2013 COMMERCIAL LAW DEVELOPMENTS

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

1. *General*

- *Counsel Financial Services, L.L.C. v. Leibowitz*, 2013 WL 3895331 (Tex. Ct. App. 2013) – A rule of professional conduct that prohibits attorneys from sharing fees with non-lawyers did not invalidate lawyer's grant of a security interest in his rights to fees to secure a loan. Paying a debt with legal fees does not amount to sharing legal fees with a non-lawyer.

- *United States v. Drier*, 952 F. Supp. 2d 582 (S.D.N.Y. 2013) – A security interest that note buyers acquired in $33 million of artwork of an attorney who brokered the sale was effective despite a massive fraud perpetrated by the attorney (not specifically involving that transaction). The buyers gave value by promising to pay a $1.65 million fee to the attorney.

2. *Consignments*

- *In re Fine Diamonds, LLC*, 501 B.R. 159 (Bankr. S.D.N.Y. 2013) – Article 9 governs a consignment of diamonds only for the purpose of determining the consignor's rights against creditors of the consignee or buyers of the goods. The court held that the relationship of the consignor to the consignee is governed by other law. As a result, the consignor's failure to file a financing statement had no bearing on the consignee's liability for conversion for failing to return the goods or remit the proceeds thereof.

Comment: Article 9 does govern some aspects of the consignor-consignee relationship because that relationship creates a "security interest." UCC § 1-201(b)(35).

3. *Real Property*

   - *In re Marble Cliff Crossing Apartments, LLC*, 484 B.R. 175 (Bankr. S.D. Ohio 2012) -- (Security cameras and other equipment loosely installed in an apartment building did not constitute fixtures and the security interest in those assets was perfected by a standard SOS filing; unfortunately, dicta in the case states that the *only* way to perfect a security interest in fixtures is to file a fixture filing in the real estate records – that is an incorrect statement of law.

4. *Leasing*

   - *In re Purdy*, 490 B.R. 530 (Bankr. W.D. Ky. 2013) – Fifty-month "leases" of dairy cows were really "sales" with a retained security interest because the lessee had no right to terminate the leases and 50 months exceeds the economic life of dairy cows, 30% of which need to be culled each year. This conclusion was further supported by other evidence indicating that the lessee was the true owner, including that the debtor retained the proceeds of cows sold, that some the cows were selected and purchased by the lessee only to be later reimbursed by the lessor, and that some of the cows were not branded with the lessor's brand until after delivery to the lessee. As a result, lender with a perfected security interest in the lessee-debtor's existing and after-acquired livestock had priority over the lessor.

   - *GECC v. FPL Service Corp.*, 2013 WL 6238484 (N.D. Iowa 2013) – A five-year lease of two copiers was a "sale" and secured transaction because the lessee had no right to terminate the lease and had an option to purchase the copiers for $1 at the end of the lease term.

- *In re Rodriguez*, 2013 WL 1385665 (Bankr. S.D. Tex. 2013) – A 30-month lease of two tractors required the "lessee" to make an up-front payment of $24,000 and monthly payments of $2,320. It also gave the lessee an option to purchase the equipment at the end of the lease term for $6,000, when the tractors were estimated to be worth $12,000–$13,000. The court concluded that the transaction was a sale with a retained security interest.

5. *Sales*

- *Huntington Village Dental, PC v. Rathbauer*, 966 N.Y.S.2d 346 (N.Y. Sup. Ct. 2013) – A handwritten term in a promissory note given in connection with the purchase of a dental practice provided that if the buyer failed to pay the note and remained in default for 90 days, "ownership of the practice and assets shall revert back to the seller with credit to purchaser for all sums paid." The court held that this did not create an Article 9 security interest in the absence of a pledge of property as security for the debt. The handwritten term also did not create a possibility of reverter that automatically revested the property in the seller; at most it created a basis for rescission, which would require judicial action to enforce.

- *Person v. Bowman*, 2013 WL 663726 (Wash. Ct. App. 2013) – A purchase agreement for a horse required the buyer to: (i) make a $300 down payment and monthly payments in an amount "to be determined" until the buyer paid $2,200 in total; (ii) keep the horse at a specified stable until the buyer paid off the balance; and (iii) pay a boarding fee and all veterinary, farrier, and training expenses. It also required the seller to deliver the registration papers for the horse only after the buyer paid in full. The court held that this created a sale with a retained security interest. Although the buyer may have subjectively thought that she had leased the horse, judged objectively, the transaction was a "sale." As a result, the seller was not

responsible for the actions of the horse under the Washington Equine Activities Statute.

- *In re HomeBanc Mortgage Corp.*, 2013 WL 211180 (Bankr. D. Del. 2013) – Article 9 does not apply to a securities repurchase agreement. Thus a repo participant's sale of the securities subject to the repo after the counter-party defaulted was not subject to a standard of commercial reasonableness.

- *Icon Amazing, L.L.C. v. Amazing Shipping, Ltd.*, 951 F. Supp. 2d 909 (S.D. Tex. 2013) – A sale-leaseback of a vessel under which the seller-lessee was obligated to repurchase the vessel at the end of the lease term was really a secured financing transaction. As a result, the seller-lessee's failure to pay rent was not a failure to pay for charter of a vessel and the court had no maritime jurisdiction over the buyer-lessor's claim.

- *In re C.W. Mining Company*, 488 B.R. 715 (D. Utah 2013) – An agreement provided for a coal broker to prepay a mining company for coal to be mined. The agreement expressly provided that it did not create a security interest and that title to the mined coal would transfer from the mining company's lessor to the broker upon severance. The court held that this created a security interest.

- *In re Clean Burn Fuels, LLC*, 492 B.R. 445 (Bankr. M.D.N.C. 2013) – A seller of corn had only a security interest, not ownership, of corn in a storage bin on the buyer's property and leased by the seller from the buyer. Even though the agreement expressly provided that title remained with the seller until "the [corn] leaves the storage bin and moves across the weighbelt into the plant at [the debtor's] Ethanol Facility," the agreement also provided that delivery was complete when the corn was received at the debtor's facility. Thus delivery occurred when the corn arrived at the storage bin. A retention of title by a seller of goods after delivery is limited in effect to reservation of a security interest. UCC §§ 1-201(b)(35) and 2-102.

- *In re Jones*, 2013 WL 1092099 (Bankr. E.D. Tenn. 2013) – Bills of sale executed by buyers and a seller of automobiles provided that "this agreement will not remain binding if a third party finance source does not agree to purchase the installment sale contract based on this agreement." The bills of sale gave the seller the option to cancel the transaction if the financing fell through and the buyer failed to return the vehicle. The documents created a security interest and did not prevent the vehicles from becoming property of the buyers' bankruptcy estates.

- *Long John Silver's, Inc. v. Nickleson*, 2013 WL 1797442 (W.D. Ky. 2013) – Debtors assigned to a lender "all of [their] right, title, interest in and to all legal claims, rights of action, lawsuits, settlements and judgments" relating to the debtors' franchise agreements. The agreements further provided that "[t]his assignment is absolute and unconditional." The court held that the transaction was an absolute transfer of debtors' causes of action and counterclaims, not an assignment for security. As a result, the debtors would not be regarded as the owners of counterclaims for the purposes of venue for an action brought by the franchisor and a clarifying amendment to agreement after action was brought was not relevant.

- *Fenway Financial, L.L.C. v. Greater Columbus Realty, L.L.C.*, 2013 WL 4516008 (Ohio Ct. App. 2013) – A transaction labeled as a sale of accounts by a real estate agent was really a secured loan because the agent retained all risk of loss, the transaction documents referred to an advance and described the agent as the "debtor," granted the factor a security interest in all of the agent's current and future accounts, deposit accounts, and general intangibles to secure the agent's obligations, the factor filed a financing statement listing the agent as debtor, and the agent retained the right to any surplus over the amount advanced plus interest. As a result, the transaction was governed by an Ohio statute that prohibits real estate brokers

from paying an agent's commission to a creditor of the agent. UCC § 9-406 did not override this statute because the more specific statute prevails over the more general unless the general is later in time and manifests an intent to prevail, and § 9-406 was not later in time.

6. *Intellectual Property and Licenses*

   - *In re ProvideRx of Grapevine, LLC*, 2014 Bankr. LEXIS 971 (Bankr. N.D. Tex. 2014) – Although granting clause in loan documents referenced all of the debtor's "IP assets," the placement of that phrase within a discussion only of patent applications limited the scope of the grant to collateral related to patents. Because the filed financing statement covered only specified patent applications along with "corresponding rights to patent and all other intellectual property protection of every kind," the security interest was perfected only in IP associated with the patent applications. The language used was insufficient to give a reasonable person inquiry notice of a security interest in IP assets, other than the patent applications.

7. *Tort Claims*

   - *In re Wilds*, 2013 WL 2419899 (D. Colo. 2013) – A judgment creditor assigned to his lawyer the right to collect the judgment. The assignment was excluded from Article 9 under UCC § 9-109(d)(2), (7), and (9). Nevertheless, the lawyer's lien was perfected under non-UCC law when the lawyer filed a notice with the court and, because that occurred during the preference period, the transfer was avoidable.

   - *In re: Derivium Capital LLC*, 716 F.3d 355 (4th Cir. 2013) – Plaintiff brought a tort claim against a bank in relation to a debtor's bankruptcy claim. The Plaintiff was incapable of asserting a tort claim against the bank because the two parties had committed the same tort. The plaintiff and the defendant

both received margin payments related to the debtor's ponzi scheme.

B. Security Agreement and Attachment of Security Interest

1. Security Agreement

- *In re Caffey*, 2013 WL 3199816, 2013 Bankr. LEXIS 2570 (Bankr. N.D. Ohio 2013) – A debtor signed a "loan agreement" in favor of an automotive repair facility mechanic, which stated that "[a] lien is hereby placed on the above mentioned vehicle until loan is paid in full." The agreement granted a security interest in the debtor's vehicle even though there was no evidence regarding when and where the agreement was created, the agreement did not specify what law applied, the creditor did not sign the agreement, and the creditor gave no consideration beyond previously having made repairs to the vehicle for which the debtor had not fully paid.

- *Crozier v. Wint*, 736 F.3d 1134 (8th Cir. 2013) – A promissory note signed by married couple stated that it was "secured by a filed UCC Financing Statement." There was also a filed financing statement initialed by the husband. Together they could be sufficient to create a security interest if the husband was the sole owner of the collateral described in the financing statement or acted as an agent of the wife when he initialed the financing statement.

- *In re Cruse*, 2013 WL 323275 (Bankr. S.D. Ind. 2013) – Because timber to be cut is goods – and not real estate potentially subject to a vendor's lien – the seller of timber to be cut by the buyer did not have a security interest in the severed timber because there was no written security agreement.

- *In re Box*, 2013 WL 3357871 (Bankr. M.D. Ga. 2013) – A vehicle seller who was listed as the first lienholder on the vehicle's certificate of title and who obtained the debtor's signature on a

promissory note, but not on a security agreement, did not have a security interest.

- *Caterpillar Fin. Servs. Corp. v. Peoples Nat. Bank, N.A.*, 710 F.3d 691 (7th Cir. 2013) – Court rejected composite document rule while failing to notice attachment may have been achieved when secured creditor took possession of collateral pursuant to a security agreement.

2. *Obligation Secured*

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

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

3. *Rights in the Collateral*

- *In re WL Homes, LLC*, 534 Fed. App'x 165 (3d Cir. 2013) – A parent corporation did not have sufficient rights in a deposit account of its wholly owned subsidiary to grant a security interest in the deposit account. However the subsidiary consented to the use of its deposit account as collateral because the CFO of the parent, who signed the security agreement on behalf of the parent, was also the president of the subsidiary and thus knowledge of and consent to the transaction were properly imputed to the subsidiary.

- *In re Terrabon, Inc.*, 2013 WL 6157980 (Bankr. S.D. Tex. 2013) – A subsidiary obtained a certificate of deposit using funds advanced by the subsidiary's parent company for that purpose. The subsidiary then executed a security agreement granting a security interest in the CD. The security interest attached to the CD, even if the parent company owned the CD, because either the parent consented to the subsidiary's use of the CD as collateral or because the same individual served as CEO of both entities and executed the documents, and thus acted under the apparent authority of the parent. Alternatively, the parent was estopped from denying the creation of the security interest because it allowed the subsidiary to appear as the owner.

- *Verathon, Inc. v. DEX One Service, Inc.*, 2013 WL 1627073 (S.D. Ohio 2013) – A medical equipment dealer did not own equipment that its customers had purchased and then sent to the dealer's warehouseman for service. Thus the warehouseman did not acquire a security interest in the equipment from the dealer. While the warehouseman may have had a statutory repairman's lien for the value of the repair services provided, the warehouseman had been paid for those services and was not entitled to a repairman's lien for unrelated warehousing charges of the dealer.

- *United States v. Dupree*, 919 F. Supp. 2d 254 (E.D.N.Y. 2013) – A lender with a security interest in all of the assets of a borrower and certain related entities had standing to raise in a forfeiture action a superior claim to a deposit account of another related entity. The transfers, commingling, and exchanges of loan proceeds and other assets among the borrower and all its related entities gives rise to the secured party's claim that it had a security interest in the deposited funds as collateral under the security agreement. Moreover, the secured party might be able to trace the deposited funds as proceeds of collateral.

- *Bank of England v. Rice*, 2013 WL 427919 (E.D. Ark. 2013) – A lender did not have a security interest in rice that the lender argued was owned by a partnership because the joint venture agreement between spouses did not establish a partnership, and thus the rice was owned separately by the individuals.

- *U.S. ex rel. Farm Service Agency v. Harvey Fertilizer and Gas Co.*, 2013 WL 953868 (E.D.N.C. 2013) –A security agreement identified specific equipment owned by the debtor partnership. The partners, by signing the agreement, expressly certified the truth of the partnership's statements under penalty of perjury. The court could disregard one partner's affidavit, filed in a subsequent priority dispute, averring in a conclusory manner that the partnership never owned some of the equipment. As a result, the secured party had priority over a subsequent secured party regardless of whether the partnership still owned the equipment or had transferred the equipment, still encumbered, to one of the partners.

- *Southwest Guaranty, Ltd. v. U.S. Acquisitions & Oil, Inc.*, 830 N.W.2d 723 (Wis. Ct. App. 2013) – A mortgage that granted a creditor a security interest in "all machinery, furnishings, equipment, fixtures . . . owned by [the debtor] . . . now or hereafter located upon the Premises" did not include property owned by third parties. However, the debtor lacked standing to raise the rights of third parties that allegedly owned some of the personal property.

- *In re Rezykowski*, 493 B.R. 713 (Bankr. E.D. Pa. 2013) – An individual, in connection with the purchase of a limited liability company, signed a security agreement providing for the grant of a security interest in the assets of "the buyer." The court held that the individual undoubtedly intended to cause the LLC to grant a security interest in the assets of the LLC, itself, as evidenced by the separate purchase agreement, which referred to the collateral as "all . . . goods and chattels used in

connection with said business" and which also purported to "control" over conflicting terms in the security agreement.

- *In re Open Range Communications, Inc.*, 2013 WL 542471 (Bankr. D. Del. 2013) – A borrower deposited loan proceeds into a deposit account in which a lender had a security interest. The proceeds were intended for the payment of third-party contractors and "for such other purposes as may be approved by" the lender. The court held that the proceeds were not held in a resulting trust for the contractors.

- *Settlement Funding, LLC v. Brenston*, 2013 WL 4517159 (Ill. Ct. App. 2013) – A buyer of rights to payment under a structured settlement did not inform the court of contractual restrictions on the right to transfer. As a result the court lacked the authority to approve the transfer, the court's approval was fraudulently obtained and rendered the court order authorizing the sale void.

4. *Restrictions on Transfer*

- *McDonald v. Yarchenko*, 2013 WL 3809512 (D. Or. 2013) – A lender did not comply with a term in an LLC operating agreement requiring the prior written consent of a majority of the five non-transferring members to the debtor's grant of a security interest in his membership interest. A fax purporting to express the consent of two members was signed by at most one of them and a letter that stated consent was given by another member at the time the lender made the loan was signed six years later. However, the debtor waived the right to challenge the validity of the transfer by signing the agreement to encumber his interest.

- *Marion Blumenthal Trust ex rel. Blumenthal v. Arbor Commercial Mortgage LLC*, 2013 WL 3814385 (N.Y. Sup. Ct. 2013) – An agreement that prohibited the assignment of interests in the shares of a cooperative apartment but which did not state that

an assignment was void did not prevent attachment of a security interest. However, a restrictive covenant requiring the owners to offer the apartment for sale upon the occupant's death or cessation of occupancy remained enforceable and thus the secured party could not currently foreclosure on the apartment.

- *State Department of Corrections v. Developers Surety and Indemnity Co.*, 2013 WL 5779779 (Ga. Ct. App. 2013) – A contractor could assign its right to payment under a contract with a state government agency to a bonding company to secure the contractor's obligation to reimburse bonding company for losses on the bond despite contractual prohibition on assignment because UCC § 9-406 invalidated that restriction. The transaction was not excluded by UCC § 9-109(d)(16) because the property at issue was the contractor's right to payment, not property of the state.

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

- *First Bancorp, Inc. v. United States,* 945 F. Supp. 2d 802 (W.D. Ky. 2013) – A security interest in after-acquired accounts was perfected despite the fact that the financing statement did not mention after-acquired property.

  Comment: UCC § 9-204, Comment 7.

- *In re Moore*, 2013 WL 2154383 (Bankr. N.D. Miss. 2013) – A secured party's Food Security Act financing statement described the collateral as "All crops, and Farm Products whether any of the foregoing is owned now or acquired later" and then identified the two counties in which the debtor's crops were grown. The indication of collateral was sufficient to perfect the secured party's security interest in the portion of the debtor's sweet potato crop grown in those two counties but not the portion grown in a third. The financing statement was also insufficient to perfect a security

interest in sweet potatoes whose origin was unknown but which were processed in one of the counties listed. The security interest was not perfected initially because the bank could not prove that the crops came from one of the listed farms and did not become perfected because the potatoes were processed in one of the counties listed. As a result, a buyer took free of the security interest in potatoes from a processing facility in and from potatoes grown in the unlisted county but subject to a security interest in potatoes grown in the listed counties.

- *Bishop v. Alliance Banking Co.*, 2013 WL 5583574 (Ky. Ct. App. 2013) – A financing statement accurately identified a backhoe by make, model and year but misstated the first three digits of the serial number – "1100249697" instead of "JJG0249697." The indication was sufficient to perfect the security interest in the backhoe. As a result, a buyer who purchased the backhoe from the debtor took subject to the security interest.

- *Gulf Coast Farms, LLC v. Fifth Third Bank*, 2013 WL 1688458 (Ky. Ct. App. 2013) – A debtor was the manager and 35.45% owner of an LLC. He submitted evidence indicating that the secured party knew that the debtor intended to pledge as collateral only 35.45% of the LLC's assets. The security agreement described the collateral as all of the LLC's interests in specific assets. The court held that the LLC's entire interests were encumbered. There was no ambiguity that would permit introduction of parol evidence.

- *In re ProvideRx of Grapevine, LLC*, 498 B.R. 118 (Bankr. N.D. Tex. 2013) – A security agreement granted a security interest in specified patent applications along with "corresponding rights to patent and all other intellectual property protection of every kind." The security interest was limited to IP associated with the patent applications, particularly given that the other portions of the agreement addressed only patent and patent-related rights. However, because the term sheet that preceded the loan stated that the debtor "shall provide the [secured party] with a senior

security interest in the IP assets owned" and the note indicated that the loan was made pursuant to the term sheet, the court held that debtor had granted a security interest in all its IP assets. It was immaterial that the security agreement and financing statement did not expressly cover non-patent IP assets. Because "general intangibles" would have been an acceptable term in a security agreement and is broader than the phrase "IP assets," use of "IP assets" was an effective description of the collateral.

- *In re Residential Capital, LLC*, 495 B.R. 250 (Bankr. S.D.N.Y. 2013) (initial ruling) 2013 WL 6086456 (Bankr. S.D.N.Y. 2013) (ruling after hearing) – A security agreement initially identified certain assets as "Excluded Assets," and therefore not subject to the security interest created by a security agreement. Those assets remained unencumbered when the assets ceased to be Excluded Assets after a transaction with an unrelated creditor was terminated. After hearing testimony about the parties' intent, assets identified as Excluded Assets became subject to the blanket security interest after the assets ceased to be Excluded Assets.

- *U.S. Commodity Futures Trading Commission v. U.S. Bank*, 2013 WL 5944179 (N.D. Iowa 2013) – Extrinsic evidence was needed to determine whether an agreement executed by futures commodity merchant granting a secured party a security interest in "all property in which [the merchant] has an ownership interest" to secure obligations of the merchant and the merchant's affiliates might have encompassed its customers' property in violation of 7 U.S.C. § 6d(b).

- *Collins v. Angell*, 2013 WL 3243559 (N.D.N.Y. 2013) – A security agreement and financing statement identified collateralized cattle by name and ear tag number. For some cattle the ear tags had either fallen off or did not match one of the listed numbers. While the names of the cattle were referenced in a certificate of registration for each cow, each certificate included a sketch of the cow's distinctive markings. Those markings could be used to

identify the cows, the only evidence of industry custom to identify cattle in this manner was an affidavit not stated to be based on the affiant's personal knowledge.

- *In re Gene Express, Inc.*, 2013 WL 1787971 (Bankr. E.D.N.C. 2013) – A commercial real estate lease granted the landlord a security interest in "any personal property belonging to Tenant and left on the Premises." The lease did not adequately describe the collateral because "personal property" is not a permissible description in a security agreement and because it refers to property that may be abandoned in the future, rather than property that is presently identifiable. UCC § 9-108(C).

- *Johnson v. Binkley*, 2013 WL 5593287 (Ariz. Ct. App. 2013) – A deed of trust granted a security interest in "Personal Property," defined as "all equipment, fixtures, and other articles of personal property . . . attached to the Real Property." It further provided that it constituted a security agreement "to the extent any of the Property constitutes fixtures," was limited to fixtures and did not encumber non-fixtures. Even if it had covered non-fixtures, the description as "personal property" would have been inadequate. The unsigned financing statements filed by the creditor also did not create a security interest in the non-fixtures.

- *In re Estate of Wheeler*, 2013 WL 3440953 (Colo. Ct. App. 2013) – Commercial lease that purported to grant the landlord a security interest in "all property now owned or hereafter acquired by [the tenant] which shall come in or be placed upon the Premises," was a sufficient description.

- *In re K-V Discovery Solutions*, 2013 WL 501721 (Bankr. S.D.N.Y. 2013) – Noteholders did not have a security interest in the debtor's interest in a particular drug because the security agreement expressly excluded all of the debtor's rights in the drug until such time as the debtor had fully paid the seller for rights in the drug and thereby discharged the seller's lien. The exclusion was not limited to the trademark in the drug because the indenture, in

defining the drug, used a trademark symbol after the drug's name because that would not comport with the plain meaning of the security agreement. In any event, the security agreement expressly controlled over anything in the indenture to the contrary. Moreover, the court held that it makes sense to the read the exclusion consistently with the debtor's contract with the seller, which required the debtor to reconvey all of the debtor's rights in the drug – free and clear of all liens – in the event of nonpayment, and thus the whole point of the exclusion was to avoid a breach of the debtor's agreement with the seller.

- *FirstMerit Bank v. Presbrey and Associates, P.C.*, 2013 WL 4840472 (N.D. Ill. 2013) – The inclusion of "accounts" and "general intangibles" in a security agreement's description of collateral was sufficient to encompass the debtor's fees such as contingency fees, referral fees, and reimbursed client expense advancements.

- *First Bancorp, Inc. v. United States,* 945 F. Supp. 2d 802 (W.D. Ky. 2013) – A debtor's rights to payment from the sale of LLC interests, corporate stock, and real estate were accounts. A security agreement covering all "accounts" that the debtor "owns or has sufficient rights in which to transfer an interest, now or in the future," was sufficient to cover after-acquired accounts.

- *California Charley's Corp. v. City of Allen Park*, 2013 WL 1442242 (Mich. Ct. App. 2013) – The inclusion of "commercial tort claims" in a security agreement's description of collateral was an insufficient description. As a result, garnishors of arbitration award resolving commercial tort claim had priority over secured party.

- *In re Residential Capital, LLC*, 497 B.R. 403 (Bankr. S.D.N.Y. 2013) – Junior secured noteholders did not have a security interest in any commercial tort claims because none were described in the security agreement with the specificity required by UCC § 9-108(e)(1).

- *In re Cunningham*, 489 B.R. 602 (Bankr. D. Kan. 2013) – A signed credit card application in which the debtors purported to grant the card issuer a security interest "in the goods purchased with your Card," combined with sales receipts that identified the goods so purchased was not an adequate description of the collateral, given that a description of consumer goods only by collateral type is insufficient and the receipts were not a component of the security agreement.

- *In re Murphy*, 2013 WL 1856337 (Bankr. D. Kan. 2013) – A signed credit card application in which the debtors purported to grant the card issuer a security interest "in the goods purchased with your Card," was an adequate description of the collateral because it was not a description only by collateral type.

- *In re Thrun*, 495 B.R. 861 (Bankr. W.D. Wis. 2013) – A customer's signed Consumer Lending Plan with a credit union provided that credit union would have a security interest in "all goods, property, or other items purchased under this Plan . . . either now or in the future." The description was sufficient to cover a motor vehicle purchased with an advance under the plan even without considering the unsigned advance receipt stating that "[t]his advance is governed by the terms of your Consumer Lending Plan" and "[y]ou are giving a security interest in . . . the collateral described on page 2," which identified the vehicle the customer was purchasing by year, make, model, and VIN number.

  Comment: See also In re Cikar, 2013 WL 4041341 (Bankr. W.D. Wis. 2013) (involving the same issue and decided the same day by incorporating the opinion in *Thrun*).

- *In re LDB Media, LLC*, 497 B.R. 332 (Bankr. M.D. Fla. 2013) – A lender did not have a security interest in the equipment located in the debtor's news trucks because the security agreement identified the trucks and did not mention the equipment located in them.

- *In re Duckworth*, 2013 WL 211231 (Bankr. C.D. Ill. 2013) – Although a security agreement that misdescribed the secured obligation as a note executed on December 13, 2008, "together with all other indebtedness . . . for which Grantor is responsible under this Agreement or under any of the Related Documents" did secure the note executed and dated December 15, 2008, it did not secure obligations incurred in 2009 because those obligations were not "Related Documents," which was defined somewhat circularly to relate to documents executed in connection with the "Indebtedness," which was in turn defined in reference to the "Related Documents."

- *In re World Imports, Ltd. Inc.*, 498 B.R. 58 (Bankr. E.D. Pa. 2013) – A carrier had a maritime lien on goods in its possession to secure the charges for shipping those goods but not for the charges of shipping other goods that the carrier had previously released to the debtor.

- *Newsom v. Rabo Agrifinance, Inc.*, 2013 WL 1682379 (Ark. Ct. App. 2013) – A financing statement's inclusion of "crops" in its description of collateral was a sufficient indication of collateral by type and it was not necessary to identify the counties in which such crops were growing. The fact that the financing statement listed the debtor's address as Barretville, Indiana, rather than Barretville, Tennessee, was not material given that, because of the competing creditor's association with the debtor, his ability to inquire was not affected.

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

D. Perfection

1. Certificates of Title

- *Vanderbilt Mortg. and Finance, Inc. v. Westenhoefer*, 716 F.3d 957 (6th Cir. 2013) – A security interest in a mobile home was not perfected because the secured party failed to file the title lien statement in the county where the debtor resides, as required by Kentucky law, even though, as a result of the filing elsewhere, the security interest was noted on the certificate of title for the mobile home.

- *In re Nutgrass*, 2013 WL 571796 (Bankr. E.D. Ky. 2013) – A security interest in a titled manufactured home that was affixed to realty but for which no affidavit of conversion to real property was filed was not perfected by recorded a mortgage. The home remained personal property and a notation on the certificate of title was required to perfect.

- *In re Cantrell*, 2013 WL 4777172 (Bankr. E.D. Ky. 2013) – A security interest in a titled manufactured home that was affixed to realty on or before 1982 but for which no affidavit of conversion to real property was filed was not perfected by a mortgage recorded in 2008. Even though the home was affixed to the real property prior to enactment of the Kentucky law dealing with perfection of security interests in title manufactured homes, that law was in effect prior to recordation of the mortgage and controlled in this case.

- *Lozman v. City of Riviera Beach, Fla.*, 133 S.Ct. 735 (2013) – A houseboat that could not be viewed in a reasonable way as carrying people or things over water was not a vessel subject to the federal maritime lien law. In what may be one of the best quotes of the year, the Court noted "[t]o state the obvious, a wooden washtub, a plastic dishpan, a swimming platform with pontoons, a large fishing net, a door taken off its hinges, or

Pinocchio (even when inside the whale) are not vessels even though they can float and perhaps carry items."

2. *Control*

   - *In re Bressler*, 2013 WL 5946111 (Bankr. M.D.N.C. 2013) – A secured party had control over the debtor's security accounts under UCC § 9-106(c) because the secured party had control over all of the security entitlements carried in the account due to the fact that the secured party was identified in the broker's records as the person having the security entitlements and thus the secured party became the entitlement holder within the meaning of UCC § 8-106(d)(1).

   - *In re Formatech, Inc.*, 496 B.R. 26 (Bankr. D. Mass. 2013) – A lender with a perfected security interest in the debtor's investment property had priority over a stock seller that had a claim for rescission based on fraud because the secured party was a protected purchaser.

   - *Fifth Third Bank v. U.S.D.A.-Rural Development*, 2013 WL 1787151 (W.D. Mich. 2013) – A secured party with control over a debtor's deposit account had priority in that deposit account over garnishors.

   - *CIMC Raffles Offshore (Singapore) Ltd. v. Schahin Holding S.A.*, 942 F. Supp. 2d 425 (S.D.N.Y. 2013) – The collateral agent for a senior lender group had a perfected security interest in debtors' deposit accounts and LLC interests. Thus the funds in the deposit accounts were controlled by the collateral agent and needed to pay the senior lenders. The debtors could not assign or transfer the funds or LLC interests and a judgment creditor was not entitled to order requiring turnover of the funds or the LLC certificates.

   - *Fifth Third Bank v. United States Dep't of Agriculture – Rural Dev.*, 2013 U.S. Dist. LEXIS 59705 (W.D. Mich. April 26, 2013) – Court

analyzes terms of deposit account control agreement and determines that the secured party has a security interest perfected by control in the deposit account because the depository bank had agreed to comply with the secured party's directions without further consent of the debtor.

3. *Possession*

- *In re Clean Burn Fuels, LLC*, 492 B.R. 445 (Bankr. M.D.N.C. 2013) – A corn seller that retained a security interest in corn stored in corn bins on the debtor's property and leased by the seller from the debtor was not perfected by possession. Even though the seller had the right to cut the power needed for the debtor to access to the corn and the agreement obligated the debtor to place signs on the bins or in the debtor's plant to notify third parties that the bins had been designated exclusively to receive and store corn owned by the seller, the debtor never requested permission from the seller to remove the corn from the bins, was never prevented from removing the corn, and never posted signs, and thus the seller's alleged possession over the corn did not provide any notice to third parties.

- *In re Kaushik*, 2013 WL 4775574 (Bankr. N.D. Ga. 2013) – It was not clear whether a secured party had perfected its security interest in certificated securities delivered to a broker because there was a factual dispute about whether the debtor or the secured party delivered the certificates and about whether, under the terms of the agreement with the broker, the debtor had access to the securities account.

- *Israel Discount Bank of New York v. First State Depository Co., LLC*, 2013 WL 2326875 (Del. Ch. Ct. 2012) – A bailee of collateral – rare coins and bullion – had entered into an agreement with the secured party to honor the secured party's instructions. The bailee refused to release the collateral to the secured party and released the collateral to the debtor. The bailee was liable to the

secured party for breach of the bailment agreement. The secured party did not act in a commercially unreasonable manner by contacting the FBI given that the debtor and the bailee intentionally concealed from the secured party material facts regarding the loans and the collateral.

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

   - *In re C.W. Mining Company*, 488 B.R. 715 (D. Utah 2013) – Financing statements identified the debtor as "CW Mining Company," rather than as "C. W. Mining Company," its registered name. The financing statements were ineffective to perfect a security interest because under the filing office's search logic an exact match is required and a search under the debtor's correct name would not have disclosed the filings that lacked the periods and space.

   - *People v. Cratty*, 2013 WL 967803 (Mich. Ct. App. 2013) – Individual was properly convicted of filing fraudulent financing statements against judges, lawyers, and court officers.

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

     Comment: This individual debtor name issue was addressed in the recent revisions to UCC Article 9.

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

   - *In re Tobacco Square LLC*, 2013 WL 1246794 (Bankr. M.D.N.C. 2013) – A secured party did not file a financing statement with the secretary of state's office but did make a fixture filing. The fixture filing perfected a security interest in the fixtures – lighting fixtures, wall sconces, ceiling fans, heating and air conditioning units, microwaves, ranges and oven units, disposals, dishwashers, and cooling units on the roof – but did not perfect a security interest in the other items of personal property: refrigerators, exercise equipment, televisions, pictures, washers, dryers, and window treatments.

6. *Amendments, Termination and Lapse of Financing Statement*

   - *In re Residential Capital, LLC*, 497 B.R. 403 (Bankr. S.D.N.Y. 2013) – Junior secured noteholders did not have a security interest in collateral released by their collateral agent and for which the collateral agent filed UCC-3 amendments because the collateral agent was the secured party and thus, even if the collateral agent acted outside the scope of its authority, it was authorized to release the liens and amend the financing statement. Decisions about releases and termination statements filed by an unauthorized party were not relevant.

   - *In re RAG East, LP*, 2013 WL 796616 (Bankr. W.D. Pa. 2013) – Although a subsequent lender relied on a filed termination statement when making its loan, because the secured party neither filed nor authorized the termination statement the statement had no effect on the secured party's perfection or priority.

   - *International Home Products, Inc. v. First Bank of Puerto Rico, Inc.*, 495 B.R. 152 (D.P.R. 2013) – A termination statement that debtor filed without the secured party's signature or authorization after the secured party filed new financing statements

following a lapse in perfection was ineffective. The security interest therefore remained perfected.

- *Monroe Bank & Trust v. Chie Contractors, Inc.*, 2013 WL 1629300 (Mich. Ct. App. 2013) – A secured party remained perfected after filing an amended financing statement that purported to be both an amendment deleting a specific item of collateral and a termination statement because the incongruous nature of the error would have put a searcher on notice that further inquiry was required and thus was not seriously misleading.

- *In re Highland Construction Management Services, LP*, 2013 WL 1336918 (Bankr. E.D. Va. 2013) 497 B.R. 829 (Bankr. E.D. Va. 2013) (vacating initial decision) – Secured party whose filing lapsed during the debtor's bankruptcy case lost perfection and, therefore, priority to the debtor in possession, who has the status of a lien creditor. On reconsideration, court vacated its initial decision, concluding that because a security interest is deemed upon lapse never to have been perfected as against a purchaser for value – but not a lien creditor – the security interest remains perfected and the debtor in possession takes subject to it.

- *In re Miller Brothers Lumber Co., Inc.*, 2013 WL 5755052 (M.D.N.C. 2013) – A secured party whose filing lapsed during the debtor's bankruptcy did not lose priority to the bankruptcy trustee because lapse renders the security interest retroactively unperfected against purchasers but the trustee, with the status of a lien creditor, is not a purchaser.

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

Comment: Correction statements, now called information statements, do not have the same effect as a new UCC-1. When in doubt, file a new financing statement to ensure perfection.

- *In re Motors Liquidation Co.*, 486 B.R. 596 (Bankr. S.D.N.Y. 2013) – A mistakenly filed UCC termination statement was not effective to terminate the financing statement because it was not authorized by the secured party.[*] The decision joins several notable decisions from the last few years on this issue, each of which focuses carefully on the facts surrounding authorization and agency, sometimes with different results. The decision is a reminder that a searcher cannot assume the validity of a termination statement found in a lien search result and that outside counsel should be particularly cautious when involved in UCC amendments and terminations in any capacity.

E. Priority

1. Lien Creditors

- *Keybank v. PAL I, LLC*, 2013 WL 5488814 (Idaho 2013) – A lender with a perfected security interest in equipment did not lose its security interest after a judgment creditor levied on the collateral. The secured party failed to comply with procedures in the state statute governing third-party claims to property subject to judicial process. As a result, the secured party was entitled to the proceeds of the judicial sale from the judgment creditor.

- *Massachusetts Port Authority v. Williams Maritime Repair Service, Inc.*, 2013 WL 1328745 (D. Mass. 2013) – A perfected security interest in a debtor's accounts had priority over a federal tax lien only to the extent that the accounts were choate when the notice of tax lien was filed. For this purpose, the account

[*] Steve Weise is assisting the secured party in this litigation.

became choate when the debtor entered into a contract for services with the account debtor. However, the secured party did not have a security interest in commercial tort claims because no such claims were described in the security agreement or existed when the security agreement was executed.

- *First Bancorp, Inc. v. United States*, 945 F. Supp. 2d 802 (W.D. Ky. 2013) – Because a security interest in after-acquired accounts was perfected as soon as the debtor acquired the accounts in question, which was after the IRS filed a notice of tax lien for 2006 taxes but before it filed a notice of tax lien for 2007 taxes, the security interest was junior to the lien for 2006 taxes and senior to the lien for 2007 taxes. To the extent that the IRS levied on the accounts to satisfy the 2006 taxes, it had priority even though it later reallocated payments received to the 2007 taxes because 26 U.S.C. § 6402(a) authorizes the IRS to credit any overpayment to any outstanding tax liability of the taxpayer and makes no exception for when doing so would undermine the priority of another claimant to the funds. To the extent that the IRS levied on the accounts to satisfy the 2007 taxes, the secured party had priority.

- *In re Alpha Protective Services, Inc.*, 2013 WL 5636747 (Bankr. M.D. Ga. 2013) – A secured party which perfected a security interest in the debtor's accounts and contract rights before the IRS filed a notice of tax lien had priority in the debtor's rights to payment under service contracts even though the debtor did not perform its obligations under those contracts until more than 45 days after the notice of tax lien was filed. The secured party's priority extended even to the rights to payment under the extension of those service contracts pursuant to an extension option.

- *In re Cruse*, 2013 Bankr. LEXIS 360 (Bankr. S.D. Ind. 2013) – A secured party who did not perfect its security interest could not

assert a secured claim in debtor's bankruptcy. The claim at issue was a claim of creditor as unpaid seller of timber to debtor. The creditor's assertion that the criminal acts of debtor should result in perfection was rejected.

2. *Buyers and Other Transferees*

   - *State Bank of Cherry v. CGB Enterprises, Inc.*, 984 N.E.2d 449 (Ill. 2013) – Because strict compliance with the direct notice rules of the Food Security Act is required for a secured party to retain a security interest in farm products sold to a buyer, a notice that failed to identify the counties in which the farm products were grown or located was ineffective even though the notice stated that it covered "farm products wherever located." As a result, a grain elevator that purchased the debtor's grain took free of bank's security interest and had no liability to the secured party even though the grain elevator violated the notice by sending a check for the purchase price directly and solely to the debtor.

   - *New London Tobacco Market, Inc. v. Burley Stabilization Corp.*, 2013 WL 2112290 (E.D. Tenn. 2013) – The Food Security Act preempts a state conversion claim against a buyer of crops. The buyer took free of a perfected security interest granted by the sellers, all of whom were engaged in farming operations.

   - *Arthur Glick Truck Sales, Inc. v. Stuphen East Corp.*, 914 F. Supp. 2d 529 (S.D.N.Y. 2013) – The buyers of fire trucks took free of a supplier's perfected security interest in the chasses because the buyers had constructive possession – both because they had paid in full and because the seller had possession as their agent – and were buyers in ordinary course of business.

   - *Sensient Flavors, L.L.C. v. Crossroads Debt, L.L.C.*, 2013 WL 5857604 (Mich. Ct. App. 2013) – A consignor that sold and delivered cherries to a processor and then repurchased the cherries was a buyer in ordinary course of the repurchased cherries that took free of the security interest of the processor's

lender even though the consignor was the processor's major customer and offset the purchase price against the amount the processor owed it for colorings and flavorings. However, as to cherries remaining with the processor, the consignor had only an unperfected security interest that was subordinate to the lender's security interest. It did not matter that the processor was to sell the cherries back to the consignor; the transaction was a delivery for sale and thus a consignment.

- *In re Steel Stadiums, Ltd.*, 2013 WL 145628 (Bankr. N.D. Tex. 2013) – Because a secured party's perfected security interest in debtor's inventory would have priority over an unpaid supplier's reclamation rights under Article 2, it similarly had priority over the supplier's equitable right of rescission.

- *Marathon Machine Tools, Inc. v. Davis-Lynch, Inc.*, 400 S.W.3d 133 (Tex. Ct. App. 2013) – An embezzlement victim whose stolen funds were used to buy a lathe, and who became a lien creditor by virtue of its equitable right to a constructive trust on the lathe, had priority over the seller that retained a security interest in the lathe because the seller did not perfect its security interest until eight months after the sale.

- *Pierrard v. Wright Implement 1, LLC*, 993 N.E.2d 1200 (Ind. Ct. App. 2013) – The buyer of a tractor subject to a perfected security interest was liable for conversion for thwarting the secured party's repossession efforts even though the buyer might not have known of the security interest when he purchased the tractor and even though he may have sold the tractor prior to the repossession efforts.

3. *Statutory Liens; Forfeiture*

- *United Prairie Bank v. Galva Holstein Ag, LLC.*, 2013 WL 6223416 (Minn. Ct. App. 2013) – A hog farmer's feed suppliers, who had a statutory lien on hogs that ate the feed, had priority over a bank with a security interest in the proceeds of the farmer's

hogs to the extent that the sale price of the hogs exceeded the acquisition price of the hogs. This priority did not have to be reduced by the payments the suppliers received. Those payments could be allocated to other, non-priority debt.

- *Caterpillar Financial Services Corp. v. Burroughs Diesel, Inc.*, 2013 WL 1607370 (Miss. Ct. App. 2013) – If truck lease – which required the lessee to keep a truck in repair – was terminated before the lessee authorized repairs, then the mechanic who repaired the truck was not authorized to do so by the owner and would not be entitled to a mechanic's lien.

- *Alliance Laundry Systems, LLC v. Bharaj*, 2013 WL 1688367 (N.J. Super. Ct. 2013) – A secured party with a perfected security interest in a laundromat's washers and dryers had priority over lessor's statutory landlord's lien.

- *Ryan v. United States*, 725F.3d 623 (7th Cir. 2013) – Court cannot void a federal tax lien to the extent that such lien exceeds the value of a Chapter 13 debtor's assets. At the time of debtor's Chapter 13 filing, debtor's assets amounted to less than $2,000, while the government held a $140,000 tax lien against debtor's possessions. The United States conceded that under Section 506(a) of the Bankruptcy Code its secured claim was limited to the value of debtor's possessions, but argued that Section 506(d) of the Bankruptcy Code did not authorize the court to extinguish the remainder of the tax lien.

- *Gerdau Ameristeel US, Inc. v. Broeren Russo Construction, Inc.*, 992 N.E.2d 27 (Ill. App. 2013) – Plaintiff failed to present evidence refuting defendant's demand to foreclose on a mechanic's lien. Defendants were subcontractors whose mechanic's lien was purportedly released by the general contractor, who had no authority to do so. Defendants were therefore entitled to foreclose on the lien.

- *In re Steel Stadiums, Ltd.*, 2013 Bankr. LEXIS 148 (Bankr. N.D. Texas 2013) – A first priority perfected security interest of a bank creditor in equipment and inventory trumped an unpaid supplier's right of recission.

4. *Subordination and Subrogation*

   - *Travelers Casualty and Surety Company of America v. Paderta*, 2013 WL 3388739 (N.D. Ill. 2013) – A surety for a general contractor, which paid the developers and was subrogated to the developer's setoff rights, had priority over the lender to the general contractors, which had a perfected security interest in the general contractor's accounts. The surety stood in the shoes of the developer and the secured party stood in the shoes of the general contractor.

   - *United States v. Dupree*, 919 F. Supp. 2d 254 (E.D.N.Y. 2013) – A law firm that had received an assignment from a corporation of its interest in a deposit account in payment of past and future legal services to an individual criminal defendant had no standing to claim a superior claim to the funds in a forfeiture action because: (i) it received the assignment long after the criminal acts and the relation-back doctrine vests title in the United States as of the start of the conspiracy; and (ii) the law firm could not be a *bona fide* purchaser of the deposit account because the forfeiture claim was in the indictment of the law firm's client and the law firm must have read the indictment.

5. *Equitable Claims*

   - *In re WEB2B Payment Solutions, Inc.*, 488 B.R. 387 (8th Cir. BAP 2013) – A bank which, pursuant to contract, had a "possessory lien" on deposited funds, released the lien when it remitted the funds to the depositor's bankruptcy trustee without seeking adequate protection until nine months later.

- *Legal Asset Funding, LLC v. Cousins*, 2013 WL 2248084 (N.J. Super. Ct. 2013) – A lender that had no security interest in a lawyer's accounts took payment from the lawyer free of the rights of the secured party that had funded litigation and had a perfected security interest in the lawyer's accounts because there was no evidence that the lender acted in collusion with the debtor to violate the rights of the secured party. UCC § 9-332. The lender's alleged knowledge of the security interest and failure to search for financing statements were not sufficient to raise a factual issue about collusion.

- *BancorpSouth Bank v. Hazelwood Logistics Center, LLC*, 706 F.3d 888 (8th Cir. 2013) – A secured party's perfected security interest in a borrower's general intangibles extended to the borrower's right to a property tax refund and had priority over any equitable lien that might be claimed by a consulting firm that, pursuant to a contingent fee agreement, assisted the borrower in obtaining the refund, even though the bank knew of the fee agreement. Equitable considerations cannot be used to alter statutory priorities.

- *Newsom v. Rabo Agrifinance, Inc.*, 2013 WL 1682379 (Ark. Ct. App. 2013) – A lender's perfected security interest in debtor's crops had priority over any equitable lien that the individual who partnered with the debtor in producing the crops might have because the lender: (i) engaged in no egregious or fraudulent conduct, and (ii) acquired and perfected its lien before becoming aware of the individual's involvement, and thus neither encouraged the individual's efforts nor made them necessary.

- *ACF 2006 Corp. v. Merritt*, 2013 WL 466603 (W.D. Okla. 2013) – A lender with a perfected security interest in a law firm's accounts had priority in firm's right to receive a portion of the recovery in contingent fee case over creditors who provided to the law firm services relating to that case but who had no

security interest. Equitable considerations are not a basis for altering Article 9's priority rules.

- *Case v. Case*, 970 N.Y.S.2d 151 (N.Y. App. Div. 2013) – A creditor with a perfected security interest in proceeds of debtor's partnership dissolution action had priority over a law firm with charging lien on recovery because the security interest was perfected before the law firm began work in the action. The law firm did not "create" the funds at issue because the funds were already in possession of the receiver when the law firm began work; the law firm's efforts merely helped established the debtor's rights to the funds.

- *BancorpSouth Bank v. Hazelwood Logistics Ctr., LLC*, 706 F.3d 888 (8th Cir. 2013) – Bank's perfected security interest in general intangibles covered tax refunds and trumped an equitable lien in the tax refunds in favor of a lawyer who had provided services to the debtor; court rejects argument that the equitable lien should count as an artisan's lien provided special priority under applicable state law.

- *Westco Agronomy Co., LLC v. Wollesen*, 2013 WL 5745556 (Iowa Ct. App. 2013) – A lender with a junior security interest in crop proceeds failed to raise a factual question as to the certainty of the senior secured party's recovery from other crop collateral and thus the senior secured party was entitled to summary judgment on the junior's request for a marshaling order.

6. *Set Off*

- *Ladd v. Motor City Plastics Co.*, 2013 WL 5857395 (Mich. Ct. App. 2013) – A bank with a security interest in a deposit account it maintained had setoff rights that were superior to the rights of a judgment creditor with writ of garnishment on the account and thus had no liability to the creditor even though the bank had not in fact exercised its setoff rights but instead had allowed the debtor to access the funds. Such action was not a

waiver of the bank's rights because its security interest continued in the withdrawn funds.

7. *Priority — Competing Security Interests*

   - *American Bank, FSB v. Cornerstone Community Bank*, 733 F.3d 609 (6th Cir. 2013) – A secured party that made a loan to finance an insurance policy and had a security interest in the unearned premiums had priority in the deposit account of the insurance broker into which the loan was deposited over the rights of the depositary that had swept the account to cover an obligation of the broker because the Tennessee Premium Finance Company Act gives a security interest in unearned premiums priority over subsequent purchasers. As a result, the depositary was liable for conversion.

   - *Monroe Bank & Trust v. Chie Contractors, Inc.*, 2013 WL 1629300 (Mich. Ct. App. 2013) – A secured party contractually agreed to subordinate its security interest in specified equipment to an equipment lender – and the lender's assignees. The finance company that paid off the equipment lender and received an assignment of the equipment lender's security interest had priority over the bank.

   - *In re HW Partners, LLC*, 2013 WL 4874172 (Bankr. E.D. Wash. 2013) – First lender that acquired a security interest in mortgage notes and recorded an assignment of each mortgage but which did not take possession of the notes or file a financing statement lost priority in the proceeds of the real estate to the second lender who, after the debtor accepted replacement notes and mortgages, perfected its interest in the replacement notes by filing a financing statement and later taking possession of them. Priority is governed by Article 9, not by real estate law, and the second lender had priority as the first to file or perfect even if the replacement notes were proceeds of the original notes and thus collateral for the first lender.

8. Purchase-Money Security Interests

- *In re Saxe*, 491 B.R. 244 (Bankr. W.D. Wis. 2013) – A security interest in a farmers' skidsteer that the farmers purchased with loan proceeds qualified as a PMSI even though there was no separate security agreement or UCC financing statement relating to the skidsteer and neither the security agreements nor the financing statements stated that the security interest was purchase-money. PMSI status survived even though the note evidencing the original secured obligation was replaced with a new note that extended the payment term. Because there was only one secured obligation, UCC § 9-103(e) on allocation of payments did not apply and the security interest in the skidsteer remained a PMSI until the entire secured obligation was paid.

- *Caterpillar Financial Services Corp. v. Peoples National Bank*, 710 F.3d 691 (7th Cir. 2013) – A lender that refinanced an equipment sellers' PMSIs did not acquire a PMSI because the lender did not receive an assignment of the sellers' interests. Although the lender's financing statement was filed after the financing statement of a prior creditor that subordinated its interest to a bank, and thus the bank would normally have priority over the lender for the lesser of the debt owed to the bank or the debt owed to the subordinating creditor, the bank was unable to show that the creditor had a security agreement. Therefore, the lender had priority over the bank's own security interest, which was perfected last, and bank was liable for conversion in refusing to pay the proceeds of the collateral to the lender.

- *In re Damon Pursell Construction Co.*, 490 B.R. 367 (8th Cir. BAP 2013) – A lender's perfected security interest in two excavators was initially junior to the interests of two creditors, each of which had a perfected PMSI in one of the excavators. The debtor sold one excavator and used the funds to pay the wrong

PMSI creditor and the lender's security interest became senior in the remaining excavator because the payment terminated the paid creditor's security interest and the unpaid creditor had no security interest at all in the unsold excavator. There was no basis for imposing an equitable lien in part because, presumably, the security interest of the unpaid creditor remained attached to the excavator sold.

- *T. Gluck & Co., Inc. v Craig Drake Manufacturing, Inc.*, 2013 N.Y. Misc. LEXIS 2384 (N.Y. Sup. Ct. 2013) – A consignor with PMSI priority in diamonds consigned to debtor lost that priority after five years when it failed to renew the notification to the debtor's inventory lender. Accordingly, the inventory lender had priority in the consigned diamonds as the first to file or perfect. Regardless of the consignor's loss of priority in the consigned diamonds, the inventory lender had priority in the debtor's accounts. Because the inventory lender had priority, the consignor had no claim for conversion.

- *In re Smith*, 2013 WL 4525175 (Bankr. W.D. Ky. 2013) – A lender's PMSI in 45 cattle did not have priority over earlier perfected security interest of another lender because the first lender never sent the PMSI notification required by UCC § 9-324(d).

9. *Proceeds*

- *In re Gamma Center, Inc.*, 489 B.R. 688 (Bankr. N.D. Ohio 2013) – A secured party that had a perfected security interest in a medical provider's nuclear stress test camera, and the proceeds and products thereof, did not have a security interest in the provider's accounts or the collections on accounts because even if the accounts were generated solely through use of the camera, the accounts were not proceeds or products of the camera.

- *In re Tusa-Expo Holdings, Inc.*, 496 B.R. 388 (Bankr. N.D. Tex. 2013) – Although payments of accounts were deposited into lock box that was swept daily by the senior secured party, the funds subsequently released to the debtor by the senior secured party were indirect proceeds of accounts and thus part of the junior secured party's collateral. The transfer of those funds to the junior secured party was therefore a transfer of collateral and could not be preferential even though the junior secured party was undersecured.

- *In re Milton Abeles, LLC*, 2013 WL 5304014 (Bankr. E.D.N.Y. 2013) – Funds received in settlement of fraudulent transfer action brought by debtor's bankruptcy trustee were not proceeds of creditor's prepetition security interest in the debtor's deposit account, from which the fraudulent transfer was made.

- *Algonquin Power Income Fund v. Christine Falls of New York, Inc.*, 509 F. App'x 82 (2d Cir. 2013) – Under New York common law, an agreement assigning all "rights in action . . . arising from or relating to" specified real property was sufficient to grant a security interest in a malpractice claim against engineers for failing to properly measure the property. Subsequent enactment of amendments to Article 9 had no effect because UCC § 9-702(b) provides for the continued efficacy of the security interest. No discussion of the limitations on § 9-702 in § 9-703.

- *1st Source Bank v. Wilson Bank & Trust*, 735 F.3d 500 (6th Cir. 2013) – A secured party claimed a security interest in a trucking company's accounts as well as their rigs. The financing statement was limited to the rigs and the "proceeds" thereof. The secured party was not perfected in the debtor's accounts because the accounts were neither included in the collateral description in the financing statement nor "proceeds" of the rigs. The "use" of equipment does not generate "proceeds."

The opinion does not discuss whether the debtors operated the rigs or leased them.

F. Default and Foreclosure

1. Default

- *Regions Bank v. Thomas*, 2013 WL 791616 (Tenn. Ct. App. 2013) – A secured party did not breach the duty of good faith by declaring a default and accelerating the debt due to the debtor's failure to insure the collateralized aircraft, even though the debtor was current on payments and the secured party later force placed insurance pursuant to another clause in the agreement. The obligation of good faith and fair dealing does not create additional contractual rights or obligations and cannot be used to avoid the express terms of an agreement.

- *Highland CDO Opportunity Master Fund, L.P. v. Citibank*, 2013 WL 1191895 (S.D.N.Y. 2013) – An issuer of credit default swaps stated a cause of action against a counter-party for failing in good faith to value the underlying assets and then issuing excessive margin calls. The issuer did not state a claim for the counter-party's failure to provide notification of sale of the collateralized securities because those securities were traded on a recognized market and threatened to decline speedily in value. The Issuer did state causes of action for failing to sell the securities in a commercially reasonable manner and for not providing a post-sale accounting.

- *In re Henderson*, 492 B.R. 537 (Bankr. D. Nev. 2013) – A newly enacted Nevada law limits default in automobile retail installment contracts to a failure to pay as required by the agreement and situations when "[t]he prospect of payment, performance or realization of collateral is significantly impaired." Thus a default-on-bankruptcy clause in such a contract is unenforceable.

- *FirstMerit Bank v. Presbrey and Associates, P.C.*, 2013 WL 4840472 (N.D. Ill. 2013) – A debtor defaulted on secured loan when guarantor died because that death was expressly listed in the transaction documents as an event of default.

- *Bare v. JPMorgan Chase Bank*, 2013 WL 6073335 (Cal. Ct. App. 2013) – A secured party was entitled to repossess the debtor's vehicle after a payment default even though the debtor alleged that the parties had orally agreed to modify the payment terms because the written agreement, as permitted by state law, prohibited oral modifications. The debtor's claim of fraud similarly failed because, as a result of the clause prohibiting oral modifications, the debtor could not have justifiably relied on oral statements.

- *Lyon Financial Services, Inc. v. Illinois Paper and Copier Company*, 732 F.3d 755 (7th Cir., 2013) - A financing agreement contained a representation and warranty that the agreement was enforceable. The District Court analyzed the question of whether a breach of that representation and warranty could lead to a cause of action against the party making it, concluding that no cause of action was possible because under Illinois law no party may reasonably rely on a representation of law. The Seventh Circuit concludes here that Minnesota law applies and certifies the question to the Minnesota Supreme Court.

- *Joyce v. Fidelity Real Estate Growth Fund II, L.P.*, 2013 IL. App (1st) 121697, 2013 Ill. App. LEXIS 401 (Ill. App. June 19, 2013) – A debtor defaulted on a loan made by a lender and negotiated a forbearance agreement with the lender, pursuant to which the debtor delivered in escrow a deed in lieu of foreclosure. The forbearance agreement included a provision permitting the lender to accelerate the loan if the debtor failed to meet certain sales targets and such deficiencies were not cured within thirty days. The debtor failed to meet certain sales goals and failed to cure the default within thirty days. The lender filed a deed in

lieu of foreclosure and conveyed the property to its subsidiary. The debtor asserted it was not in default because it sold certain parking spaces allowing it to reach its sales goals, and, in the alternative, that a 1.5% shortfall was immaterial. The lender argued that the parking space sale was improperly characterized because it included an unreported debit to the purchasers account, and that the 1.5% shortfall was material because the forbearance agreement specified that any failure to meet sales goals would result in an event of default. The court held that the lender could accelerate.

2. *Repossession of Collateral*

   - *Bank of America v. Petty Properties, LLC*, 2013 WL 173813 (W.D. Ark. 2013) – Although a security agreement described the collateral to include "all patient lists, files and records" of a medical provider, as well as the provider's receivables, because of privacy concerns the patient lists, files and records were not included in the replevin judgment.

   - *Santander Consumer USA, Inc. v. Hahnel*, 2013 WL 1010732 (Conn. Super. Ct. 2013) – A secured party did not meet its burden of showing a right to immediate possession of the collateral because the security agreement provided that "[i]f this is a consumer credit transaction . . . a notice of default is required before we exercise our remedies," and the secured party had submitted no evidence that it had provided a notice of default.

   - *A & N Food Market, Inc. v. New K & S Supermarket, Inc.*, 2013 WL 6038412 (N.Y. Sup. Ct. 2013) – A seller of a grocery store that retained a security interest in the property sold was not entitled to a prejudgment order granting it the right to immediate possession of the inventory because the seller had not shown a likelihood of success on the merits given that the debtor had raised a material factual dispute about whether the seller had committed fraud. However, the seller was entitled to an order

enjoining the debtor from selling or otherwise disposing of the collateral outside the ordinary course of business.

- *CIT Small Business Lending Corp. v. Advanced Dental Concepts, P.C.*, 2013 WL 3716882 (E.D. Tenn. 2013) – A secured party was entitled after default to possession of the collateral even though the amount of its damages were not yet determined.

- *Khepera-Bey v. Santander Consumer USA, Inc.*, 2013 WL 3199746 (D. Md. 2013) – An assignee of a secured party was entitled to a temporary restraining order prohibiting the debtor from conveying title to the collateralized vehicle or removing it from the state because the debtor was in default, had no income or assets, had filed numerous frivolous pleadings, and had had a clean title reissued in the debtor's name.

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

  Comment: UCC § 9-609 provides that after a default a secured party may take possession of collateral without judicial process only if it proceeds without breach of the peace.

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

but did have a claim under the Fair Debt Collection Practices Act. The debtor had no evidence to support her claim against the secured party and the repossession company for negligent hiring and supervision of the individual repossession agents. The defendants were entitled to summary judgment on the plaintiffs' claims for emotional distress because the only evidence was their own testimony; they offered no medical records because none of them consulted a physician and while a severely degrading event may lead to an inference of emotional distress, the incident was not so degrading as to excuse the plaintiffs' failure to explain their emotional distress with more specificity.

Comment: The Fair Debt Collection Practices Act and other consumer protection laws layer on top of UCC Article 9's foreclosure rules.

3. *Notice of Foreclosure Sale*

- *In re Reno Snax Sales, LLC*, 2013 WL 3942974 (9th Cir. BAP 2013) – The sale of collateral by bankruptcy trustee was not a disposition by the secured party under Article 9 or under a state statute requiring a secured party disposing of a repossessed vehicle to notify all obligors, even though the secured party received most of the sale proceeds. Thus the secured party had no duty to notify a co-obligor of the sale.

- *Santander Consumer USA, Inc. v. Superior Pontiac Buick GMC, Inc.*, 2013 WL 27921 (E.D. Mich. 2013) – Chattel paper financier had no duty to notify the car dealer it financed of sales of repossessed vehicles because the dealer was not the debtor or a secondary obligor with respect to such transactions.

- *GECC v. FPL Service Corp.*, 2013 WL 6238484 (N.D. Iowa 2013) – An equipment lessee under a lease that was really a sale and secured transaction could not waive prior to default the right to notification of a disposition of the equipment. The lessor's

disposition notification was inadequate because it did not cover all the collateral. As a result, there is a presumption that no deficiency is owing. Because of a lack of admissible evidence, summary judgment was inappropriate on whether the sale was commercially reasonable and on whether the lessor could rebut the presumption.

- *First Community Credit Union v. Levison*, 395 S.W.3d 571 (Mo. Ct. App. 2013) – A notification of disposition sent to each of two co-debtors in a consumer transaction needed to identify the debtor to whom it was addressed but did not need to identify the co-debtor. Although the notification did not expressly state that the amount to redeem could be obtained by calling a specified phone number, it stated the amount due, instructed the debtor to call the lienholder for the cost of repossession, and listed the phone number of the secured party and the phone number of a "Repossessed Auto Specialist." Because there was no evidence that the redemption amount could not have been obtained by calling one of those numbers, the notification complied with this requirement. Although the notification did not expressly state that additional information concerning the disposition and the secured obligation could be obtained by using a phone number or mailing address provided, no such statement is needed as long as a phone number or address is provided, and both were.

- *Boulevard Bank v. Malott*, 397 S.W.3d 458 (Mo. Ct. App. 2013) – A notification of disposition in a consumer transaction stating that "[t]he collateral will be sold at a public/private sale" failed to notify the debtor of the method of the disposition and was therefore insufficient as a matter of law. The debtor was thus entitled to statutory damages even though the debtor did not challenge the commercial reasonableness of the sale.

- *Colonial Pacific Leasing Corp. v. N & N Partners, LLC*, 2013 WL 5880590 (N.D. Ga. 2013) – A secured party that sent notification

that collateral would be sold at a public sale was entitled to a judgment for the resulting deficiency even though the sale was held at 8:00am and Georgia statutorily defines a public sale as one occurring between 10:00am and 4:00pm. If this nevertheless was a public sale the debtor alleged no injury from the early start and if this was a private sale, the error in the notice was minor and caused no damage. The fact that the notices of other sales of collateral were sent by a subsidiary of the secured party, rather than the secured party itself, was immaterial because there was no evidence that this interfered with the debtor's right to redeem the collateral.

- *Regions Bank v. Thomas*, 2013 WL 791616 (Tenn. Ct. App. 2013) – A secured party that, during lengthy dispute about the debtor's failure to insure collateralized aircraft, notified the debtor that it "may also elect to exercise its rights as a secured creditor to take possession of, store and sell the aircraft and its engines" and later that it "understands that the aircraft will require as yet unknown repairs in order to enable the aircraft to be transported to any place of sale" did not thereby comply with the requirement to notify the debtor of the time and place of a public sale or the date on or after which a private sale would be conducted. As a result, the sale was not commercially reasonable and the secured party is presumed not to be entitled to recover the resulting deficiency.

- *Barclays Bank PLC v. Poynter*, 710 F.3d 16 (1st Cir. 2013) – A security agreement provided: (i) that the secured party may sell yacht "after first giving Owner notice thereof ten (10) days in advance of the time and place of sale" and, alternatively, (ii) that the secured party may exercise any "rights, privileges and remedies granted by applicable law". The security agreement did not in fact require ten-days notice of the sale. The secured party was therefore entitled to the deficiency resulting from a sale two months after the secured party sent notification that

the yacht "will be sold by way of private sale sometime after the date of this letter."

- *Gardner v. Ally Financial Inc.*, 61 A.3d 817 (Md. 2013) – Collateralized vehicles were sold at a private sale, not a public sale, under Maryland's Credit Grantor Closed End Credit law because even though the public was invited through weekly advertisements in the *Baltimore Sun*, non-dealers had to provide a refundable $1,000 deposit to attend, which obscured the transparency that is the hallmark of an open, public sale. As a result, the secured party failed to send the required post-sale disclosure.

- *Rich v. Ford Motor Credit Company, LLC*, 741 S.E.2d 163 (Ga. Ct. App. 2013) – A secured party complied with a Georgia statute that requires a secured party to notify the debtor of its intent to pursue a deficiency within ten days after repossessing a motor vehicle because the ten-day period begins on actual repossession, not when the secured party places the debtor's account on "repo status."

- *Smith v. Toyota Motor Credit Corp.*, 2013 WL 1325460 (D. Md. 2013) – Maryland Credit Grantor Closed End Credit law requires a secured party that repossesses automobiles to give advance notification of the time and place of a sale, regardless of whether the sale is conducted as a private or public sale.

4. *Commercial Reasonableness of Foreclosure Sale*

- *Ross v. Rothstein*, 2013 WL 3793585 (D. Kan. 2013) – A secured party to whom the debtor had, pursuant to a settlement agreement, delivered a pledged stock certificate with a legend indicating that resale was prohibited by SEC Rule 144 was entitled to an order directing the debtor to do all he could to provide a new certificate without the restrictive legend because the secured obligation was with recourse and thus the six-

month holding period began when the debtor acquired the shares and had long expired.

- *Edgewater Growth Capital Partners LP v. H.I.G. Capital, Inc.*, 2013 WL 1689028 (Del. Ch. Ct. 2013) – A foreclosure sale of entire business to a shell company formed by largest holder of the senior secured debt had to be public to comply with Article 9. A sale is public when there is an opportunity to bid accompanied by presale advertising or invitations sent to interested bidders. A negotiated agreement between the secured party and the debtor that provides a structure for marketing the collateral does not necessarily make a sale private; what matters is whether the process used gave third parties a meaningful opportunity to bid for the business.

  The secured party's agreement with the debtor pursuant to which the secured party allowed the debtor to market the business for 55 days (later extended to 83 days) with the assistance of a financial consultant hired by the secured party enhanced the commercial reasonableness of the ultimate sale, rather than detracted from it, because it helped identify the interested parties to whom an invitation to bid was sent. Because two advertisements were placed in the *Wall Street Journal* and invitations were sent to more than 60 entities identified by a financial consultant as the parties most likely to bid, the sale was public even though no other bidders attended. The commercial reasonableness requirement did not require the secured party to extend the sale process given that the business to be sold was insolvent and losing money. The sale was commercially reasonable even though of the 36 entities that signed a nondisclosure agreement and received confidential information about the business, none made an offer or showed up at the foreclosure sale.

- *Security Alarm Financing Enterprises, Inc. v. Parmer*, 2013 WL 593767 (N.D.W. Va. 2013) – A judgment lienor stated a claim

against a senior secured party for conducting a commercially unreasonable disposition by alleging that the secured party conducted the sale on a Saturday morning, imposed unusual and restrictive financial conditions upon potential bidders, and refused to allow potential bidders to inspect or otherwise access the assets being sold, all in an effort to orchestrate a sale to a company owned by a related party to escape liability for its unsecured debt. The lienor also sufficiently alleged a basis for successor liability by claiming that the management and operation of the business remained the same after the sale.

- *Gulf Coast Farms, LLC v. Fifth Third Bank*, 2013 WL 1688458 (Ky. Ct. App. 2013) – Because the debtor's security agreement covering equine collateral expressly provided that "any disposition of Collateral at a regularly scheduled auction where similar Collateral is ordinarily sold (*e.g.* Keeneland or Fasig–Tipton sales) with or without reserve . . . is per se commercially reasonable," the secured party's sale of the collateral at a Keeneland sale was commercially reasonable and the debtors could not argue, even through expert testimony, that the secured party's disposition was commercially unreasonable.

- *Ally Financial Inc. v. Bosch Motors, Inc.*, 2013 WL 1326479 (D. Nev. 2013) – Debtor/auto dealership did not raise a factual issue concerning the commercial reasonableness of the secured party's sale of the dealership's inventory only by alleging that the sales price was below Kelley Blue Book wholesale value. The secured party sold some vehicles to the manufacturer at prices almost equal to the amount financed and sold others at dealers-only auctions and through direct sales, but the debtor did not allege that the manner of these sales was commercially unreasonable.

- *KeyBank v. Hartmann*, 2013 WL 1312013 (E.D. Ky. 2013) – A secured party was not entitled to summary judgment in its deficiency action against guarantors despite their contractual

waiver if "all defenses, legal or equitable, otherwise available" because the guarantors were "obligors" under Article 9 and could not waive the requirement that a foreclosure sale be conducted in a commercially reasonable manner, the guarantors had raised the issue of commercial reasonableness in their answer, the secured party has the burden of establishing the commercial reasonableness of the sale, and the secured party had not offered any evidence on the issue.

- *Bank of America v. Ardelean*, 971 N.Y.S.2d 69 (N.Y. Sup. Ct. 2013) – A secured party was not entitled to summary judgment in its deficiency action against debtor because the $10,000 discrepancy between the original purchase price of the collateral, which debtor possessed for approximately one month, and the proceeds of the foreclosure sale raised the issue of commercial reasonableness. The secured party has the burden of establishing the commercial reasonableness of the sale and the secured party had not offered any evidence on the issue.

- *Mason Logging Co. v. General Elec. Capital Corp.*, 746 S.E.2d 180 (Ga. Ct. App. 2013) – A secured party was not entitled to summary judgment on commercial reasonableness of its sale of logging equipment because the secured party has the burden of proving both that the terms of the sale were commercially reasonable and that the resale price was fair and reasonable in relation to the value of the collateral. The debtor's lay opinion about value was sufficient to create a factual issue precluding summary judgment.

- *Spizizen v. National City Corp.*, 516 F. App'x 426 (6th Cir. 2013) – A secured party was entitled, after the debtors' default, to freeze the collateralized securities account containing securities entitlements valued in excess of the secured obligation. The security agreement expressly gave the secured party the right to refuse debtor access to the account and both the agreement

and UCC the UCC gave the secured party the *right* to sell the entitlements but not the *obligation* to do so. The secured party's setoff against deposit account was proper regardless of who owned the deposited funds because the deposit account agreement expressly so provided and thus more restrictive common-law rules were irrelevant.

- *Smith v. Firstbank Corp.*, 2013 WL 951377 (Mich. Ct. App. 2013) – A secured party's private sales of publicly traded stock in blocks of 600,000 and 450,000 shares to brokerage firms at prices below the prevailing market price per share were commercially reasonable due to the concern that sales of such large blocks on the exchange would depress the price, a concern that was reasonable given it had occurred the previous year with respect to this stock.

- *Deer Creek Excavating v. Hunt's Trenching*, 2013 WL 1400970 (Ohio Ct. App. 2013) – A buyer with a security interest in a rejected machine sold the machine in a commercially reasonable manner because the sale was via an auction conducted by professional auctioneers, the sale was advertised, and the machine was available for inspection three days prior to auction.

- *FDIC v. Moore Pharmaceuticals, Inc.*, 2013 WL 1195636 (D. Nev. 2013) – The FDIC's sale of a portion of the collateral for a price equal to an independent appraiser's estimate and its decision not to sell the remainder of the collateral because it was worth less than the cost of transportation and sale was commercially reasonable.

- *In re Strata Title, LLC*, 2013 WL 2456399 (Bankr. D. Ariz. 2013) aff'd __ B.R. __ (9th Cir. BAP 2014) – A "self-operative" term in an LLC operating agreement between two 50% owners provided that one of them would become the 100% owner if its capital contribution was not repaid by a specified date created a security interest. Although that security interest was

unperfected and the date had not yet occurred when the other member filed for bankruptcy protection, the bankruptcy trustee took subject to that term because Arizona law gives LLC members the authority to adopt provisions in an operating agreement governing the relations between members, changes in classes of members, and the right to acquire other member's interests. As a result, the debtor's interest ceased to be property of the estate when the specified date passed without the other member receiving its capital contribution.

- *Eighth & Jackson Inv. Group v. Kaw Valley Bank*, 2013 WL 183753 (D. Kan. 2013) – Interpleader action brought by buyer of pledged LLC membership interest in which buyer sought both an order about who was entitled to the purchase price and a declaration that buyer acquired the interest free and clear was proper as to the purchase price, which had been deposited with the court, but not as to the declaratory relief.

- *Fifth Third Bank v. U.S. Department of Agriculture-Rural Development* 2013 WL 529858 (W.D. Mich. 2013) – Bank against which default judgment was entered when it failed timely to respond to writ of garnishment could nevertheless bring interpleader action to determine whether garnishor's interest in deposit account was superior to the interests of prior garnishor or secured party with control.

- *System Soft Technologies, LLC v. Artemis Technologies, Inc.*, 837 N.W.2d 449 (Mich. Ct. App. 2013) – A judgment creditor could be enjoined from collection activities and its writs of garnishment against account debtors could be quashed because the judgment debtor's secured lender had priority in the debtor's assets, even though, after declaring the debtor in default and accelerating the debt, the secured lender entered into a forbearance agreement with the debtor and was allowing the debtor to operate its business by not foreclosing the security interest.

- *CIMC Raffles Offshore (Singapore) Pte. Ltd. v. Schahin Holding S.A.*, 2013 WL 4082973 (S.D.N.Y. 2013) – A creditor with a judgment against an entity that managed the operations of charter vessels and that could request draws for operating expenses from the administrative agent for the senior secured lenders was entitled to an order directing the administrative agent to remit all draw requests to the judgment creditor but the judgment creditor could not attach assets under the control of the senior lenders or require the judgment debtor to request draws.

- *Helicon Partners, LLC v. Kim's Provision Co., Inc.*, 2013 WL 1881744 (Bankr. S.D. N.Y. 2013) – A secured party could, under New York Law, attach by way of *ex parte* garnishment the deposit account of the entity to which debtor had fraudulently transferred accounts and which the debtor had operated as an alter ego.

- *Enterprise Bank & Trust v. Lipton*, 2013 WL 394868 (W.D. Pa. 2013) – Another secured creditor was not a necessary party to a secured party's action against the debtors for delivery of the collateral because Article 9 protects the other creditor's interests – regardless of whether its interest is senior or junior to the plaintiff's – and the debtors faced no risk of double liability or inconsistent obligations given that their personal liability had been discharged in bankruptcy.

- *Bank of America v. Sea-Ya Enterprises, LLC*, 2013 WL 126268 (D. Del. 2013) – A secured party who failed to send notification of disposition to one guarantor rebutted the presumption that the guarantor was not liable for the deficiency because the secured party conducted a commercially reasonable sale and the guarantor – who never read the transaction documents – neither would nor could have affected the outcome of the sale.

- *JPMorgan Chase Bank v. Chelsie Corp.*, 2013 WL 2558428 (W.D. Mich. 2013) – Although a secured party was entitled to

summary judgment on its action against the debtor and guarantors on the secured obligation, because the creditor failed to address the requirements of 28 U.S.C. § 2004 regarding a judicial sale of personal property, the creditor was not entitled to summary judgment on its request for a judicial sale.

- *Crozier v. Wint*, 736 F.3d 1134 (8th Cir. 2013) – Because it was unclear if the secured transaction was a consumer transaction, the trial court erred in applying on summary judgment the absolute bar rule just because the secured party disposed of one small piece of collateral without providing notification to the debtors. There is no *de minimis* exception to the absolute bar rule.

- *Highland CDO Opportunity Master Fund, L.P. v. Citibank, N.A.*, 2013 U.S. Dist. LEXIS 40415 (S.D.N.Y. Mar. 21, 2013) – Debtor alleged sufficient facts to survive dismissal on its claims that the secured parties failed to sell collateral in a commercially reasonable fashion where the auctions were to close on New Year's Eve and where marketing efforts allegedly did not involve "typical industry players". The collateral assets involved were CLO interests and CDO interests.

- *Barclays Bank PLC v. Poynter*, 710 F.3d 16 (1st Cir. 2013) – The court interpreted the remedies provisions of a security document as providing for multiple independent sources of recovery for secured party. As a result, the secured party whose foreclosure sale notice did not satisfy one set of contractual requirements but did satisfy Article 9 requirements was sufficient.

- *Bergene v. Comty Bank of Tex., N.A.*, 2013 Tex. App. LEXIS 7209 (Tex. Ct. App. June 13, 2013) – The sale at a foreclosure auction to the secured party's subsidiary was commercially reasonable and the debtor was required to pay the deficiency amount because sale price bore a reasonable relation to market value.

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

   - *In re Hood*, 2013 WL 4776734 (Bankr. N.D. Miss. 2013) – A secured party was entitled to a judgment against the debtor for the amount of the secured obligation even though the bank had not yet disposed of the collateral. The fact that the collateral is available for sale does not prohibit entry of judgment before a foreclosure sale takes place. The debtor was, however, entitled to some credit for the repossessed collateral.

   - *Outsource Services Management, LLC v. Nooksack Business Corp.*, 292 P.3d 147 (Wash. Ct. App. 2013) – Because tribal corporation formed to operate casino on reservation expressly waived sovereign immunity in the loan agreement and in several subsequent forbearance agreements, the state court had subject matter jurisdiction to hear contract claim brought by lender. Because the waiver applied to "any dispute, claim or controversy between the parties hereto arising out of or relating in any way to this Agreement or any other Loan Document or any actions contemplated to be taken in accordance herewith or therewith," it was broad enough to waive not only the tribal corporation's sovereignty but also the sovereign protection of its property. The loan agreement was not void due to lack of approval by the National Indian Gaming Commission because it was not a Class III management contract in part because, even though the loan agreement granted the creditor a security interest in certain proceeds from the casino, it excluded revenues needed to pay operating expenses, thus ensuring that the secured party could manage the gaming facility even if the debtor defaulted.

   - *Lafferty v. Wells Fargo Bank*, 153 Cal. Rptr. 3d 240 (Cal. Ct. App. 2013) – A lender that received an assignment of retail installment sales contract for the purchase of a mobile home was, under the FTC Holder Rule, not only subject to the

debtors' defenses to payment but also liable for any claim that the debtors had against the dealer, limited to the amount the debtors had paid under the installment contract.

- *International Fidelity Insurance Company v. Bank of America*, 2013 WL 2249543 (Cal. Ct. App. 2013) – Even if a secured party with a mortgage on a hotel and condominium development project accepted an assignment of the surety bond that the developers obtained to insure the earnest money deposits of the condominium buyers, that assignment was for security and thus the bank did not assume any of the developer's obligations on the bond, in particular the obligation to reimburse the issuer.

- *Peel v. Credit Acceptance Corp.*, 408 S.W.3d 191 (Mo. Ct. App. 2013) – A lender that financed a borrower's purchase of a vehicle was liable under the Missouri Merchandising Practices Act for more than $1 million in compensatory damages, punitive damages, and attorney's fees for collecting on the borrower's obligation even though purchase of vehicle was void because the seller never provided the borrower with title to the vehicle.

- *Midkiff v. Crain Ford Jacksonville, LLC*, 2013 WL 2457272 (Ark. Ct. App. 2013) – A car seller whose agent broke into buyers' garage to retake car, thereby causing damage to the garage, after financing fell through was improperly granted summary judgment on buyers' claims for conversion, wrongful repossession, and violation of the Arkansas Deceptive Trade Practices Act. A factual issue remained about whether the "finance approval" contingency was satisfied when the buyers left the seller's showroom with the car.

- *Bediako v. American Honda Finance Corp.*, 537 Fed. App'x 183 (4th Cir. 2013) – A secured party that failed to provide the pre-disposition notification required by Maryland's Credit Grantor Closed End Credit law was nevertheless entitled to collect the principal amount of the debt. Because the payments made and

proceeds received from the disposition totaled less than the original principal amount of the debt, the secured party had no liability to the debtor.

- *Bassett v. Barnes Used Cars, Inc.*, 2013 WL 4506788 (Ill. Ct. App. 2013) – A debtor's cause of action for wrongful repossession and conversion based on the allegedly violent conduct of the secured party's agent during repossession was properly dismissed with prejudice because it was brought under UCC § 9-609 – which does not provide the debtor with a cause of action – rather than under UCC § 9-625. However, the debtor's claim for wrongful repossession and conversion based on debtor's claim not to have defaulted was improperly dismissed.

- *Tri-State Truck Ins., Ltd. v. First National Bank of Wamego*, 931 F. Supp. 2d 1120 (D. Kan. 2013) – A debtors' claim against a participant for damages resulting from filed financing statements in connection with loans that had been rescinded was barred by *res judicata* because the claim could have been raised in a prior action in which the debtors sought and obtained a judgment declaring that they owed nothing to any of the participants and that all UCC filings be terminated.

- *In re Fischer*, 501 B.R. 346 (8th Cir. BAP 2013) – A secured party initially failed, pursuant to a stipulated order, to file a termination statement after collateral was sold and proceeds disbursed. It later did file the termination statement. The secured party was not in contempt because the order only approved the stipulation and did not itself impose duties on the bank and, even if it had, the stipulation placed no deadline on the bank's duty.

- *Dealer Services Corp. v. American Auto Auction, Inc.*, 2013 WL 2451250 (Conn. Super. Ct. 2013) – A floor plan financier with PMSI priority in the debtor's vehicles failed to prove actual and constructive fraudulent claims against putative creditor with a junior security interest because there was insufficient evidence

that the junior secured party had fraudulent intent – even if the debtor did. There was also insufficient evidence that the debtor was insolvent at the time of or was rendered insolvent by the payments to the junior secured party.

- *St. Clair v. Capital One Bank (USA)*, 2013 WL 1110810 (D. Minn. 2013) – Although an employee of the repossession company hired by the secured party violated the Driver's Privacy Protection Act by improperly accessing information about the debtor in the Minnesota Department of Driver and Vehicle Services database, and a secured party has a nondelegable duty not to breach the peace during repossession, the secured party was not liable for violation because it did not result in a breach of the peace.

- *Nelson v. Santander Consumer USA, Inc.*, 931 F. Supp. 2d 919 (W.D. Wis.), *vacated*, 2013 WL 5377280 (W.D. Wis. 2013) – Because the purchaser of a loan after the debtor's default is a "debt collector" for the purposes of the Fair Debt Collection Practices Act, an entity that purchased the entire business of a creditor was a "debt collector" with respect to a loan that was already in default. The purchaser was liable for $571,000 in statutory damages for violating the Telephone Consumer Protection Act by calling the debtor's cell phone 1,026 times.

- *WC Capital Management, LLC v. UBS Securities, LLC*, 711 F.3d 322 (2d Cir. 2013) – A broker with a security interest in securities held in customers' accounts did not violate SEC Rule 10b–16(a) by not expressly disclosing the complex formulas it employed to calculate customers' collateral requirements or by not providing advance notice to customers before it changed its margin policies.

- *Firestone Financial Corp. v. King Amusements, Inc.*, 2013 WL 1286665 (N.D. Ill. 2013) – A debtor stated causes of action for a secured party's disposition of collateralized equipment at a

private sale without prior notification and for repossessing property not subject to its security interest.

- *MBK Services, Inc. v. Cole Taylor Bank*, 2013 WL 5436652 (Ill. Ct. App. 2013) – An agent that located and procured subcontractors so that debtor could bid on government printing contracts had no claim against the bank that had a perfected security interest in the debtor's assets and which seized the debtor's assets, including its receipts from the government, because even if the agent was the true owner of the government contracts, it had allowed the debtor to exercise full control over the funds received thereon and is therefore estopped from denying the bank's security interest. There was no basis for imposing a constructive trust on the receipts because the agent did not set up an escrow account or do anything else to protect its interest in the proceeds of the government contracts. Even if a constructive trust were imposed, the bank would still be entitled to priority because principles of equity cannot override the UCC's priority rules.

- *Catahama, LLC v. First Commonwealth Bank*, 2013 WL 5874578 (W.D. Pa. 2013) – A secured party with a senior security interest in accounts receivable was not liable under promissory estoppel to a junior secured party for allegedly agreeing to forbear from enforcing its interest. The junior secured party acted at its own risk by extending money without confirming directly with the secured party the specific details and temporal scope of the alleged subordination agreement.

- *Santander Consumer USA, Inc. v. Superior Pontiac Buick GMC, Inc.*, 2013 WL 27921 (E.D. Mich. 2013) – Summary judgment denied on whether car dealer breached obligations owed to its chattel paper financier because their contract was ambiguous about whether the dealer was to repurchase the vehicle or repurchase the chattel paper if the representations and warranties were untrue and because the financier was required

to use reasonable efforts to deliver the collateral and reasonableness is not something that can be decided on summary judgment. The fraud of dealer's employee in booking car loans – misrepresenting the equipment and options on the cars – did not give rise to an independent tort because the agreement dealt with misrepresentations and thus the sole basis of recovery must be in contract.

- *GECC v. Gary*, 2013 WL 390959 (S.D.N.Y. 2013) – Neither a debtor nor guarantors was entitled to set off against the secured obligation amounts that would have been received had the secured party consented to the debtor's proposed sublease of the collateralized aircraft because: (i) the parties waived the right to setoff in the loan agreements; (ii) the agreements explicitly required the secured party's consent to a sublease; (iii) there was no requirement that any failure to consent be reasonable; and (iv) even if reasonableness were required, the secured party reasonably withheld consent given that the requested financial information about the proposed sublessee was not provided and the transaction would have involved relocating the aircraft to Dubai under the supervision of an Estonian company, which would have made it more difficult to repossess the aircraft.

- *Mid-Am Building Supply, Inc. v. Schmidt Builders Supply, Inc.*, 2013 WL 1308980 (D. Kan. 2013) – A debtor remained liable to the seller of goods for the purchase price despite the secured party's repossession and sale of the goods. The debtor could not claim a defense to the duty to pay based on impracticability or frustration of purpose.

- *State v. LaPean*, 2013 WL 5354413 Wis. Ct. App. 2013) – An owner-operator of farm implements dealership was guilty of transferring encumbered property with intent to defraud even though nothing in the security agreement expressly required the debtor to remit proceeds to the secured party rather than

use them to pay business expenses. The secured party's representative testified that there was such a duty to remit proceeds to the secured party.

- *Land O'Lakes Purina Feed LLC v. Jaeger*, 2013 WL 5526994 (S.D. Iowa 2013) – A credit seller of pigs that retained a security interest in the pigs sold to and accepted by the buyer had no duty to mitigate its damages under either Article 2 or Article 9 by accepting return of or repossessing the pigs. The secured party could instead maintain an action for the unpaid purchase price.

- *AEL Financial, LLC v. Countryside Publishing Co., Inc.*, 2013 WL 5878435 (N.D. Ill. 2013) – Summary judgment denied on whether equipment lease broker that originated and sold equipment leases was liable for breach of its representations and warranties that the documents were genuine. While much of the equipment was fictitious, there was an undisclosed relationship between the seller and the lessee, and the lease included a charge for software that is free on the internet, the lessee did expressly represent that it had received the equipment and make substantial rental payments to the buyer of the lease. The lease broker was not liable for representing that the equipment had been delivered because the buyer of the lease knew that was not true when the representation was made. The inclusion of that representation in the documents was a mistake. The broker did not breach its representation that the lease was enforceable because even if the equipment did not exist and hence the lease buyer did not obtain a security interest in the equipment, there was no dispute that the lessee entered into the transaction and was bound thereby.

- *Regions Bank v. Hyman*, 2013 WL 5487035 (M.D. Fla. 2013) – A secured party that took ownership of collateralized aircraft through abandonment from the debtor and later resold the aircraft at a private sale was entitled to a deficiency judgment

against the guarantors based in the resale price, not the value as of the date that it took ownership, because the sale was conducted in a commercially reasonable manner.

- *Wells Fargo Bank v. Chesapeake Financial Services, Inc.*, 2013 WL 3805064 (D. Md. 2013) – A lender that advanced funds to finance the purchase of vessel but which was defrauded because the borrowers forged the purchase documents was entitled to summary judgment on its cause of action against the broker that originated the loan for breach of: (i) its representation and warranty that the "documents evidencing and securing the Obligations . . . are legally enforceable according to their terms"; and (ii) its obligation to repurchase the loan upon demand if any representation or warranty it made to lender "is false or misleading in any material respect." The repurchase obligation is not an illegal penalty clause. Broker may have a cause of action against the documentation company retained to document the transaction for breach of an alleged contractual duty to provide a valid certificate of documentation for the vessel but the documentation company did not have a contractual duty to verify the documents relating to the obligation. The lender stated a negligence cause of action against the documentation company because the company was providing processional services and knew of the lender's role in the transaction, thus making the lender a foreseeable plaintiff but the documentation company did not have a duty to affirmatively investigate or prevent fraud in the underlying transaction.

- *BNP Paribas Mortgage Corp. v. Bank of America*, 949 F. Supp. 2d 486 (S.D.N.Y. 2013) – Bank that served as served as indenture trustee, collateral agent, depositary, and custodian in connection with $1.6 billion secured loan to a corporate borrower had no duty as collateral agent under the security agreement or as indenture trustee under the indenture to follow the lenders' instructions to sue itself for breach of its duties

under the depositary agreement or custodial agreement. A person cannot bring an adversarial claim against itself, even when acting in different capacities. Moreover, the security agreement and indenture do not require such action because they limit the bank's obligation to those available under the law, and under the law an entity cannot sue itself. The bank also had no duty to assign the claim against itself because an assignor can assign only the rights it has and the bank had no right to sue itself. The bank was not liable for negligently failing to prevent the fraud perpetrated by the borrower's corporate parent because the bank had no duty independent of its contractual obligations and such claims were barred by the economic loss doctrine.

- *Wells Fargo Bank National Gasoline, Inc.*, 2013 WL 696651 (E.D.N.Y. 2013) 2013 WL 1822288 (E.D.N.Y. 2013) (subsequent ruling) – A credit agreement granted a secured party a security interest in accounts and required the debtor to hold the proceeds of accounts in trust for the secured party. Individuals transferred the proceeds from the collection account in which they were to be maintained and then used the proceeds for other purposes. The individuals were liable for conversion of the proceeds. Although a conversion claim arising out of contract must have an independent basis, the claim was independent because the individuals were not signatories to the credit agreement. Although one of the individuals had guaranteed the debt, the claim against him for conversion was nevertheless proper because as the conversion claim was based on unlawful possession of funds, not a refusal to pay the debt.

- *Medical Lien Management, Inc. v. Allstate Insurance Co.*, 2013 WL 2450632 (Colo. Ct. App. 2013) – A tort victim could, prior to settling his claim against tortfeasor's insurer, assign a portion of that claim to the creditor that paid his medical bills. That creditor then stated a claim against the insurer for issuing

payment directly to the tort victim despite previously receiving instructions to pay the creditor.

- *Walker v. International Recovery Systems, Inc.*, 2013 WL 3380579 (E.D. Pa. 2013) – A debtor could not maintain an action against repossession agent based on the alleged illegality of the secured loan because the putative secured party was an indispensable party and the security agreement required arbitration, and thus the claim against the repossession agent was not ripe for adjudication.

- *Williams Tractor, Inc. v. ANB Venture, LLC*, 2013 WL 2368803 (Ark. Ct. App. 2013) – An equipment buyer that took subject to a perfected security interest was liable for detention damages, measured by the rental value of the equipment, after refusing the secured party's demand for possession. The buyer was not entitled to any offset for the costs of storage or the repairs it made to the equipment.

- *Kadyk v. Long*, 2013 WL 2550742 (D. Or. 2013) – Debtor/mechanic had no cause of action for negligence against former employer, on whose premises the debtor had left his tools, for allowing a putative secured party to repossess the tools because the former employer owed no duty to the debtor to safeguard the tools.

- *Lobel v. Genesis Group Intern., Inc.*, 2013 WL 1818424 (S.D. Fla. 2013) – Creditors with a security interest in the shares of a corporation had no cause of action for conversion against individual who accepted an assignment of the corporation's trademark because the creditors had no rights in the trademark.

- *Blue Rider Finance, Inc. v. Harbor Bank Maryland*, 2013 WL 1196204 (D. Md. 2013) – Lender that, before providing bridge financing for production of film, relied on allegedly fraudulent representations of bank vice president that the bank held $13 million in escrow to secure the bridge loan stated a cause of

action against the bank based on both *respondeat superior* and negligent supervision.

- *In re Roden*, 488 B.R. 736 (Bankr. N.D. Ala. 2013) – Manager and sole employee of LLC that originated and serviced equipment leases was liable to the bank to which the leases had been sold, even though he had not personally guaranteed payment, for damages caused by commingling the rental payments received with the proceeds of leases assigned to other lenders in an effort to spread the losses among all lenders.

- *Amegy Bank v. Deutsche Bank Corp.*, 917 F. Supp. 2d 1228 (M.D. Fla. 2013) – A secured party was, after the debtor improperly sold the collateral and used the proceeds to pay down a mortgage loan and pay off a tax lien, not entitled to be equitably subrogated to the mortgagee's lien because the mortgage loan was not paid in full. The secured party was entitled to be equitably subrogated to the tax lien. The secured party's claims for conversion against another mortgagee and a depositary based on the deposit of some proceeds with the depositary and their subsequent transfer to the mortgagee would not be dismissed because the secured party adequately alleged that the mortgagee and depositary colluded with the debtor to violate the secured party's rights.

- *Pirrotti v. Respironics, Inc.*, 2013 WL 321772 (D. Conn. 2013) – Because a disposition of collateralized intangible assets occurred after little advertising, in the absence of competitive bids or outside attendees, and to the secured party that convened the sale, material facts remained unresolved as to whether the sale established the fair market value of the property. As a result, the value of the property might have exceeded the amount of the secured obligation and the sale might have been a constructively fraudulent transfer.

- *Healix Infusion Therapy, Inc. v. Heartland Home Infusions, Inc.*, 733 F.3d 700 (7th Cir. 2013) – Fact that provider of infusion therapy

services had filed a financing statement against one of its client's accounts did not provide a competitor with notice of the provider's services contract with the client sufficient to support a claim for tortious interference with contract under Texas law.

- *FUNimation Entertainment v. A.D. Vision, Inc.*, 2013 WL 2189881 (S.D. Tex. 2013) – Debtor had no standing to bring an antitrust claim against competitor that bought collateral from secured party who purchased it at a public sale after the debtor's default. Even if the competitor encouraged or conspired with the secured party to foreclose on the collateral, the foreclosure was legally permissible, the debtor's injury resulted from its own default, and the antitrust laws were enacted to protect competition, not competitors, and there was no harm to competition here.

- *Fourteen Florence Street Corp. v. Armenia Coffee Corp.*, 2013 WL 3466540 (N.J. Super. Ct. 2013) – Purchase of substantially all of the debtor's assets at a foreclosure sale by a corporation controlled by the debtor's principals, which then operated the same business with the same key employees, was a fraudulent transfer intended to hinder collection efforts of the debtor's landlord, as was the grant of the security interest. In addition, the purchaser had successor liability.

- *Tap Holdings, LLC v. Orix Finance Corp.*, 970 N.Y.S.2d 178 (N.Y. App. Div. 2013) – Subordinated lenders stated claims for piercing the corporate veil, successor liability, and fraudulent transfers against entity formed by senior lenders which acquired the membership interests in the debtor, reaffirmed the senior debt, and then continued the debtor's business at the same location using the same trade names, physical assets and website, and with the same executives in the same positions. The claims were not barred by a clause in subordination agreement providing that the subordinated lenders "waive any right to . . . challenge the appropriateness of any action the . . .

Senior [Lenders] take with respect to the Senior Debt and hereby consent to the . . . Senior [Lenders] exercising or not exercising such rights and remedies as if no other debt existed," because intentional misconduct cannot be waived.

- *U.S. v. Adaptive MicroSystems, LLC*, 914 F. Supp. 2d 1331 (Ct. Int'l Trade 2013) – A buyer that purchased assets of debtor from receiver could have successor liability as a continuation of the debtor's business given that one owner of the debtor held stock in the buyer, the buyer employed substantially all of same people as the debtor to carry out a similar business under the same trade name and out of some of the same locations, and the buyer held itself out to the public as the same entity as the debtor by boasting "Over 30 Years" of experience on its website.

- *Alb USA Auto, Inc. v. Modic*, 2013 WL 1697357 (Ohio Ct. App. 2013) – A secured party had a cause of action for replevin but not for conversion against a mechanic that had repaired collateralized motor vehicle and refused to release possession until payment of the repairs and storage costs.

- *UniCredit Bank AG v. Deborah R. Eastman, Inc.*, 2013 WL 237810 (D. Kan. 2013) – A noteholder that was appointed by an indenture trustee as the trustee's agent to enforce actions against debtor of securitized obligation facially had standing to bring the claim. The noteholder also had standing in fact. The sale and servicing agreement between the loan issuer and the special purpose entity created for the securitization transferred all rights to the loan, unlike what occurs in a participation agreement, and these rights were subsequently assigned to the indenture trustee, which assigned them to the noteholder. Moreover, the noteholder was a person entitled to enforce the note even if it was not a holder of the note.

- *America Atlantic Transmission v. Nice Car, Inc.*, 112 So. 3d 639 (Fla. Dist. Ct. App. 2013) – A secured party had no right under

the Florida Motor Vehicle Repair Act to post bond and thereby prevent mechanic lienor from selling the car and receive possession of the car; only the owner has such a right. The secured party has only a right to a hearing, at which the trial court has the authority to address secured party's concerns and order the posting of a bond.

- *Aidid v. Progressive Direct Insurance Co.*, 2013 WL 3284276 (Minn. Ct. App. 2013) – A medical provider who received an assignment of an insured's rights to payment from insurers and then filed a lien statement with the secretary of state held a security interest in the insured's claim against her automobile insurer – a health-care insurance receivable. The medical provider had no right to intervene in insured's action to confirm arbitration award for her insurer after the provider failed to act on the assignment or timely challenge the award.

- *SKS Investments Ltd., Corp. v. Gilman Metals Co.*, 2013 WL 249099 (D. Colo. 2013) – Summary judgment granted for creditor on promissory note but not on claim for the debtor's failure to file a financing statement because it was not clear that any damage resulted from the debtor's breach of that promise given that the creditor could itself have filed.

G. Collection

- *First Trinity Capital Corp. v. Catlin Specialty Insurance,* 2013 WL 6230099 (S.D. Miss. 2013) – Insurance premium financier had no right to collect unearned insurance premiums from the insurer because, due to the broker's fraud, the insurer never received any funds and the policies were never issued. The broker was not the agent of the insurer.

- *Pensco Trust Co. v. Blewett*, 2013 WL 3223637 (D. Id. 2013) – The obligation to collect on collateral in a commercially reasonable manner applies only if the secured party actually seeks to collect on collateral. A secured party with a security interest in a note

secured by a deed of trust had no duty to proceed against the maker of the note and could instead sue the debtors on the secured obligation. Idaho's one-action rule and anti–deficiency statute were not applicable on these facts.

- *Rolling Hills Bank & Trust v. Mossy Creek Farms Ltd. Partnership*, 828 N.W.2d 325 (Iowa Ct. App. 2013) – The maker of nonnegotiable promissory notes that the payee assigned to its lender discharged its obligation under UCC § 9-406 by paying the payee before it received notification of the assignment.

- *Reading Co-operative Bank v. Construction Co., Inc.*, 984 N.E.2d 776 (Mass. 2013) – An account debtor that, despite agreeing to pay secured party directly, sent twelve checks to the debtor, was liable to the secure party under UCC § 9-406 for the full amount of all those checks – $3 million – even though the secured obligation was only $530,000. The account debtor can seek to recover the resulting surplus under UCC § 9-608 by establishing itself as a subordinate creditor of the debtor. Because the secured party is entitled to the full amount of the misdirected checks, not merely its actual damages, it had no duty to mitigate damages by applying a guarantor's payment to the secured obligation. Although there was evidence that the secured party was aware of the account debtor's misdirection of payments before the final two checks were sent, the secured party's silence did not give rise to estoppel because there was no evidence that the account debtor was aware of or relied upon the secured party's implicit consent.

- *Chemical Bank v. Long's Tri County Mobile Homes, Inc.*, 2013 WL 2227848 (Mich. Ct. App. 2013) – Although guarantors waived their rights to require the creditor "to proceed against the maker or against any other person or to apply any security it holds or to pursue any other remedy," and thus the secured party would normally be entitled to enforce the guaranties without first attempting to enforce its rights to the collateral, because the creditor obtained a court order granting it possession of the

collateral – a fair reading of which means that the creditor was granted control over the collateralized accounts – the creditor had a non-waivable duty to collect or sell the accounts in a commercially reasonable manner. Maintaining exclusive control over the accounts while allowing their value to deteriorate was not "commercially reasonable."

- *Summit Financial Resources, L.P. v. Kathy's General Store, Inc.*, 527 F. App'x 724 (10th Cir. 2013) – An account financier had a cause of action against a customer of debtor who continued to prepay the debtor for goods after the customer received notification to pay the account financier directly because even though the transactions involved prepayment, they created accounts.

H. Retention of collateral

- *Nelson v. Vernco Construction, Inc.*, 406 S.W.3d 374 (Tex. Ct. App. 2013) – A secured party's forbearance agreement with a debtor recited that the secured party "now owns" the debtor's contract and tort claims in a pending lawsuit and further recited that "pursuant to applicable law, [secured party] is the owner of all claims (including commercial tort claims) identified in the Litigation." As a result the secured party who had accepted the claims in partial satisfaction of the secured obligation, was now the owner of the claims, and the debtor had no standing to prosecute the claims. As a result, the judgment in favor of the debtor had to be vacated.

- *McDonald v. Yarchenko*, 2013 WL 3809512 (D. Or. 2013) – By sending a written proposal and receiving no objection thereto within 20 days, the secured party conducted an effective acceptance of the collateral – the debtor's interest in an LLC – in full satisfaction of the secured obligation even though the collateral was worth at least $407,000 and possibly as much as $1.6 million while the secured obligation was only about $12,000.

- *Joyce v. Fidelity Real Estate Growth Fund II, L.P.*, 2013 IL. App (1st) 121697, 2013 Ill. App. LEXIS 401 (Ill. App. 2013) – A borrower defaulted on a loan and negotiated a forbearance agreement with the lender, pursuant to which the borrower delivered in escrow a deed in lieu of foreclosure. The forbearance agreement included a provision permitting the lender to accelerate the loan if the borrower failed to meet certain sales targets and the deficiencies were not cured within thirty days. The borrower failed to meet the sales goals and failed to cure the default within thirty days. The lender filed a deed in lieu of foreclosure and conveyed the property to its subsidiary. The borrower asserted it was not in default because it sold certain parking spaces allowing it to reach its sales goals, and, in the alternative, that a 1.5% shortfall was immaterial. The lender argued that the parking space sale was improperly characterized because it included an unreported debit to the purchasers account, and that the 1.5% shortfall was material because the forbearance agreement specified that any failure to meet sales goals would result in an event of default. The court held for the lender.

III. GUARANTIES

- *Ringgold Capital IV, LLC v. Finley*, 2013 IL App (1st) 121702, 2013 Ill. App. LEXIS 406 (Ill. App. June 19, 2013) – The court found that a borrower failed to plead valid fraud claims against a guarantor. On August 3, the guarantor executed a limited guaranty for obligations created under a July 27 loan agreement, which was never made. The borrower eventually entered into a loan agreement on August 24, with the same terms as the proposed July 27 loan agreement. The guarantor's guarantee was never re-executed or amended to reflect the August 27 closing date. The borrower defaulted on the loan and attempted to assert claims regarding the August 27 loan agreement. The guarantor did not have any obligations under the August 27 loan agreement.

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

- *In re Northlake Foods, Inc.*, 715 F.3d 1251 (11th Cir. 2013) – Debtor S corporation filed for Chapter 11 bankruptcy protection. The debtor had made a transfer dividend paid to its member as reimbursement for paying the debtor's taxes. The transfer was not fraudulent because the transfer did not make debtor or its creditors worse off, as the debtor would have had to pay the taxes itself had it not been an S corporation.

- *Paloian v LaSalle Bank Nat'l Ass'n (In re Doctors Hospital of Hyde Park)*, 2013 Bankr. LEXIS 4244 (Bkrtcy. N.D.Ill. 2013) – The latest edition in a series of cases analyzing fraudulent transfers, bankruptcy remoteness, and security interest issues, on remand from the Seventh Circuit. The decision involves findings of fact that the challenged sale of assets was made at a time the seller was solvent, was made to a stand-alone bankruptcy remote entity, and was a true sale.

V. LENDER AND BORROWER LIABILITY

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

- *Meyer v. U.S. Bank National Association*, 715 F.3d 703 (8th Cir. 2013) – An allegation that a lender forged a document relating to a loan agreement was precluded by a subsequently executed series of forbearance agreements releasing all claims against the lender.

- *Iqbal v. Zafar*, 2013 U.S. Dist. LEXIS 146393 (N. Dist. Ill. 2013) – A lender did not have a fiduciary duty towards the borrower nor did it have a specific duty to hire reasonable management and properly supervise management's operation of plaintiff's business. Express language in a forbearance agreement limiting the lender's duties and liabilities was helpful to the court's analysis.

- *AIG v. Bank of America*, 712 F.3d 775 (2d Cir. 2013) – The Edge Act does not apply to underwriting or sponsoring mortgage backed securities, and therefore that jurisdiction is proper in state courts for such suits.

- *Harris N.A. v. Hershey*, 711 F.3d 794 (7th Cir. 2013) – Court rejects defenses and lender liability claims by guarantor arising out of forbearance negotiations. Guarantor claimed fraud in the inducement, duress, and violation of the duty of good faith and fair dealing by the lender in arguing that it did not have to make good on its guarantee. The Court cites lack of evidence and the Illinois Credit Agreement Act in support of its conclusion.

B. Obligations Under Corporate and Securities Laws

- *Cheatham v. RCA Rubber Co. of Am.*, 2013 U.S. Dist. LEXIS 103012 (M.D. Tenn. 2013) – The court pierced the corporate veil between

two separate entities in order to use joint assets to satisfy ERISA obligations. In doing so, the court noted that a federal veil-piercing standard applies to ERISA cases, and suggested that "deference to the corporate identity may be particularly inappropriate in relation to ERISA because Congress enacted ERISA in part to protect employees who were being deprived of anticipatory benefits because of a corporate sham," citing earlier Sixth Circuit precedent. This case is an important reminder that creating wholly separate affiliates, including in securitization transactions, can be a challenge. There are, however, key distinctions between this case and a typical securitization structure. For example, the court ultimately held a parent responsible for liabilities of its subsidiary, where the parent had previously paid retirement costs of the subsidiary.

- *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62 (Del. Ch. 2013) – The Delaware Chancery Court analyzed a typical reverse triangular merger structure under Delaware law and concluded that the transaction did not constitute an assignment of assets to the post-merger entity by assignment of law or by contract. The conclusion is helpful where the reverse triangular merger clause is used where there are anti-assignment provisions that would be tripped by an assignment.

VII. COMMERCIAL PAPER AND ELECTRONIC FUNDS TRANSFERS

- *F.D.I.C. v. Cashion*, 720 F.3d 169 (4th Cir. 2013) – A receiver for a bank sought to enforce a promissory note that a borrower had made payable to the bank. As evidence, the receiver submitted a copy of the promissory note. The borrower requested production of the original note, which the receiver did not produce. The borrower contended that the receiver failed to meet its burden of proof of ownership of the note due it its failure to produce the original copy thereof. Under North Carolina law, the original note was not required to be produced where the borrower failed to call into question the note's authenticity with more than "bald speculation."

- *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81 (2d Cir. 2013) – The beneficiary alleged that the issuer failed to honor a letter of credit and the Second Circuit held that there was jurisdiction, noting that the issuer executed a letter of agreement stating "that sufficient contacts exist with the State of New York from this transaction" and consenting to personal jurisdiction in New York for any claim arising from such transaction. The court reasoned that if the trier of fact deemed this evidence credible, then sufficient contact would exist to confer personal jurisdiction upon the issuer in New York.

IX. CONTRACTS

- *American Express Co. v. Italian Colors Restaurant*, _ U.S. _ (2013) – Agreement to arbitrate is enforceable even if it as a practical matter makes the "effective vindication" of federal antitrust not possible.

X. OTHER LAWS AFFECTING COMMERCIAL TRANSACTIONS

A. *Consumer Law*

- *Dan's City Used Cars, Inc. v. Pelkey*, 133 S.Ct. 1769 (2013) – The Court concluded that the Federal Aviation Administration Authorization Act does not preempt the provisions of the New Hampshire Consumer Protection Act relating to towage and storage liens. The case may have implications in other scenarios where federal and state laws appear to overlap in the areas of consumer protection and liens.

B. *Professional Liability*

- *Garten v. Shearman & Sterling LLP*, 958 N.Y.S.2d 107 (N.Y. App. Div. 2013) – A secured party had no cause of action against its attorneys for malpractice in failing to provide him with a first-priority security interest because he knew the identity of the senior creditor and fully understood that his position would be junior when his loan was made. The fact that the debtor misled the secured party about the amount owing to the senior lienors and the debtor's own financial health were irrelevant because the secured party did not retain the attorneys to review the debtor's financial records.

- *DG Cogen Partners, LLC v. Lane Powell PC*, 917 F. Supp. 2d 1123 (D. Or. 2013) – Debtor had no cause of action against its attorneys for malpractice in connection with the execution of an unreasonably unfavorable settlement of tort and contract claims because the debtor's secured party had acquired all of the debtor's general intangibles at a foreclosure sale and thus the debtor was not a proper plaintiff.

- *Bolan Textile (HK), Ltd. v. DeHaan*, 2013 WL 1131066 (S.D. Ohio 2013) – Law firm's motion for summary judgment on client's

malpractice claim for negligently failing timely to perfect client's junior security interest was denied because factual questions remained about whether the client suffered damages.

- *Hattem v. Smith*, 2013 WL 6096535 (N.Y. App. Div. 2013) – Seller's legal malpractice judgment against its attorney for failing to perfect a security interest in the assets of the business sold to a buyer, which failure led to a loss of priority, reversed because an instruction on the seller's comparative negligence was warranted. There was evidence that the seller, who was experienced in commercial transactions, introduced the lender that acquired a prior security interest to the buyer for the purpose of financing the purchase and never informed the attorney of the lender's involvement in the transaction.

- *FDIC v. Lowis & Gellen*, LLP, 2013 WL 788188 (N.D. Ill. 2013) – Law firm being sued for negligence for failing initially to perfect client's security interest in chattel paper stated cause of action for contribution against client's subsequent counsel for its "overly zealous litigation tactics" that forced the debtor to file for bankruptcy protection within ninety days of when the security interest was eventually perfected, which resulted in the security interest being avoided in bankruptcy.

- *Gutarts v. Fox*, 961 N.Y.S.2d 101 (N.Y. App. Div. 2013) – Law firm being sued for malpractice related to its failure timely to perfect client's security interest had no claim or breach of contract, breach of warranty, or indemnification against company hired by law firm to file the appropriate paper work. There was no breach of contract because the company had been hired to file a UCC correction statement and a termination statement, which it did, and any negligence involved would not be actionable. There was no breach of warranty because no warranty was made. There was no right to indemnification because the invoice agreement

contained a liquidated damages provision limiting liability to the cost of the services provided.

- *Fagen, Inc. v. Exergy Development Group of Idaho, LLC*, 2013 WL 5781473 (D. Minn. 2013) – Law firm was not entitled to dismissal of third-party complaint brought against it by builder that had purchased 99% of the developer, subject to a repurchase obligation, and which allegedly relied on the law firm's true sale opinion.

- *Thermo Credit, LLC v. Cordia Corp.*, 2013 WL 425930 (E.D. La. 2013) – An accounts financier stated cause of action against debtor's attorney for negligently misrepresenting that the debtor had the power and authority to perform under the agreement – which included providing a security interest in receivables – when in fact the receivables were owned by subsidiaries that were not party to the security agreement. It did not matter that the receivables had not yet been identified at the time of the attorney's representation.