort to obtain relief from the stay was an action "on the contract" for the purposes of California Civil Code § 1717, and thus the successful debtor was entitled to an award of attorney's fees.

Executory Contracts

226. *In re Trump Entertainment Resorts, Inc.*,
[526 B.R. 116](#) (Bankr. D. Del. 2015)
A trademark licensor was entitled to relief from the stay to pursue termination of the debtor's license because the license is not assumable without the licensor's consent, even though the debtor had no plan to assign the license, and the licensor withheld consent despite having permitted the debtor to grant a security interest in the license.

Sales of Assets

227. *Illinois Department of Revenue v. Elk Grove Village Petroleum, LLC*,
[541 B.R. 673](#) (N.D. Ill. 2015)
Because the state taxing authority's power under state law to pursue the purchaser of a taxpayer's assets for unpaid tax liabilities if the purchaser fails to withhold and remit to the authority a portion of purchase price is an "interest" that was extinguished by the debtor's sale of assets under § 363(e), the Bankruptcy Court erred in not valuing that interest and providing adequate protection. It did not matter that the assets were fully encumbered by a security interest that was prior to the authority's lien, because the extinguished interest related to the authority's right to pursue the purchaser, not to share in the proceeds of the sale.

Discharge, Dischargeability & Dismissal

228. *In re Lawson*,
791 F.3d 214 (1st Cir. 2015)
The liability of the debtor, who accepted a transfer knowing that it was intended to hinder the transferor's creditors, was fraudulent within the meaning of § 523(a)(2), and therefore nondischargeable, even though the debtor made no fraudulent misrepresentation.
229. *In re Reichartz*,
529 B.R. 696 (Bankr. E.D. Wis. 2015)
The obligations of individuals who served as straw-man purchasers of cars – signing purchase agreements and obtaining financing but without ever taking possession of the cars and in an effort to provide financing to the dealer – were nondischargeable under § 523(a)(2) because the individuals never intended to repay the loans, they expected their friend the dealer to pay.
230. *Deutsche Bank Trust Co. Americas v. Vitellas*,
13 N.Y.S.3d 163 (N.Y. App. Div. 2015)
Even if the holder of a mortgage note obtained the note after the makers' bankruptcy discharge, the holder could enforce the mortgage.
231. *In re Holman*,
536 B.R. 458 (Bankr. D. Or. 2015)
The debtor's obligation on a loan was not excepted from the discharge under § 523(a)(2)(A) due to the debtor's alleged misrepresentation that the loan would be secured by a financing statement filed against the debtor's LLC because there was no justifiable reliance given that the lender did not obtain a security agreement and did not conduct a search, which would have revealed prior perfected security interests.
232. *In re Jacobson*,
532 B.R. 742 (Bank. N.D. Iowa)
Although the debtors invaded a bank's legal interests, and thereby inflicted "injury," by not processing through their account at the bank some of the checks that they received for sale of crops in which bank had security interest, they did not intend to injure bank. Instead, although they processed some checks through personal accounts at other banks to pay for living and medical expenses, they merely intended the act that led to the injury; they did not intend the injury nor was the injury substantially certain to result.

Avoidance Powers

– Preferences

233. *In re Big Drive Cattle, LLC*,
[2015 WL 1509824](#) (Bankr. D. Neb. 2015)
Prepetition payments by feedlot to owner of cattle following the feedlot's sale of the cattle were avoidable preferences. The payments were not made from funds held in constructive trust for the owner because the owner, as a member of the feedlot, knew of and consented to the feedlot's grant of a security interest in its deposit accounts and the subsequent deposit of the sale proceeds into those deposit accounts caused the funds to lose the protection they would otherwise have had as bailment proceeds.
234. *In re Genmar Holdings, Inc.*,
[776 F.3d 961](#) (8th Cir. 2015)
Because the settlement agreement between the buyer and seller of a defective boat required the seller to refund the buyer's down payment "no sooner tha[n] 15 days" after the buyer re-conveyed title and the seller received confirmation that the buyer's lender had discharged its lien, it was not clear that the exchange was intended to be contemporaneous, and thus the buyer was not entitled to a contemporaneous exchange preference defense under § 547(c)(1). While providing a reasonable time for review of the title documents would not be inconsistent with a contemporaneous exchange, the settlement agreement's provision for a *mandatory* delay more closely resembled a short-term loan.
235. *In re D'Angelo*,
[2015 WL 1511016](#) (E.D. Pa. 2015)
Chapter 13 debtors could not avoid an equitable lien on their home in favor of lender that, in a transaction void due to forgery, paid off the mortgage on the debtors' home and was subrogated to the mortgagee's rights. Although the state court order awarding the equitable lien occurred during the 90-day preference period, the only "transfer" occurring at that time was an assignment of mortgagee's interests to the lender, and thus was not a transfer of property in which the debtors had an interest.
236. *In re C.W. Mining Co.*,
[798 F.3d 983](#) (10th Cir. 2015)
Because the § 547(c)(2) preference defense refers to the ordinary course of business or financial affairs *of* the debtor and the transferee, not *between* the debtor and the transferee, the first transaction between the debtor and a creditor can qualify for the defense. Although a new debt that is large, unprecedented for the debtor, and undertaken only because the debtor is sliding into bankruptcy might not qualify for the defense, the debtor's incurrence of \$805,000 in debt to purchase used equipment to permit it to change its operations from a continuous-mining method to a longwall system, thereby increasing its mining capacity by a factor of four to five, was in the ordinary course of its business.

237. *Slobodian v. United States*,
[533 B.R. 126](#) (Bankr. M.D. Pa. 2015)
The funds that a payroll services company paid prepetition to the IRS to cover the withholding taxes of a customer's employees were held in trust for the IRS and thus were not the company's property.
238. *Slobodian v. United States*,
[533 B.R. 126](#) (Bankr. M.D. Pa. 2015)
The preference defense for *de minimis* transfers in § 547(c)(9) permits aggregation of only those transfers that are "transactionally related," and thus a payroll services company's five separate payments to the IRS on the same day on behalf of, apparently, five different clients could not be aggregated.

– Strong-Arm Powers

239. *In re 800 Bourbon Street, LLC*,
[541 B.R. 616](#) (Bankr. E.D. La. 2015)
Lender with a nonrecourse loan that failed, postpetition, to reinscribe its collateral mortgage on the debtor's real property lost perfection vis-à-vis third parties. However, because the debtor was paying creditors in full, the post-petition loss of perfection was immaterial.

– Fraudulent Transfers

240. *Ritchie Capital Management, LLC v. Stoebner*,
[779 F.3d 857](#) (8th Cir. 2015)
A financially troubled corporate debtor's grant of a security interest in its valuable trademark rights, over the objection of its CEO, to secure the preexisting debt of its parent company – debt incurred as part of a Ponzi scheme – bore sufficient badges of fraud so as to create a presumption that it was an intentionally fraudulent transfer.
241. *FDIC v. FBOP Corp.*,
[2015 WL 1538802](#) (N.D. Ill. 2015)
The FDIC stated a claim for avoidance – as both an actual and a constructive fraudulent transfer – of a bank holding company's grant of security interest in its right to receive tax refunds because the refunds were attributable to losses suffered by the holding company's failed banks and those rights belonged to the banks, not to the holding company.

242. *In re EPD Investment Co.*,

523 B.R. 680 (9th Cir. BAP 2015)

Regardless of whether the state statute requiring actions to avoid a fraudulent transfer within seven years is a statute of limitations or a statute of repose, § 546(a) tolled the expiration of the period. Because the period had not expired when the petition was filed and the trustee brought the action within two years of the petition date, the action was timely.

243. *1756 W. Lake Street LLC v. American Chartered Bank*,

787 F.3d 383 (7th Cir. 2015)

The transaction by which a bank accepted a deed in lieu of foreclosure to property worth \$1.7 million in satisfaction of \$1.5 million debt was not transfer for less than reasonably equivalent value because even if \$200,000 disparity was significant, the debtor also received a forbearance that was worth more than that amount.

244. *In re Teltronics, Inc.*,

540 B.R. 481 (Bankr. M.D. Fla. 2015)

The bankruptcy trustee did not prove that a transaction in which the debtor received \$5,000 in return for its right to block the sale of a patent portfolio, worth about \$14 million, for \$12 million was not for reasonably equivalent value because the only evidence of value was of the patent portfolio, not of the blocking right. While a purchase option might be valued at the difference between the value of the underlying asset and the proposed sale price, the debtor did not have a purchase option.

245. *Bank of America v. Veluchamy*,

535 B.R. 783 (N.D. Ill. 2015)

A transaction whereby debtors, in their capacity as majority shareholders of a closely-held family corporation, cause the corporation to effect a stock split in favor of the debtors' children, the minority shareholders, so that parties' respective equity interests in company were altered, was a "transfer" of debtors' equity in company for the purposes of § 548.

– Post-Petition Transfers

246. *In re Bill*,

529 B.R. 779 (Bankr. D. Idaho 2015)

Because a secured party that, on the petition date, had a perfected security interest in a boat that the debtor co-owned with his mother: (i) released its security interest postpetition to permit the boat to be re-titled in the mother's name; and (ii) contemporaneously received a new security interest from the mother, and the transfer of the lien was not authorized by the court, the lien was avoidable. The transactions did not result in a mere continuation of the original security interest because the documents expressly referred to a release of the original interest and the grant of a new one.

247. *In re Britt Motorsports, LLC*,
[2015 WL 1880057](#) (Bankr. E.D.N.C. 2015)

The motorcycle manufacturer that, without court approval, provided motorcycles to the debtor postpetition engaged in unauthorized and avoidable secured financing. The transaction was not a consignment because even though the manufacturer had the right to take the motorcycles back at any time, the documents obligated the debtor to pay for the goods, the debtor was billed upon shipment of the goods rather than upon sale, the debtor was authorized to set the retail price, the debtor received the profit from re-sales rather than a commission; and the debtor did not need the manufacturer's authorization prior to selling a unit.

– **Other**

248. *In re Blendheim*,
[803 F.3d 477](#) (9th Cir. 2013)

The lien of a creditor who filed but failed to defend a secured claim in response to the debtor's objection was void pursuant to § 506(d).

– **Protection for Settlement Payments**

249. *In re Greektown Hldings, LLC*,
[2015 WL 8229658](#) (Bankr. E.D. Mich. 2015)

Wire transfers made to former owners of the debtor's parent with respect to promissory notes issued in connection with a leveraged buyout were settlement payments insulated from avoidance as constructively fraudulent transfers because the payments were made in exchange for privately issued securities and were made by and to a financial institution because the transfer were initiated by a brokerage firm and were directed to the owners' accounts at banks.

Equitable Subordination

250. *In re Starlight Group, LLC*,
[531 B.R. 611](#) (Bankr. E.D. Va. 2015)

Lenders who had provided funds for a single-member LLC to invest in the real estate market, in reliance on security agreements that were ineffective to grant liens on the real property, were entitled to equitable liens on the debtor's real property giving them priority over the claims of a creditor who was not an owner of the debtor but who controlled the debtor and knew that the security agreements were ineffective. Alternatively, the creditor's claim would be equitably subordinated to the lender's claims.

251. *In re DigitalBridge Holdings, Inc.*,
[2015 WL 5766761](#) (Bankr. D. Utah 2015)

The lender that obtained and perfected a security interest in the debtor's collateral, knowing that the debtor had failed to perfect the security interest granted to three prior lenders (because the debtor had filed a financing statement in the state where its principal place of business was located, rather than the state in which it was organized), would not be equitably subordinated. The lender did not engage in inequitable conduct even though it had a management contract with the debtor because that contract expressly disclaimed fiduciary duties and the lender loaned far less than the value of the collateral, thereby not rendering the prior security interests out of the money.

252. *In re SKG Ventures, LLC*,
[2015 WL 7755525](#) (Bankr. N.D. Ill. 2015)

The secured claim of an entity newly formed by equity holders to loan money to the debtor would be equitable subordinated because: (i) the debtor distributed its unusually large earnings resulting from increases in the market price for metal to its equity holders, leaving the debtor and its unsecured creditors unprotected against a sharp market decline; (ii) when a sharp market decline occurred the next year, and documentation for a capital call was prepared, that plan was abandoned in favor of a secured loan to better protect equity holders at the expense of trade creditors; and every aspect of the debtor's finances was kept confidential from its trade creditors.

Reorganization Plans

253. *In re Marlow Manor Downtown, LLC*,
[2015 WL 667543](#) (9th Cir. BAP 2015)

Debtor could not separately classify the unsecured portion of lender's claim, even though the claim was supported by a guaranty, because: (i) the guarantor was insolvent; (ii) the claim was therefore substantially similar to other unsecured claims; and (iii) the debtor had no legitimate business or economic reason for the separate classification.

254. *In re Akinpelu*,
[530 B.R. 822](#) (Bankr. N.D. Ga. 2015)

Individual Chapter 11 debtors could not separately classify the large, unsecured portion of a secured creditor's claim, even though supported by non-debtor guarantees, merely because the claim controlled the class and separate classification was necessary to ensure that an impaired class voted in favor of the debtor's plan. The debtors offered no legitimate reason – other than gerrymandering the classes – for the separate classification.

255. *In re Hart Oil & Gas, Inc.*,

[534 B.R. 35](#) (Bankr. D.N.M. 2015)

To preserve a claim by the estate, a confirmed confirmation plan must identify the claim with some specificity. The confirmed plan in this case, by expressly preserving “avoidance actions,” did preserve the debtor’s strong-arm powers claim under § 544 but not the debtor’s claims for equitable subordination, surcharge of collateral, or lender liability, none of which is an avoidance action. The debtor’s claim for marshaling was also preserved because it was specifically mentioned in the disclosure statement.

256. *In re Paul*,

[534 B.R. 430](#) (M.D. Ga. 2015)

Chapter 13 debtor who, prior to the petition, had engaged in a car title pawn transaction for which the redemption period had not expired on the petition date, had merely a right to redeem, extended by § 108(b), and thus was not entitled to turnover of the car or to treat the pawnbroker’s claim as secured and use § 1322 to modify the claim. Moreover, because the debtor conceded that she cannot redeem the car, pursuant to § 541(b)(8), the car is not property of the estate.

257. *In re Zair*,

[535 B.R. 15](#) (Bankr. E.D.N.Y. 2015)

A Chapter 13 plan could, over a secured party’s objection, provide for the debtor’s real property to be surrendered to and title vested in the secured party, in satisfaction of the secured claim, provided provision was made for the secured party to file a claim for the deficiency.

258. *In re Sagendorph*,

[2015 WL 3867955](#) (Bankr. D. Mass. 2015)

A Chapter 13 plan could, over a secured party’s objection, provide for the debtor’s real property to be surrendered to and title vested in the secured party, in satisfaction of the secured claim, provided the property is not contaminated, vandalized, or worth significantly less than the secured debt.

259. *Goodwyn v. Capital One*,

[2015 WL 5120860](#) (Bankr. M.D. Ga. 2015)

Because the creditor with a security interest in the debtor’s car did not object to – and therefore implicitly accepted – the debtor’s Chapter 13 plan, which provided for interest on the claim at 6%, rather than the contractual rate of 20.51%, the creditor could not after consummation of the plan seek the remaining interest even though the debtor was not eligible for and did not receive a discharge.

Other Bankruptcy Matters

- 260.
- Ferguson v. West Central FS, Inc.*
- ,

[2015 WL 5315612](#) (C.D. Ill. 2015)

The creditor with a junior security interest in the debtors' crops and equipment could not, after the equipment was sold and the proceeds distributed to the senior secured party, obtain a marshaling order requiring the senior secured party to look first to the later-generated proceeds of its other collateral. Marshaling was not appropriate when the crops and equipment were sold because it would have required the senior secured party to forego immediate payment and instead accept long-term secured claim treatment under the debtors' plan. Marshaling was not appropriate after the proceeds of the crops and equipment were distributed because there were no longer two separate funds.

- 261.
- In re One2One Communications, LLC*
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[805 F.3d 428](#) (3d Cir. 2015)

The district court abused its discretion in dismissing an appeal of a confirmation order as equitably moot. Equitable mootness is properly limited to complex bankruptcy reorganizations involving multiple, interrelated debtors and hundreds or thousands of creditors. The debtor's reorganization in this case involved a \$200,000 investment in the reorganized debtor, only one secured creditor that held a blanket lien on the debtor's assets for less than \$100,000, only seventeen unsecured creditors, not including insiders, and no new financing, merger, dissolution, issuance of securities, name change, change of business location, or change in management. A strong concurring opinion argued for reconsideration en banc of the equitable mootness doctrine.

- 262.
- In re Caesars Entertainment, Operating Co.*
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[526 B.R. 265](#) (Bankr. N.D. Ill. 2015)

A bankruptcy court has no power to disband a Committee of Second-Priority Noteholders appointed by the U.S. Trustee, even if an intercreditor agreement would prevent the committee from performing many of its statutory functions and the committee's operations would be duplicative of the Unsecured Creditors Committee, thereby increasing administrative costs with no corresponding benefit to the estate.

- 263.
- In re Callas*
- ,

[2015 WL 1850260](#) (Bankr. N.D. Ill. 2015)

While a mortgagee's perfected but unenforced assignment of rents constitutes a sufficient security interest in rents to make post-petition rents cash collateral, the rents that the debtor received prepetition were not cash collateral because, under Illinois law, an assignment of rents does not grant the mortgagee a lien on rents until the mortgagee takes steps after default to obtain possession of the property and start collecting the rents.

264. *In re Pace*,

[2015 WL 6728007](#) (Bankr. W.D.N.C. 2015)

Because the Chapter 7 debtor's attorney failed to comply with applicable rules of professional conduct, which require an attorney to advise the client in writing of the desirability of seeking the advice of independent legal counsel before obtaining a security interest in the client's property to secure payment of fees, the attorney's prepetition security agreement with the debtor was not enforceable. Even if the agreement were enforceable, the Bankruptcy Code does not permit a Chapter 7 debtor's attorney to be paid for post-petition services out of estate property.

265. *Arlington Capital LLC v. Bainton McCarthy LLC*,

[534 B.R. 337](#) (N.D. Ind. 2015)

The bankruptcy trustee's attorneys, who unsuccessfully pursued a claim under § 363(n) against the buyer of the debtor's assets for rigging the bidding process, were entitled to payment of their fees from assets of the estate even though a secured claimant had a security interest in all the assets. Had damages been awarded against the buyer, they would have been proceeds of a bankruptcy cause of action, not proceeds of the collateral, and hence would not have been subject to the claimant's security interest and would instead have benefitted the estate.

266. *In re Talbut*,

[2015 WL 5145598](#) (Bankr. N.D. Ohio 2015)

Although the term in the operating agreement for a LLC giving the LLC the option to purchase a member's interest in the event the member files a bankruptcy petition was an unenforceable *ipso facto* clause, another term giving the LLC a right of first refusal before any transfer of a membership interest was enforceable. Consequently, the bankruptcy trustee for one member would not be permitted to sell the debtor's membership interest absent evidence that the trustee had complied with the right of first refusal.

GUARANTIES & RELATED MATTERS

267. *JPMorgan Chase Bank v. Winget*,

[602 F. App'x 246](#) (6th Cir. 2015)

A guaranty agreement that defined both an individual and a trust as "guarantor," and provided that the individual would be released upon a specified condition, could not be reformed due to mutual mistake to release both parties on the occurrence of that condition. The guaranty was unambiguous, there was no mistake of fact, and reformation due to a scrivener's error is limited to situations in which the writing omits or mistakenly describes an agreed-to term, but here there was no agreement prior to the execution of the guaranty, a point supported by the integration clause in the guaranty.

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268. *GECC v. Anderson*,
[2015 WL 575159](#) (D. Conn. 2015)
Because the forbearance agreement among borrowers, guarantors, and lender provided that “Lender has entered into this Agreement in good faith and, in accordance with the present policies and procedures of Lender,” and the meaning of that phrase was unclear, guarantor was entitled to admit parol evidence that the lender’s representative had stated, when the loan was first made, that the lender’s policy was not to chase guarantors unless there was evidence of fraud or wrongdoing in connection with the loan, and that the forbearance agreement incorporated that policy. Accordingly, the lender was not entitled to summary judgment on its claim against the guarantor.
269. *In re Lehman Brothers Holdings, Inc.*,
[541 B.R. 551](#) (S.D.N.Y. 2015)
A “hell or high water clause” in a guaranty that purports to waive all defenses based on the unenforceability of any loan document is effective to waive any defense based on lack of consideration or authority, even if the guaranty agreement was not the subject of extended negotiation.
270. *Pacifica L 39 LLC v. Ramy*,
[2015 WL 394239](#) (Cal. Ct. App. 2015)
Guarantees that contained express waivers of the guarantors’ rights and defenses, including any defenses that could be asserted by the borrower and any defenses available under California Civil Code § 2787 through § 2855 were effective. While such a general waiver might not be effective against equitable defenses, such as unclean hands, not covered in any of those statutory provisions, there was no allegation of unclean hands in this case.
271. *CertusBank v. Miller*,
[2015 WL 2084613](#) (N.D. Ga. 2015)
Even though a court concluded that the lender did not obtain fair market value when it conducted four separate foreclosures on real property, and thus refused to confirm the foreclosure sales, the lender was entitled to a judgment for the full debt against the guarantor because the guarantor agreed to be unconditionally liable regardless of whether the lender pursued any of its remedies against the debtor or the collateral and even if the debtor was discharged from liability and because the guarantor waived any defense based on impairment of the collateral or on any anti-deficiency statute.
272. *136 Field Point Holding Co. LLC v. Invar International Holding, Inc.*,
[2015 WL 1254846](#) (S.D.N.Y. 2015)
A corporation’s guarantee of the obligation of its individual owners to pay \$1 million if they failed to vacate a luxury apartment after their lease term expired was enforceable even if the obligation of the individuals was an unenforceable penalty because the guaranty agreement expressly provided that it was “absolute under any and all circumstances, without regard to the validity, regularity or enforceability of the Transaction Documents.”

273. *Bank of America v. Dello Russo*,
[610 F. App'x 848](#) (11th Cir. 2015)

A guarantor had no defense to payment based on his allegation that he provided funds to the debtor at the lender's request in return for a promise to credit those funds against the amount owed on the guaranty. The guaranty itself required the guarantor to pay the lender and, under Illinois law, a guaranty is a credit agreement that cannot be modified except by a writing signed by both parties.

274. *JMT Capital Holdings, LLC v. Johnson*,
[2015 WL 3832674](#) (N.D. Cal. 2015)

Guarantors had no defense based on the usurious nature of the loan because under Texas law a usury defense is personal to the debtor and cannot be asserted by a guarantor unless the guaranty agreement also contains the usurious provision. However, the guarantors might be entitled to a defense based on the lender's repudiation of the loan agreement and refusal to continue funding the loan, causing the debtor to be unable to repay the advances that were made. Although the guaranty agreement provided that each guarantors "waives and relinquishes all rights and remedies accorded by applicable law to guarantors and agrees not to assert or take advantage of any such rights or remedies," because the language covers rights that guarantors may assert directly, not rights of debtors that guarantors may assert indirectly, the defense was not waived.

275. *Berry v. Encore Bank*,
[2015 WL 3485970](#) (Tex. Ct. App. 2015)

Guarantors who signed an absolute and unconditional guaranty in which they expressly waived any right "to require or control application of any . . . collateral" had no defense merely because the lender's preferred ship mortgage was primed by a maritime lien that predated the mortgage. There was no mutual mistake of fact giving rise to a defense because all the parties were aware that repairs to the vessel had begun before loan and guaranty were executed and the guarantors had assumed the risk by expressly agreeing that the lender was not required to realize upon or take any actions with respect to the collateral. The guarantors had no claim for negligent misrepresentation because the guaranty agreement stated that the guarantors were not relying on any representation by the lender regarding the collateral. Finally, the guarantors had no claim for negligence against the lender because the lender owed them no duty with respect to the collateral and, in any event, such a claim would be barred by the economic loss doctrine.

276. *Larasco, Inc. v. Del Norte, LLC*,
[2015 WL 2329040](#) (Wash. Ct. App. 2015)

The guarantor of a promissory note that made the borrower responsible for the lender's attorney's fees was not liable for the attorney's fees incurred in collecting because the guaranty agreement covered only the "principal and interest" on the note.

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277. *Westlake v. BMO Harris Bank*,
[2015 WL 3794384](#) (D. Kan. 2015)
Although Kansas law imposes a duty of good faith in every contract, two married guarantors had no claim against the creditor for breach of the duty of good faith in enforcing a dragnet clause in the guaranty agreements because there is no separate cause of action for breach of duty of good faith and the guarantors could not point to a contract term that the creditor violated. The guarantors also had no claim for conversion, promissory estoppel, or unjust enrichment.
278. *Avnet, Inc. v. Catalyst Resource Group, LLC*,
[791 F.3d 899](#) (8th Cir. 2015)
The assignee of a promissory note made by an LLC could enforce the guaranty of an individual who indirectly owned the LLC because Iowa law, as predicted by the court, does not distinguish between special and general guaranties, and hence the assignment of a debt necessarily assigns a guaranty of that debt unless doing so would materially change the duty of the guarantor, is forbidden by statute, or is validly precluded by contract. The guaranty in this case did not purport to restrict assignment, so it was assignable.
279. *Note Acquisition, LLC v. Morrison*,
[2015 WL 6870607](#) (Pa. Super. Ct. 2015)
The entity formed by one co-debtor, which purchased from the creditor the promissory note, could enforce a confessed judgment against the other co-debtor for the entire amount of the obligation, not merely half.
280. *Brentwood Scottsdale LLC v. Smith*,
[2015 WL 728364](#) (Ariz. Ct. App. 2015)
The assignment of a mortgage note operates also as an assignment of the guaranty of that note.
281. *Quantum Corporate Funding, Ltd. v. Ellis*,
[6 N.Y.S.3d 255](#) (N.Y. Sup. Ct. 2015)
The law firm retained to ensure that a loan transaction would be legal and enforceable could be liable for malpractice for its failure to confirm that the guarantor was of legal age and thus competent to provide an enforceable guaranty.
282. *In re Estate of Nardoni*,
[2015 WL 1514908](#) (Ill. Ct. App. 2015)
Bank that made a new loan to pay off two previous loans thereby extinguished the original loans. As a result, the estate of an individual who had signed a continuing guaranty of the original loans was discharged.

LENDING, CONTRACTING & COMMERCIAL LITIGATION

283. *White Winston Select Asset Funds, LLC v. Intercloud Systems, Inc.*,
[619 F. App'x 157](#) (3d Cir. 2015)

A prospective lender stated a cause of action against the prospective lender for breach of the term sheet the parties had signed, and which provided for a breakup fee and reimbursement of the lender's expenses if the borrower obtained financing elsewhere, because the term sheet appeared to be an enforceable agreement. While the term sheet did not obligate the prospective lender to make a loan and did refer to continued negotiations, it also provided that the prospective borrower "shall" pay the breakup fee and the prospective lender's expenses and provided that this obligation "shall survive the Termination Date." On the limited facts before the court, it was impossible to determine if the breakup fee was an unenforceable penalty.

284. *In re Energy Future Holdings Corp.*,
[540 B.R. 96](#) (Bankr. D. Del. 2015)

Under New York law, a prepayment premium is not due after default unless the agreement expressly requires it. The language in the indenture providing for payment of "all principal of and premium, if any," after default, was not sufficiently clear. Moreover, the prepayment premium, which was due upon optional redemption of notes, was not triggered by the automatic acceleration of the notes when the debtor filed for bankruptcy protection. Even if the debtors repay the notes in bankruptcy, such repayment would not be "optional" because the Notes were accelerated under the terms the indenture.

285. *Solaria Corp. v. United States*,
[123 Fed. Cl. 105](#) (2015)

A prospective borrower did not state a claim for breach of contract against a government corporation that had entered into a commitment letter for a \$30 million loan because the letter expressly permitted the corporation to terminate its obligations if, "in its sole judgment, [it] is not satisfied with the results of its due diligence investigation," and the investigation raised several concerns. The prospective borrower also did not state a claim for breach of the duty of good faith even though it alleged that the corporation cancelled the loan for political embarrassment – that is, the corporation did not want the circumstances of the loan to be publicized and contrived false reasons to terminate it – because the commitment letter expressly authorized the corporation to terminate based on its sole judgment, and the duty of good faith does not impose obligations inconsistent with an agreement's express terms.

286. *Fournier v. L'Attitude Holdings, LLC*,
[2015 WL 6162077](#) (Mich. Ct. App. 2015)

Because an agreement to forbear payment on a promissory note needs either to be in a signed writing or supported by consideration, the alleged oral forbearance agreement for which no consideration was claimed was unenforceable.

287. *Lazard Technology Partners, LLC v. Qinetiq North America Operations LLC*,
[114 A.3d 193](#) (Del. 2015)

The former stockholders of a corporation did not have a cause of action against the successor by merger for breach of an earn-out provision in the merger agreement because the benchmarks for the earn-out were not reached. While the agreement did prohibit the purchaser from “taking any action to divert or defer [revenue] with the intent of reducing or limiting the Earn-Out Payment,” and even if the purchaser acted with the knowledge that its actions would reduce the likelihood that the earn-out would be due, there was no evidence that the purchaser’s actions were taken with such intent. The covenant of good faith and fair dealing was not implicated because it merely fills interpretive gaps in an agreement and there were no such gaps in the merger agreement.

288. *In re Bowles Sub Parcel A, LLC*,
[792 F.3d 897](#) (8th Cir. 2015)

Commercial loan agreements providing that, upon default, the interest rate would rise from 5.04% to 10.04% was enforceable under Minnesota law as liquidated damages despite evidence that the debtor was otherwise responsible for attorney’s fees, late fees, and the costs of administration and enforcement, because uncontradicted evidence indicated that the default interest provided reimbursement for costs not otherwise reimbursed, including the special servicer’s salary, expenses, and overhead, vendor expenses, attorney’s fees, appraisals, and travel expenses.

289. *Madden v. Midland Funding, LLC*,
[786 F.3d 246](#) (2d Cir. 2015)

Although the National Bank Act preempts usury laws of the state where a borrower is located by expressly permitting national banks to charge whatever interest rate is permitted by the law of the jurisdiction where the bank is located, the Act does not protect the assignee of the debt from a national bank. Accordingly, a borrower might have a cause of action against a buyer of the borrower’s debt for violation of the Fair Debt Collection Practices Act and New York usury statutes by charging and attempting to collect usurious interest.

290. *Mahlum v. Adobe Systems Inc.*,
[2015 WL 124663](#) (N.D. Cal 2015), *appeal pending*, (9th Cir. Feb. 20, 2015)

The term in a one-year software license agreement providing the licensee with a right to terminate in exchange for payment of half of the amount remaining due under the contract was not a liquidated damages clause but a clause providing for alternative performance. Therefore, the clause need not comply with the rules applicable to clauses on liquidated damages.

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291. *In re NMFC, LLC*,
522 B.R. 869 (D.S.C. 2015)
Because the patent assignment that an individual inventor provided to his employer covered “all divisions, and continuations thereof,” the entity that purchased the patent from the employer’s secured party at a disposition acquired the subsequent continuation-in-part. The language of the assignment was unambiguous; the original inventor did not retain – and therefore could not transfer – any interest in a continuation-in-part.
292. *Canon Inc. v. Tesson Ltd.*,
2015 WL 3884220 (S.D.N.Y. 2015)
The term in a non-exclusive patent license permitting the licensor to terminate the license if the licensee or an entity under its control contests the validity of any of the patents was unenforceable.
293. *XL Specialty Insurance Co. v. Truland*,
2015 WL 2195181 (E.D. Va. 2015)
The language in an indemnification agreement which provided that the indemnitor’s obligations “shall not extend and be enforceable against her sole and separate estate” was ambiguous: it could mean property titled in the indemnitor’s name only or property that she acquired using funds constituting her separate property under the relevant domestic relations law. Reading the words in context suggests that the phrase was intended to refer to assets based on title, not by source of funds.
294. *Asphalt Paving Systems, Inc. v. General Combustion Corp.*,
2015 WL 167378 (D.N.J. 2015)
The use of the word “shall” in a forum-selection clause providing that jurisdiction of any dispute “shall be in Orange County, Florida” was sufficient to indicate that the clause was exclusive and mandatory, not merely permissive.
295. *Lease Finance Group LLC v. Indries*,
2015 WL 8544338 (N.Y. Cty. Ct. 2015)
The forum selection clause in a lease of a credit card processing machine was unconscionable because the lease was entered into in California between a California lessor and a California individual who operated a small business there, the lessee was not a sophisticated business entity, but an immigrant whose first language is not English and whose education level is equivalent to the eighth grade in the United States, and the lessee would be required to travel 2,700 miles from California to New York City to defend himself in a case seeking roughly \$2,600.

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296. *InterDigital, Inc. v. Wistron Corp.*,
[2015 WL 4537133](#) (D. Del. 2015)
A clause in a patent license agreement providing that the parties “irrevocably consent to exclusive jurisdiction and venue of the state and federal courts in the state of Delaware” bound the defendant to the plaintiff’s choice of a Delaware state court as the forum and operated as a waiver of the right to remove to federal court.
297. *Marwell Corp. v. Marwell Corp.*,
[2015 WL 4393289](#) (D. Utah 2015)
Because the parties’ security agreement included a clause making a California Superior Court the only forum for any action to enforce its terms or conditions, the secured party’s action in federal court in Utah on the simultaneously executed promissory note and asset purchase agreement would be dismissed, even though the claims did not directly involve the collateral. A breach of the note or purchase agreement necessarily implicates the security agreement and although the secured party has the option to pursue remedies not delineated in the security agreement, the secured party had not disclaimed the remedies provided for by the security agreement.
298. *Incline Energy LLC v. Weiner*,
[2015 WL 7351392](#) (N.D. Cal. 2015)
Although the parties’ settlement agreement selected Reno, Nevada as the place to litigate “any disputes that may arise out of [the agreement],” under the “local action doctrine” jurisdiction was proper in California for an action to foreclose a lien on California real property. Nevada courts would not have jurisdiction over the dispute or over a non-signatory who claims a lien on or other interest in the property.
299. *First Intercontinental Bank v. Ahn*,
[798 F.3d 1149](#) (9th Cir. 2015)
Because California Civil Code § 1717, which makes reciprocal a contractual clause awarding attorney’s fees to only one of the contracting parties, is fundamental policy of the state, it applies to litigation in California even though the parties’ promissory note had a valid clause choosing application of Georgia law.
300. *MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entertainment Corp.*,
[80 F. Supp. 3d 507](#) (S.D.N.Y. 2015)
Bondholders stated a cause of action for violation of the Trust Indenture Act by alleging that the issuance of a new indenture, without the bondholder’s consent, eliminated the parent guarantee and left the bondholders with a right to assert a payment default against an insolvent issuer, thereby impairing the bondholder’s prospect of repayment.

301. *Sikorsky Financial Credit Union, Inc. v. Butts*,
[108 A.3d 228](#) (Conn. 2015)

A creditor's right to post-maturity interest does not terminate upon entry of a judgment. However, because the parties' agreement did not enumerate a specific post-maturity interest rate but, instead used the phrase "highest lawful rate," a secured party who obtained a deficiency judgment was entitled to post-maturity interest at the legal rate.

302. *Bank of Commerce v. Maryland Financial Bank*,
[2015 WL 925963](#) (D. Md. 2015)

Bank that purchased 25% participation interest in a secured loan was entitled to only 25% of the proceeds from the foreclosure of the collateral, not 25% of the remaining principal due because the participation agreement provided for a ratable distribution of all amounts paid by the borrower. It did not matter that the agreement also provided that, upon foreclosure, the originator was to remit to the participant "its percentage interest first." Read in context, that provision did not create a different waterfall for proceeds from foreclosure. It also did not matter that, in exchange for the participant's agreement to permit the borrower to further encumber the collateral, the originator later agreed to remit all proceeds on a "first out basis" to the participant. The agreement was not ambiguous and thus extrinsic evidence was inadmissible.

303. *Munoz v. Branch Banking*,
[348 P.3d 689](#) (Nev. 2015)

The Nevada statute that limits the amount of a deficiency judgment available to an assignee creditor is preempted by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 and thus the bank that acquired from the FDIC a loan originated by a failed bank was entitled to a judgment for the full deficiency.

304. *Brandt v. Lee*,
[2015 WL 506443](#) (Minn. Ct. App. 2015)

Because the letter, sent by the holder of a purchase option, stating "please take this as formal notification of my intent to exercise the option" was unclear as to whether it actually exercised the option or merely provided notification of the intent to exercise, a factual issue remained about whether a later assignee of the option holder's rights was obligated to consummate the purchase.

305. *Telecom Acquisition Corp. I, Inc. v. Lucic Enterprises, Inc.*,
[2015 WL 4043306](#) (Ohio Ct. App. 2015)

The trial court did not abuse its discretion in appointing a receiver for a judgment debtor that filed a financing statement indicating that it had granted a security interest in 47 items of equipment for its restaurant and bar to an entity owned and controlled by the judgment debtor's president two days after the judgment was transferred to the court of common pleas and a judgment lien filed.

306. *Derma Pen, LLC v. 4EverYoung Ltd.*,

[2015 WL 641618](#) (D. Utah 2015)

Although the Uniform Fraudulent Transfer Act insulates from avoidance the enforcement of a security interest and defines “asset” to exclude “property to the extent it is encumbered by a valid lien,” the grant of a security interest can be an avoidable fraudulent transfer.

[2015 WL 803148](#) (D. Utah 2015)

Distributor was entitled to a preliminary injunction preventing the debtor’s secured party from foreclosing on the debtor’s trademark and domain name because the debtor’s grant of a security interest to the secured party bore several badges of an intentionally fraudulent transfer – the secured party was an insider, the transfer occurred while litigation about the collateral was pending, and the debtor was insolvent at the time – and the secured party failed to demonstrate that he acted in good faith, given that he was aware of the litigation, his secured loans were not properly documented, and he delayed filing a financing statement for a year.

307. *Rahn’s Oil & Propane, Inc. v. Ettel Logistics, Inc.*,

[2015 WL 2467760](#) (Minn. Ct. App. 2015)

Provision of Uniform Fraudulent Transfer Act that renders avoidable a transfer by an insolvent debtor to an “insider for an antecedent debt,” if the insider had reasonable cause to believe that the debtor was insolvent. does not require that the debt be owed *to* the insider. Consequently, the corporate debtor’s sale of assets to an insider who had guaranteed corporate debts was avoidable. In determining whether the debtor received reasonably equivalent value for the purposes of another provision of the Act, the guarantor was not entitled to any credit for assuming primary responsibility for the debt that the guarantor had previously guaranteed.

308. *In re UC Lofts on 4th, LLC*,

[2015 WL 5209252](#) (9th Cir. 2015)

Because a *lis pendens* does not create a lien, the filer’s release of its *lis pendens* in return for the debtor’s payment of a debt owed by upstream affiliates was not in exchange for reasonably equivalent value.

309. *Charles R. Tips Family Trust v. PB Commercial LLC*,

[459 S.W.3d 147](#) (Tex. Ct. App. 2015) (formal issue of draft opinion issued in 2014)

Because written words control over numerals, a promissory note, deed of trust, and guaranty agreement that all described the principal obligation as “one million seven thousand and no/100 (\$1,700,000.00) dollars” were not ambiguous, and thus extrinsic evidence that the amount advanced was \$1.7 million was inadmissible.

310. *In re Residential Capital, LLC*,

[531 B.R. 25](#) (Bankr. S.D.N.Y. 2015)

A depository bank could unilaterally amend the deposit agreement with its customer to make the customer liable as a guarantor for any debts its affiliates owed to the bank. The amendment was effective even though the depositor tried but was unable to close all of the deposit accounts during the notice period because of the number of checks outstanding. The amendment was not unconscionable and did not violate the statute of frauds requirement that guarantees be in writing because the deposit agreement – with its provision regarding unilateral amendment – was in a writing signed by the depositor. As a result, the bank was entitled to debit the deposit accounts to satisfy obligations incurred by the depositor and its affiliates before and during their bankruptcy case, primarily for the bank’s attorney’s fees incurred in monitoring the case.

311. *Wells Fargo Bank v. Barber*,

[85 F. Supp. 3d 1308](#) (M.D. Fla. 2015)

Because Florida law allows a judgment creditor not merely to get a charging order against the judgment debtor’s interest in a limited liability company, but also to foreclose against the LLC interest if the LLC has only one member, a judgment creditor could foreclose on the judgment debtor’s interest in a single-member, Nevis LLC. It did not matter that Nevis law does not authorize foreclosure because Florida law governs given that the interest in the LLC is personal property and the situs of that property is Florida, where the judgment debtor is located.

312. *Olszewski v. Jordan*,

[109 A.3d 910](#) (Conn. 2015)

An attorney is not entitled to an equitable charging lien against marital assets for fees and expenses incurred in obtaining judgments for a client in marital dissolution actions. Accordingly, a creditor of the client who obtained a prejudgment writ of attachment was entitled to priority in the marital assets awarded to the client.

313. *In re Mac-Go Corporation*,

[2015 WL 1372717](#) (Bankr. N.D. Cal. 2015)

Because a lender’s note, loan agreement, and security agreement provided that the debtor was to pay the costs and expenses of enforcement, including the lender’s attorney’s fees, the lender was entitled to recover the attorney’s fees the lender incurred in successfully defending against the trustee’s claims for avoidance of preferential, fraudulent, and unauthorized postpetition transfers. The attorney’s fee clauses were not limited to actions brought by the lender and thus apply to proceedings in which the lender successfully defended an action by raising the enforceable terms of the contracts.

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314. *In re Tenderloin Health*,
[2015 WL 7015559](#) (N.D. Cal. 2015)
Even though a promissory note provided for the borrower to pay the lender's costs "to help collect," including attorney's fees, and the security agreement and loan agreement both provided for the borrower to pay the lender's attorney's fees "in connection with the enforcement of this Agreement," the lender was not entitled to reimbursement of attorney's fees incurred in successfully defending a preference claim brought by the borrower's bankruptcy trustee. The action was not about "collecting" the debt or about "enforcing" either of the agreements. While assertion of an affirmative defense can give rise to a claim for attorney's fees, the lender's defense was based on its setoff rights, which were independent of its contract rights.
315. *Sparta Commercial Services, Inc. v. DZ Bank Ag Deutsche Zentral-Genossenschaftsbank*,
[2015 WL 9302831](#) (S.D.N.Y. 2015)
New York law distinguishes indemnification clauses that cover attorney's fees incurred in a dispute between the contracting parties from those that cover attorney's fees incurred by one contracting party in a suit by a non-party to the contract, and will not readily interpret the latter as covering the former. Because the parties' revolving credit agreement required the loan servicer to notify the borrower of any claim – which would be pointless to suits between the parties – the clause did not apply to litigation between the servicer and the borrower.
316. *Clark v. Missouri Lottery Commission*,
[463 S.W.3d 843](#) (Mo. Ct. App. 2015)
A loan agreement that obligated the borrower to pay the fees of an attorney that the lender hired to collect did not cover the attorney's fees that the lender incurred in successfully defending against the borrower's claim that the security agreement was ineffective.
317. *FirstMerit Bank v. Myrter*,
[2015 WL 3916673](#) (W.D. Pa. 2015)
Bank that released one spouse from her guaranty was no longer able to foreclose on real property that the couple held as tenants by the entirety.
318. *Montana Food, LLC v. Todosijevic*,
[344 P.3d 751](#) (Wy. 2015)
A member of an LLC that, pursuant to the articles of organization, was manager-managed, did not have the authority to reduce the ownership interest of the other member, who failed to make additional capital contributions, even though the LLC allegedly lacked a manager and this left the parties deadlocked.

319. *Texas Capital Bank v. Dallas Roadster, Ltd.*,
[2015 WL 1025207](#) (E.D. Tex. 2015)

Because the borrower waived the right to consequential damages in the loan agreement, the borrower could not receive profits from business opportunities lost as a result of the lender's allegedly wrongful declaration of default but the borrower could recover "warranty sales, bank commissions, interest income, document fees, and late fees."

320. *BB Syndication Services, Inc. v. First American Title Ins. Co.*,
[780 F.3d 825](#) (7th Cir. 2015)

The exclusion in a title insurance policy issued to a the lender that financed a real estate development project, which excluded liens "created, suffered, assumed or agreed to" by the insured lender, did not cover mechanics liens that contractors filed against the real property after the lender cut off funding.

321. *Ball State University v. Irons*,
[27 N.E.3d 717](#) (Ind. 2015)

University has a common-law lien on a student's transcript to secure tuition and cannot be compelled to release the transcript before payment.

322. *Fifth Third Bank v. Rogers*,
[2015 WL 2269042](#) (Ky. Ct. App. 2015)

A decedent's estate that entered into a stock purchase agreement with the decedent's four brothers was entitled to an equitable lien against the assets of the corporations. The lien was entitled to priority over the mortgages and security interests of a bank because: (i) the bank failed to follow its own due diligence policy before making the loan by not checking for pending litigation; (ii) the loan officer knew the stock purchase agreement had been executed and one of the brothers was deceased, but did not ask whether the decedent or his estate had any current interest in the corporations; and (iii) the bank had in its possession corporate bylaws requiring five directors to take action, but acted on corporate resolutions bearing only four signatures without inquiring about the missing fifth signature. Thus the bank was on inquiry notice of the equitable lien.

323. *In re Village Concepts, Inc.*,
[2015 WL 1258621](#) (E.D. Cal. 2015)

A clause in a promissory note providing that, upon default and acceleration, "the amount then due shall accrue interest . . . at the rate of twelve percent (12%) per annum or the highest rate permitted by law, whichever is less" was not an effective usury savings clause because it applied only after default.

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324. *Rivera v. Bank of America*,
[607 F. App'x 358](#) (5th Cir. 2015)
The bank that, after default and acceleration, accepted payments from the debtors on their mortgage loan, thereby waived acceleration. As a result, the statute of limitations for foreclosing on the debtor's property did not begin to run until the bank later re-accelerated the debt.
325. *River Forest, Inc. v. Multibank 2009-1 Res-ADC Venture, LLC*,
[771 S.E.2d 126](#) (Ga. Ct. App. 2015)
The bank that possessed the original promissory note but not the modification that extended the maturity date and lowered the interest rate could enforce the note because the modification was a renewal, not a novation. In such a case, the creditor may bring suit on either the original note or the renewal and the bank, as a holder of the original note, was entitled to enforce the note.
326. *Millbrook IV, LLC v. Production Services Associates, LLC*,
[2015 WL 1516531](#) (Ill. Ct. App. 2015)
Although the new entity formed to purchase the assets of the debtor at an Article 9 disposition was a mere continuation of the debtor – and thus had successor liability to the debtor's landlord – the landlord could not pursue the new entity because the landlord had agreed that, until the secured party was paid in full, the landlord “waive[d] any interest in the Collateral and agree[d] not to distraint or levy upon the Collateral or any part thereof or to assert any landlord lien, right of distraint or other claim against the Collateral for any reason.”
327. *In re MPM Silicones, LLC*,
[531 B.R. 321](#) (S.D.N.Y. 2015)
An intercreditor agreement that excepted from its debt subordination clause “any Indebtedness . . . that by its terms is subordinate or junior in any respect to any other Indebtedness” did not except senior notes with a springing lien which were subject to lien subordination because subordination of the lien did not subordinate the debt and exception had to be interpreted in context as dealing with debt subordination. Moreover, a contrary ruling would have led to an absurd result that the senior notes were senior when issued but then subordinated when their springing lien sprung.
328. *VCS, Inc. v. Countrywide Home Loans, Inc.*,
[349 P.3d 704](#) (Utah 2015)
The intermediate priority of a mechanic's lien was unaffected by the subordination agreements between trust deed beneficiaries with higher and lower priority.

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329. *Tomar Development Inc. v. Friend*,
[2015 WL 3503880](#) (Colo. Ct. App. 2015)
Agreement by which sellers of real property subordinated their deeds of trust to the lien of a purchase-money lender had no effect on the subsequent lien of another lender that was subordinate to the purchase-money lender. Colorado follows the partial subordination approach by which the intermediate lien is unaffected by a subordination agreement between the senior and junior lienors.
330. *Police and Fire Retirement System of City of Detroit v. Midwest Business Credit, LLC*,
[2015 WL 1880788](#) (Ky. Ct. App. 2015)
The subordination clause in a recorded mortgage did not subordinate the mortgage to another creditor's mortgage created and recorded a year later because a subordination clause must describe the mortgage gaining priority with "reasonable specificity." If the mortgage gaining priority does not exist when the subordination clause is drafted, the clause must specify the maximum amount, interest rate, and term of the debt secured by the mortgage gaining priority.
331. *In re County of Orange*,
[784 F.3d 520](#) (9th Cir. 2015)
A federal court sitting in diversity must apply the state law that invalidates a pre-dispute agreement to waive the right to a jury.
332. *PNC Bank v. Presbyterian Retirement Corp.*,
[2015 WL 1931395](#) (S.D. Ala. 2015)
Whether a party has, by its conduct, waived arbitration is normally a matter for the court to decide and that presumption was not overcome by language in the arbitration clause providing that "[a]ny disagreement as to whether a particular dispute or claim is subject to arbitration . . . shall be decided by arbitration" because that language did not reference waiver issues, let alone conduct-based waiver issues.
333. *Unison Co., Ltd. v. Juhl Energy Development, Inc.*,
[789 F.3d 816](#) (8th Cir. 2015)
The arbitration clause in a supply agreement covered a dispute arising under a contemporaneously executed financing agreement because the clause covered any dispute in connection with "any legal relationship associated with or contemplated by this Agreement," and the two agreements expressly referenced the financing agreement and created interdependent obligations.
334. *Ford v. Antwerpen Motorcars Ltd.*,
[117 A.3d 21](#) (Md. 2015)
Vehicle buyers' purchase order and retail installment sale contract, executed simultaneously, were part of single transaction and could be interpreted together, and thus, the integration clause in the sales contract did not preclude seller from invoking arbitration provision in the purchase order.

335. *Bank of New York Mellon v. WMC Mortgage, LLC*,
[2015 WL 2449313](#) (S.D.N.Y. 2015)

Even though both the Mortgage Loan Purchase Agreement and the Pooling and Servicing Agreement, in connection with a securitization of 4,654 residential mortgage loans, indicated that the originator had a duty to repurchase loans with respect to which the originator breached a representation or warranty, and that this was the “sole remedy” available to the trustee, money damages could be awarded with respect to mortgage loans which had already been foreclosed, and thus the equitable remedy of repurchase was no longer available.

336. *ACE Securities Corp. v. DB Structured Products, Inc.*,
[25 N.Y.3d 581](#) (N.Y. 2015)

A cause of action against the sponsor of a securitization of mortgage loans for its failure to repurchase loans that did not conform to representations and warranties started to run when the warranties were made – at the closing date – because the warranties concerned characteristics of the loans at that time, not when the sponsor later failed to repurchase. While a seller can contractually agree to an obligation separate from a warranty, the breach of which does not arise until some future date, the repurchase obligation in this case was not such an obligation because the promise did not relate to the future performance of the property sold. Accordingly, the claim was barred by the six-year statute of limitations.

337. *Proficio Bank v. Wire Source, LLC*,
[2015 WL 5126335](#) (D. Utah 2015)

A partial owner of a limited liability company which, in connection with a loan to the LLC, represented and warranted that, to its knowledge, all the LLC’s accounts “which have been reported” to the lender are genuine, and that the LLC “is solvent” did not make any representations or warranties about future events. Although the document also stated that the representations are “continuing and irrevocable” for as long as the LLC was indebted to the lender, this language did not expand the representations and warranties to future events; it merely set the time in which the owner was required to stand by its representations and warranties.

338. *River Community Bank v. Bank of North Carolina*,
[2015 WL 3822385](#) (W.D. Va. 2015)

A claim for breach of a loan participation agreement by the buyer due to a forged guaranty was barred by the statute of limitations because the warranty claim started running on the date the transaction closed, not when the forgery was or should have been discovered; although the seller also promised to “take whatever additional actions may be necessary and proper to . . . maintain a Security Interest in the Collateral securing the Loan,” that promise too was breached at the closing.

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339. *In re Cipriano*,
[2015 WL 3441212](#) (E.D. Mich. 2015)
A produce seller’s claim against a buyer for breach of the trust imposed by PACA is subject to the 3-year, state-law limitations period applicable to a breach of trust claim. That period was not re-started each time the buyer made partial payment.
340. *First Bank and Trust v. Scottsdale Ins. Co.*,
[2015 WL 3409473](#) (E.D. La. 2015)
Insurer of real property had not satisfied its obligation by issuing checks jointly to the property owner and the mortgagee, which was listed in the insurance policies as loss payee but which was unable to negotiate the checks, because the policies included an ATIMA clause, requiring the insurer to pay the mortgagee and the policyholder “as interests may appear.”
341. *Masters Group International, Inc. v. Comerica Bank*,
[352 P.3d 1101](#) (Mont. 2015)
The clause of a forbearance Agreement between lender and borrower stating that the agreement “shall be governed and controlled in all respects by the laws of the State of Michigan” covered not only claims for breach of contract and breach of the covenant of good faith, but also tort claims for fraud arising out of a contract.
Although the forbearance agreement was expressly conditioned on a related party’s execution of a security agreement by the close of business on December 29, 2008, and the party failed to do so, the lender was not entitled to summary judgment on the borrower’s breach of contract action because the lender could have waived that condition even though the agreement also stated that the lender’s failure to exercise its rights immediately “shall not be construed as a waiver or modification of those rights or an offer of forbearance,” because such a “no implied waiver” provision does not necessarily prevent a waiver by conduct.
342. *In re Lehman Brothers Holdings Inc.*,
[2015 WL 9582753](#) (Bankr. S.D.N.Y. 2015)
Although a payoff letter terminated the borrowers “obligations,” other than specified contingent obligations, and the borrower’s waiver of consequential damages was not so specified, the waiver nevertheless survived because a waiver of rights is not an obligation.
343. *In re Modern Plastics Corp.*,
[534 B.R. 723](#) (Bankr. W.D. Mich. 2015)
A lender’s assignment of all of its “right, title and interest . . . in, to and under the Loan Documents” was broad enough to cover contract claims against the debtor but not tort claims arising before the assignment. The assignment did cover claims against an individual for breach of fiduciary duty arising after the assignment and resulting in damage to or loss of collateral.

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344. *KNA Family LLC v. Fazio*,
[2015 WL 2365455](#) (Wis. Ct. App. 2015)
A mortgage that generally provided for California law to govern the loan documents and the parties' performance but also contained a clause providing that "Mortgagee's statutory power of sale and all other remedies granted hereunder and the creation, perfection and enforcement of all mortgage liens and security interests created pursuant to the Loan Documents" were governed by Wisconsin law, did not make Wisconsin law applicable to the mortgagee's claim against the Mortgagor for failing to provide the requisite payoff statement, in violation of California law. A lender's duty to provide a payoff statement beneficiary statement is not necessarily connected with enforcement of the mortgage and can arise even if the lender never commences a foreclosure action.
345. *In re Appraisal of Dell Inc.*,
[2015 WL 4313206](#) (Del. Ch. Ct. 2015)
Beneficial owners of corporate stock lost their appraisal rights when their shares were re-titled in the names of their custodial banks' nominees even though the beneficial owners were throughout the relevant period the beneficial owners of the stock.
346. *Walker v. Builddirect.Com Technologies Inc.*,
[349 P.3d 549](#) (Okla. 2015)
To incorporate the terms in a separate document, a written agreement "must make clear reference to the extrinsic document to be incorporated, describe it in such terms that its identity and location may be ascertained beyond doubt, and the parties to the agreement had knowledge of and assented to the incorporated provisions"; under this standard, a written agreement for the sale of goods to a consumer did not incorporate a separate document entitled "Terms of Sale" available on the seller's website because the written agreement merely stated that it was "subject to" the seller's "Terms of Sale" but did not specifically reference the website.
347. *Peterson v. Rubio*,
[2015 WL 5138496](#) (Cal. Ct. App. 2015)
Multiple documents relating to the same transaction – one purporting to be a sale of a promissory note; the other a loan secured by the promissory note – had to be read together, not separately, thus the sale document did not supercede the loan document. Moreover, because the parties' contradictory understandings regarding the essential nature of the transaction were so fundamental, the entire transaction had to be rescinded.
348. *City of Oronoco v. Fitzpatrick Real Estate, LLC*,
[869 N.W.2d 332](#) (Minn. Ct. App. 2015)
An attorney's statutory lien on a client's cause of action requires no notice to perfect and hence was prior to a judgment creditor's garnishment lien.

349. *Wells Fargo Bank v. Wrights Mill Holdings, LLC*,
[2015 WL 5122590](#) (S.D.N.Y. 2015)

The indenture for a CDO that empowered the preferred shareholders to authorize the indenture trustee to sell collateral to a second, higher offeror was not triggered because the first offer – by overtly offering the preferred shareholders a payment for their consent even though the preferred shareholders were out of the money – invited and induced the preferred shareholders to disregard their duties of good faith and fair dealing and hence was not a valid offer.

350. *Parker v. Schlumberger Technology Corp.*,
[2015 WL 5460401](#) (Tex. Ct. App. 2015)

The arbitration clause in an asset purchase agreement, which covered claims arising “under or in connection with” the agreement, covered the buyer’s claims against the seller’s former employee, who had signed a separate agreement not to compete required for the asset purchase to close, even though the former employee was not a signatory to the asset purchase agreement.

351. *Navient Solutions, Inc. v. Robinette*,
[2015 WL 6756859](#) (W. Va. 2015)

A borrower who completed and signed on-line applications for student loans was bound by the arbitration clause in the promissory notes because, for each transaction, the application and note were part of a single document. Even though the pages of the application and note were separately numbered, the application referenced the promissory note on and provided that the borrower expressly agreed to be bound by the terms in the promissory note portion of the documents.

352. *Bardstown Medical Investors, Ltd. v. Dukes*,
[2015 WL 300677](#) (Ky. Ct. App. 2015)

The power of attorney by which a wife gave her husband the authority to settle claims and disputes was sufficient to empower the husband to enter into an agreement to arbitrate disputes with the long-term-care facility at which the wife was admitted.

353. *Extencicare Homes, Inc. v. Whisman*,
[2015 WL 5634309](#) (Ky. 2015)

The arbitration agreements executed by a nursing home and the attorneys in fact for some residents were not binding on the residents’ heirs with respect to claims against nursing homes for wrongful death because the power of attorney – which granted authority to “institute or defend suits concerning [the resident’s] property rights,” “draw, make and sign any and all checks, contracts, notes, mortgages, agreements, or any other document including state and Federal tax returns,” “institute legal proceedings,” and “make contracts of every nature in relation to both real and personal property” – did not confer authority to execute arbitration agreements relating to claims for personal injuries and violations of the Long Term Care Facilities Act.

354. *Bockelman v. GGNSC Gallatin Brandywood LLC*,
[2015 WL 5564885](#) (Tenn. Ct. App. 2015)

Although a mother's Health Care Agent form granted her daughter only the authority to "make health care decisions for the mother," the authorization was sufficient to give the daughter the authority to enter into an arbitration agreement with a long-term care facility because the agreement was part of the admission process, even though not a condition to admission, and drawing a distinction between the health care and legal decisions involved in nursing home admissions would be untenable.

355. *Wofford v. M.J. Edwards & Sons Funeral Home Inc.*,
[2015 WL 7428743](#) (Tenn. Ct. App. 2015)

A contract between a consumer and a funeral home did not require arbitration of disputes even though, directly above the signature line, the agreement provided: (i) "See part three for terms and conditions that are part of this agreement"; and (ii) "By signing this agreement, you are agreeing that any claim you may have against the seller shall be resolved by arbitration." The first clause did not incorporate the terms in part three because those pages were not provided to the consumer prior to execution of the agreement. The second clause was unconscionable because the agreement was a contract of adhesion, the arbitration provision is completely one-sided and provides offers little notice as to the procedure and effect of arbitration, even though those details would be filled in by law.

356. *Brinkley v. Monterey Financial Services, Inc.*,
[2015 WL 7302268](#) (Cal. Ct. App. 2015)

The portion of the arbitration clause in a consumer contract providing for the loser to pay all the fees and costs of the prevailing party was substantively unconscionable but could be severed from the remainder of the clause.

357. *Innovation Ventures, LLC v. Custom Nutrition Laboratories, LLC*,
[2015 WL 5679879](#) (E.D. Mich. 2015)

Although the asset purchase agreement pursuant to which a buyer acquired all of the assets of the seller expressly provided that the buyer was not assuming the seller's liabilities and that there were no third party beneficiaries, the buyer was nevertheless bound by terms in a prior settlement agreement between the seller and another entity, pursuant to which the seller agreed not to use specified products in its production of energy drinks, because the asset purchase agreement referenced the settlement agreement's restrictions in a clause dealing with the buyer's representations, thereby incorporating them.

358. *Eastern Savings Bank, FSB v. Cach, LLC*,
[124 A.3d 585](#) (Del. 2015)

Lender that refinanced a judgment debtor's mortgage before the judgment was recorded but which recorded its own mortgage afterwards was not entitled to be subrogated to the satisfied mortgages because there was no mistake or unjust enrichment. Equitable subrogation cannot be used to undercut the authority of the recording statutes without equitable cause.

359. *DNAML PTY, Ltd. v. Apple, Inc.*,

[2015 WL 9077075](#) (S.D.N.Y. 2015)

Although a federal antitrust claim is transferable, an effective transfer must either make specific reference to the antitrust claim or make an unambiguous assignment of causes of action in a manner that clearly encompasses the antitrust claim. An asset purchase agreement, by which an entity alleged to have been injured by an antitrust violation assigned of “all of the assets owned by the [entity] and used in connection with the Business,” did not satisfy this standard. Thus, the buyer lacked standing to pursue the antitrust claim.

360. *Wells Fargo Bank v. Palm Beach Mall, LLC*,

[177 So. 3d 37](#) (Fla. Ct. App. 2015)

The clause in a non-recourse loan agreement governed by New York law providing for recourse liability if the borrower failed to maintain its status as a Special Purpose Entity, a term defined to require solvency, meant solvent under New York common law (paying debts as they become due), not solvent as defined under the UCC or Bankruptcy Code (having assets in excess of liabilities).

361. *In re Min Sik Kang*,

[2015 WL 5786692](#) (E.D. Va. 2015)

The amended operating agreement for a limited liability company was effective even though not signed by the designed “independent member” because that individual had no interest in the company, was unaware of the operating agreement, and never accepted the position. A sale of a 60% interest in the company was void because the operating agreement, as permitted by Virginia law, required a secured party’s consent to any transfer of more than 49% and the secured party had not consented.

362. *Poppe v. Stockert*,

[870 N.W.2d 187](#) (N.D. 2015)

Landlord had to use judicial process to sell personal property left behind by evicted tenant and in which the landlord had a statutory lien (but no consensual security interest).

363. *Oasis Legal Finance Group, LLC v. Coffman*,

[361 P.3d 400](#) (Colo. 2015)

The transactions by which litigation finance companies purported to buy interests in the proceeds of a personal injury claim were in reality non-recourse loans, not sales, because the obligations grow with the passage of time. Thus, the transactions were subject to the state’s Consumer Credit Code.