Commercial Law Developments

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Prepared by
Professor Stephen L. Sepinuck

GONZAGA
UNIVERSITY
SCHOOL OF LAW

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SECURED TRANSACTIONS

Scope Issues

1. *Lyon Financial Services, Inc. v. Illinois Paper and Copier Co.*,
   2016 WL 147654 (N.D. Ill. 2016)
   Factual disputes prevented summary judgment on whether a six–year lease of copier equipment was a true lease or a sale with a security interest. Although the lessee had a right to terminate, a factor suggestive of a true lease, that right was available only in extremely limited circumstances, when the lessee was essentially broke or when it would be otherwise legally impossible for it to make payments. Moreover, the price obtained for the equipment when it was sold after default suggests that the lease term equaled or exceeded the economic life of the goods and that the lessee's option to purchase for fair market value would have been for a nominal amount.

2. *In re Ajax Integrated LLC*,
   554 B.R. 568 (Bankr. N.D.N.Y. 2016)
   A four-year lease of equipment with an option to purchase at the end was a sale and secured transaction under the bright-line test of § 1-203(b) because even though there was a factual question as to whether the option price nominal as compared to the anticipated value of the equipment at the end of the lease term, the option price was nevertheless nominal because it was less than the lessee's anticipated cost of returning the equipment in the condition required by the lease. Even if the bright-line test was not satisfied, the transaction was still a sale and secured transaction under the economic realities test of § 1-203(a).

3. *In re Harris*,
   2016 WL 7732998 (Bankr. W.D. Mo. 2016)
   The debtor's four-month lease of a new bed and mattress was a true lease because, despite the debtor's right to become the owner of the goods by continuing the lease for three years, because the debtor had the right to terminate after four months with no penalty.

4. *In re Byrd*,
   546 B.R. 434 (Bankr. D. Id. 2016)
   A credit buyer who, when signing an agreement to purchase a motor vehicle and grant a security interest to the seller, also signed a document purporting to make the transaction null and void if third-party financing were not obtained, was the owner of the car even though the financing was not approved. Because the dealer had not complied with the certificate of title law within the requisite period, if it had a security interest that interest was unperfected.

5. *Purdue BioEnergy, LLC v. Clean Burn Fuels, LLC*,
559 B.R. 130 (M.D.N.C. 2016)
A seller of corn to the debtor had only a security interest, not ownership, of corn in a storage bin on the debtor's property and leased to the seller by the debtor because 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 is complete when the corn is received at the debtor's facility, and thus delivery occurred when the corn arrived at the storage bin. Retention of title by a seller of goods after delivery is limited in effect to reservation of a security interest.

6. *Fagen, Inc. v. Exergy Development Group of Idaho, LLC*,
2016 WL 5660418 (D. Minn. 2016)
A transaction between a developer and its financier by which: (i) the developer immediately conveyed 99 of the 100 membership units in a subsidiary that owned the project; (ii) the developer forgave about $11 million in debt, posted a $16.8 million letter of credit, and retained a security interest in the remaining membership unit; (iii) the developer had the right to repurchase the 99 membership units if it obtained sufficient financing by a specified date to repay all loans to the financier; and (iv) if such financing was not obtained, the remaining membership unit automatically transferred to the financier remained, was a secured transaction with respect to the one remaining membership unit.

7. *F.R.S. Development Co. v. American Community Bank and Trust*,
58 N.E.3d 26 (Ill. Ct. App. 2016)
A real estate developer's right to recapture from the city some of the cost of roadway and intersection improvements that benefit property outside the development is personal property – a general intangible – and thus the bank did not acquire those rights when it foreclosed on the real property. Instead, the bank had released its security interest in those rights when the bank released its security interest in general intangibles.

8. *In re Flour City Bagels, LLC*,
557 B.R. 53 (Bankr. W.D.N.Y. 2016)
Lenders with security interests in the debtor's general intangibles did not thereby have liens on the debtor's interest, as lessee, in several leased properties, because § 9-109(d)(11) excludes from the scope of Article 9 "the creation or transfer of an interest in . . . real property, including a lease." The lenders also did not have a security interest in the "economic value" of the leases because there is no difference between the leases themselves and their economic value and, even if they could obtain a security interest in the economic value, the financing statements' description of the collateral as "general intangibles" and "all assets" would not have been adequate to perfect.

9. *Tabatznik v. Turner*,
2016 WL 1267792 (S.D.N.Y. 2016)
Even though the secured obligation was evidenced by a note governed by New York law, a guarantor had no defense based on the lender's alleged failure to conduct a commercially reasonable disposition on Scottish real property. Article 9 of the UCC does not apply to real property or to the security agreements governed by Scottish law.

Attachment Issues

– Existence of Security Agreement

10. *In re Xinergy Ltd*,
2016 WL 551675 (Bankr. W.D. Va. 2016)
Language in an asset purchase agreement providing that, upon default, seller could enter and hold the leased premises, together with all equipment therein, so as to operate the business did not grant the seller a security interest in the leaseholds of the personal property because the agreement also stated that such language shall not be construed as a lien or security interest.

11. *In re Eggli*,
2016 WL 1417924 (Bankr. D. Neb. 2016)
A lender that somehow caused a lien to be noted on the borrower's certificate of title to a vehicle did not have a security interest because there was no authenticated security agreement.

12. *Power Up Lending Group, Ltd/ v. Danco Painting, LLC*,
2016 WL 5362558 (E.D.N.Y. 2016)
A one-page security agreement and guaranty, although not signed, was nevertheless effective because the signed loan agreement expressly provided that "the terms, definitions, conditions and information set forth in the . . . security agreement and guaranty . . . are hereby incorporated in and made a part of this agreement."

13. *Barnes v. Northwest Repossession, LLC*,
2016 WL 5373074 (N.D. Ill. 2016)
A document titled "Memorandum of Installment Sale" which mentioned a separate retail installment contract and bill of sale associated with a purchase of a vehicle, and which stated that the buyer's obligations "are secured by a retail installment contract and judgment note executed by the undersigned on this date," were insufficient to constitute a security agreement under the Illinois Commercial Code and the Motor Vehicle Retail Installment Sales Act in the absence of those referenced writings.

14. *In re Barry*,
559 B.R. 654 (Bankr. M.D. Pa. 2016)
It could not be determined at the summary judgment stage whether the lender that made a loan to a corporation had a security interest in a vehicle allegedly owned by the guarantor because the guarantor disputed the fact that he had electronically signed the note that contained the language purporting to grant a security interest and because the language identified the corporate borrower as the grantor but other documents indicated that the guarantor owned the vehicle. Although the guaranty also identified the vehicle as part of the collateral, the guarantor similarly disputed having executed the guaranty.

– Description of the Collateral

15. *Russell Road Food and Beverage, LLC v. Galam*,
180 F. Supp. 3d 724 (D. Nev. 2016)
The bank that received from a guarantor a security interest in the guarantor's property "in the physical possession of or on deposit with the Lender" did not thereby acquire a security interest in the guarantor's trademark, which was not in the bank's possession. Consequently, the buyers who purchased the borrower's real property at a foreclosure sale did not acquire the trademark; the borrower did not own it and the bank did not have a security interest in it.

16. *In re White*,
2016 WL 3177247 (Bankr. D.N.M. 2016)
The documents for a third loan between a credit union and one of its customers, which described the collateral as including "all property securing other plan advances and loans received in the past or in the future" and which also stated that "[c]ollateral securing other loans with the credit union may also secure this loan" were ambiguous and did not clearly describe the vehicles that secured the prior two loans. Consequently, the credit union was not entitled to summary judgment on the customer's claim for violation of the automatic stay and discharge injunction.

17. *In re Gracy*,
555 B.R. 767 (D. Kan. 2016)
A mobile home that was anchored to piers and slabs by metal strips and connected to utilities through underground supplies was a fixture under the common law – even though the home was still covered by a certificate of title – and thus the reference in a lender's mortgage to "fixtures" covered the mobile home.

18. *Porter Capital Corp. v. Horne*,
2016 WL 4197328 (N.J. Super. Ct. 2016)
Although a promissory note is an instrument – not an account – and hence was not covered by a security agreement's reference to "accounts," it was nevertheless covered by the security agreement's reference to "rights to payment . . . evidenced by an instrument."

19. *Kirk Excavating & Construction, Inc. v. AYS Oilfield*,
2016 WL 4733277 (S.D. Ohio 2016)
A bank that had a security agreement and filed financing statement covering "[a]ll [the debtor's] rights to payment, whether or not earned by performance, including, but not limited to, payment for property or services sold, leased, rented, licensed, or assigned" did not have a security interest in the debtor's right to payment under a construction contract because the debtor had yet not performed the services when the agreement was signed and the financing statement was filed and the documents failed to include general intangibles in the description of the collateral.

20. *Morris–Rivers, LLC v. Sonic Cavitation, LLC*,
2016 WL 7341703 (D. Nev. 2016)
A secured party was not entitled to a preliminary injunction prohibiting the debtor from relocating two generator pumps – the debtor's only remaining valuable assets – because, among other reasons, the security agreement described the collateral as all of the debtor's "equipment owned . . . on the Maturity Date" and there was evidence that the equipment was not manufactured until after the Maturity Date.

– Obligations Secured

21. *In re Southeastern Stud and Components, Inc.*,
2016 WL 2604535 (Bankr. M.D. Ala. 2016)
A steel supplier that obtained a security agreement from a customer and filed a financing statement identifying itself as the secured party, but which provided the steel through a wholly owned subsidiary, had an attached and perfected security interest. The subsidiary was acting as the steel supplier's delegate given that the bills were in the steel supplier's name and all the debtor's payments were made to the steel supplier. Thus, the debtor's obligation to pay the purchase price was an obligation owed to the steel supplier. Even if the subsidiary was not a delegate, it was the steel supplier's agent.

22. *International Manufacturing Group, Inc. v. McFarland*,
2016 WL 7163588 (Bankr. E.D. Cal. 2016)
A business loan agreement that described the indebtedness secured as including a "Note," which was in turn defined to include "any other subsequent Notes evidencing future indebtedness," was sufficient to make the collateral secure future advances even though the agreement did not otherwise expressly refer to "future advances." Even if a lay person might not understand this, itself a point of questionable relevance, the loan was a business loan and the borrower was a sophisticated borrower. The fact that the parties entered into a new business loan agreement for each subsequent loan did not indicate a contrary intent but merely that the lender was trying to cover all of its bases, and those agreements expressly "amend[ed] and restate[d]" the original agreement. Even if there were a requirement that the loans had to be related for the collateral to secure the new debt, that issue needed to have been raised before the expiration of the statute of repose.

23. *In re World Imports, Ltd. Inc.*,
820 F.3d 576 (3d Cir. 2016)
A carrier could by agreement modify its maritime lien on goods in its possession to secure not only the charges for shipping those goods but also the charges for earlier shipments of goods that the carrier had released to the debtor, even though the maritime lien is a secret lien with priority over consensual security interests.

– Rights in the Collateral

24. *In re Tusa-Expo Holdings, Inc.*,
811 F.3d 786 (5th Cir. 2016)
Although payments by account debtors were deposited into a 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.

25. *Factor King, LLC v. Block Builders, LLC*,
2016 WL 804115 (M.D. La. 2016)
The factor that purchased accounts of a subcontractor was subrogated to the rights of the subcontractor, but because the subcontractor's agreement with the general contractor expressly provided that the subcontractor was to hold payments received from the general contractor in a trust fund for the benefit of unpaid suppliers, and the general contractor and subcontractor subsequently entered into an agreement providing for the general contractor to pay the suppliers directly – which agreement was binding on the factor – the factor had no cause of action against the general contractor for the amounts it paid to the suppliers. Summary judgment was inappropriate on whether the general contractor properly withheld payment for the correct amount due to the subcontractor's failure to perform all the work contracted for.

26. *In re 11 East 36th, LLC*,
2016 WL 1117588 (S.D.N.Y. 2016)
The bankruptcy court did not err in expunging the proofs of claims filed by a lender whose pledge agreement with a borrower purported to grant a security interest in its "right, title, and interest . . . in and to its membership interest" in a subsidiary LLC but whose financing statement – prepared and filed by the borrower – identified as the collateral several condominium units owned by the subsidiary. The lender did not have a security interest in the condominium units owned by the subsidiary and its security interest in the borrower's membership interest in the subsidiary was unperfected. The lender did not raise below its request for a constructive trust, so the court declined to consider it on appeal.

27. *In re Meruelo Maddux Properties, Inc.*,
2016 WL 6123556 (9th Cir. 2016)
A security interest in a shareholder's controlling interest in a bankruptcy debtor attached to the cash distributions and new shares in the reorganized debtor that the shareholder received pursuant to the confirmed plan but it did not attach to the controlling block of shares issued pursuant to the plan to the entity that provided post-petition financing.

– Other

28. *In re Omni Enterprises, Inc.*,
2016 WL 3213562 (Bankr. D. Alaska 2016)
Although the debtor paid off in full a 2009 bank loan secured by, among other things, deposit accounts, and although a 2013 loan from and security agreement with the same bank did not expressly include deposit accounts in the collateral, the debtor's deposit accounts were nevertheless encumbered because the 2009 security agreement covered future advances. Although the 2013 security agreement contained an integration clause, that clause provided that the agreement, "together with any Related Documents, constitutes the entire understanding and agreement of the parties," and the term "Related Documents" was defined to include existing security agreements.

29. *In re Thornton*,
2016 WL 3092280 (Bankr. S.D. Ind. 2016)
A security agreement that described the collateral as a manufactured home and "all goods that are or may hereafter by operation of law become accessions to it" covered the fireplace, smoke detector, furnace, water heater, electric main, built in dishwasher, shower and tub because each of these items could not be detached without causing injury and had little independent utility if removed. However, the security interest did not extend to the refrigerator, ice maker, oven, gas washer or gas dryer because these goods would have independent utility if they were removed from the home and could be removed without injury.

30. *In re Eaddy*,
2016 WL 745277 (Bankr. S.D. Ind. 2016)
A security agreement that described the collateral as a manufactured home and "all goods that are or may hereafter by operation of law become accessions to it" covered the porch, storm windows, metal skirting outside the mobile home, heating appliances, carpeting, fireplace, built-in dishwasher, and bathroom fixtures because none of these items have utility or value outside the home in which they are installed. However, the security interest did not extend to kitchen appliances, air conditioner, drapes and curtains, or smoke detectors. The definition of "accessions" in § 9-335 is relevant only to determining priority among competing lienholders and was not necessarily how the term should be interpreted in the security agreement.

31. *Carmel Financial Corp. v. Castro*,
2016 WL 7478048 (Tex. Ct. App. 2016)
A lender that financed the debtor's purchase of a residential water treatment system and perfected its PMSI in the goods with a fixture filing did not thereby acquire an interest in the real property and could not foreclose on the real property after the mortgagee removed the goods and offered them to the lender.

32. *In re Marriage of Shannahan*,
2016 WL 944307 (Cal. Ct. App. 2016)
The assignment of and security interest in a client's interest in insurance proceeds purportedly granted to a law firm violated the automatic temporary restraining order in the client's divorce proceedings and was, therefore, invalid. Although the restraining order does not prevent a party from using property to pay reasonable attorney's fees in order to "retain legal counsel" in the proceeding, this exception deals only with the cost of initially hiring counsel, not the fees and costs incurred thereafter to maintain counsel in the action.

33. *Charge Injection Technologies, Inc. v. E.I. Dupont De Nemours & Co.*,
2016 WL 937400 (Del. Super. Ct. 2016)
A corporation being sued for wrongful use and disclosure of proprietary information had no champerty defense after a litigation financier provided financing for the plaintiff's claim in exchange for a percentage of future proceeds of and a security interest in the claim. The financier did not acquire the claim itself or the right to control its prosecution, merely a share of the proceeds. Similarly, the financing arrangement did not constitute impermissible maintenance; the financier was not an officious intermeddler because the litigation preceded the financing arrangement and the financier had no right to control the litigation or the settlement of it.

34. *Eaglebank v. BR Professional Sports Group, Inc.*,
649 F. App'x 209 (3d Cir. 2016)
Even if a security agreement would be rendered invalid if the debtor lacked authority to enter into the underlying loan agreement – a point the circuit court did not resolve but expressed considerable doubt about – and even if the district court erred in concluding that the debtor's CFO had actual authority to borrow the funds, the CFO nevertheless had apparent authority to do so because, by virtue of his position, the CFO was cloaked with such authority, the debtor's counsel assured the lender in an opinion letter that the debtor could enter into the loan, and the debtor's Board of Managers passed a specific resolution authorizing the CFO to enter into the loan agreement and borrow money "without limitation."

35. *Hart v. First National Bank and Trust*,
2016 WL 1068993 (Ky. Ct. App. 2016)
The bank that loaned funds to a son and received in exchange a security agreement signed by the son covering a mobile home and a mortgage executed by the parents coving the land on which the mobile home was situated was entitled to an equitable lien on the mobile home if in fact it was owned by the mother.

36. *Stand Up Multipositional Advantage MRI, P.A. v. American Family Ins. Co.*,
878 N.W.2d 21 (Minn. Ct. App. 2016)
A patient's assignment of a no-fault insurance claim to a medical provider before services were performed was invalid because the applicable automobile insurance policy prohibited assignment and under Minnesota law an assignment is invalid if made before the medical provider bills the patient for medical services.

37. *In re Application of 140 W. 57th Street Building LLC*,
2016 WL 184528 (N.Y. Super. Ct. 2016)
A secured party that submitted an affidavit of its president – who was also a principal of the debtor – declaring that the secured party had a perfected security interest in the debtor's collateral and that, to protect its interest, the secured party had taken over control of the collateral, liquidated it, and deposited the proceeds in a deposit account, was insufficient to show that the deposit account in fact contained proceeds of the collateral or, if so, to what extent. Because the secured party did not have a control agreement, and therefore did not have a perfected security interest in the deposit account as non-proceeds, the secured party failed to create a factual issue to prevent the deposit account from being disbursed to a judgment creditor of the debtor.

38. *Mac Naughton v. Harmelech*,
2016 WL 3771276 (D.N.J. 2010)
The debtor's lawyer, who drafted a security agreement authenticated by the debtor purporting to grant the lawyer a security interest in "all of [the debtor's] . . . personal property," which agreement was ineffective because the super-generic language did not reasonably describe the collateral, was not entitled to have the security agreement reformed due to unilateral mistake. Such a mistake requires fraud or unconscionable conduct by the other party to be actionable, and there was no allegation that the debtor was at fault given that the attorney drafted the agreement. The attorney was not entitled to an equitable lien for the same reason.

39. *Granata v. Broderick*,
143 A.3d 309 (N.J. Super. Ct. 2016)
A lender that obtained a security agreement covering a lawyer's right to a contingent fee in a specified pending case had an Article 9 security interest in the lawyer's account. Because that interest was perfected by filing before two judicial liens were created on the right to the fee, the lender had priority.

40. *In re Johnson*,
554 B.R. 448 (Bankr. S.D. Ohio 2016)
A security agreement purporting to encumber "the payment, proceeds, and rights under and related to" the debtor's contract to play hockey for the Columbus Blue Jackets, failed to comply with California Labor Code § 300(b), governing assignments of wages, because the security agreement failed to state that there was no other assignment in connection with the transaction and because there was a pending garnishment order covering the wages. Accordingly, no security interest attached.

41. *Lakewood Credit Union v. Goodrich*,
887 N.W.2d 342 (Wis. Ct. App. 2016)
Even if the debtor had properly preserved the issue for appeal, the trial court did not err in concluding that a bank could and did obtain a security interest in a deposit account containing funds that the debtor originally received as social security benefits. Although 42 U.S.C. § 407(a) prohibits assignment of future benefits, it does not prevent a recipient from using benefits paid to satisfy or secure a preexisting obligation. Although § 407(a) also prohibits the use of "legal process" to obtain social security benefits payable or paid, it does not prevent a secured party from foreclosing non-judicially on its security interest, because that interest was consensual.

Perfection Issues

– Method of Perfection

42. *In re Shree Meldikrupa, Inc.*,
2016 WL 235205 (Bankr. S.D. Ga. 2016)
A creditor with a security interest in the debtor's inventory, and which had recorded a deed of trust to perfect its interest in the debtor's real property and rents but had not filed a financing statement, did not have a perfected security interest in the proceeds of inventory. The debtor, which operates a gas station, does not receive rents or any other revenue from the assignment of a real property interest.

43. *In re Blanchard*,
819 F.3d 981 (7th Cir. 2016)
Even though a vendor's interest in a land contract constitutes an account under Article 9, and filing a financing statement might be an effective way to perfect a consensual lien on that interest, because the vendor still has legal title to the real property, recording a mortgage is effective method to perfect the lien.

44. *In re Story*,
2016 WL 5210572 (Bankr. W.D.N.C. 2016)
A lender that advanced funds to consumers to purchase an HVAC unit, and which had an automatically perfected purchase-money security interest in the unit as consumer goods, did not lose perfection when the unit was installed in the consumers' home and became fixtures. Because fixtures and consumer goods are overlapping terms, unit remained a consumer good even after becoming a fixture. Moreover, a fixture filing is not necessary to perfect a security interest in fixtures, merely to have priority over certain real estate interests.

45. *In re Hudgins*,
2016 WL 5173239 (Bankr. W.D.N.C. 2016)
A lender that advanced funds to consumers to purchase an HVAC unit, and which had an automatically perfected purchase-money security interest in the unit as consumer goods, did not lose perfection when the unit was installed in the consumers' home and became fixtures. Because fixtures and consumer goods are overlapping terms, unit remained a consumer good even after becoming a fixture. Moreover, a fixture filing is not necessary to perfect a security interest in fixtures, merely to have priority over certain real estate interests.

– Adequacy of Financing Statement

46. *In re Sterling United, Inc.*,
2016 WL 7436608 (2d Cir. 2016)
Financing statements describing the collateral as "[a]ll assets of the Debtor including, but not limited to, any and all equipment . . . located at or relating to the operation of the premises at 100 River Rock Drive, Suite 304, Buffalo, New York" were effective despite the fact that the stated location of the collateral was incorrect because the language specifying the location modified the clause beginning "including, but not limited to," not the opening phrase "[a]ll assets of the Debtor."

47. *PHI Financial Services, Inc. v. Johnston Law Office, P.C.*,
874 N.W.2d 910 (N.D. 2016)
A lender with a security interest in the debtor's right to government payments under crop insurance programs was perfected by a filed financing statement describing the collateral to include such rights, even though the financing statement did not identify the crops covered.

48. *In re Fairmont General Hospital, Inc.*,
546 B.R. 659 (Bankr. N.D.W. Va. 2016)
A financing statement that identified the initial secured party as the debtor and the secured party's assignee as the secured party was ineffective to perfect because the financing statement did not properly identify the debtor. A subsequent financing statement that properly identified the debtor as debtor and identified the initial secured party as the secured party was also ineffective to perfect because the initial secured party no longer had a security interest.

– Control

49. *In re Southeastern Stud and Components, Inc.*,
2016 WL 2604535 (Bankr. M.D. Ala. 2016)
Although a deposit account control agreement between the debtor, a secured party, and a bank was terminated when the debt was paid off, the control agreement was ratified when new obligations arose. The control agreement was effective despite a discrepancy between the account numbers listed and the debtor's actual account numbers because all the parties knew and acted as if the agreement applied to the debtor's actual deposit accounts. Even if the control agreement were not effective, the deposit accounts contained only identifiable proceeds of the goods sold by the secured party to the debtor and in which the secured party retained a security interest.

– Collateral Covered by a Certificate of Title

50. *In re Ajax Integrated, LLC*,
2016 WL 1178350 (Bankr. N.D.N.Y. 2016)
A secured party that sent to the debtor notice of lien forms regarding 30 vehicles that served as collateral, but which forms the debtor never signed, did not have a perfected security interest in the vehicles.

51. *In re Parker*,
2016 WL 6783222 (Bankr. D. Id. 2016)
A secured party that prepared an application for a certificate of title noting its lien on a vehicle and gave the application to the debtor, who never filed it with the Idaho Transportation Department, did not have a perfected security interest. Idaho law specifies that a security interest on a titled vehicle is perfected "as of the date of the filing of a properly completed application with the department or an agent of the department," and this never occurred.

52. *In re Hadley*,
2016 WL 7383965 (6th Cir. BAP 2016)
Even if the debtor's attorney had a valid attorney's lien or security interest in two vehicles, that interest was not perfected by the attorney's possession of either the unendorsed title certificates or the vehicles. Perfection occurred, at the earliest, when the debtor signed the certificates, which occurred six days before the debtor filed for bankruptcy, and thus was preferential.

53. *Edgerly v. Vanderbilt Mortgage & Finance, Inc.*,
492 S.W.3d 100 (Ark. Ct. App. 2016)
Even if the certificate of title for the debtor's mobile homes was not amended to identify the secured party's assignee as the lienholder, the assignee was perfected under § 9-310(c) because it received an assignment of a perfected security interest.

54. *In re Sweeney*,
556 B.R. 208 (Bankr. E.D.N.C. 2016)
Because the debtor's manufactured home was not permanently affixed to the real property on which it was located, even though the home's wheels and axles had been removed, a security interest in the home and the accessions thereto was perfected by having the lien noted on the certificate of title. The home's vinyl siding, fiberglass tub, garden tub, water heater, furnace, fireplace, shutters, ceiling fans, and central air conditioning system were all accessions and thus the security interest in them was perfected. However, the range, washer, dryer, and refrigerator were not physically united with the home, were therefore not accessions, and thus the security interest in them was not perfected by the notation on the certificate of title. Because no financing statement was filed, the security interest in the appliances was unperfected.

– Other

55. *In re Spence*,
545 B.R. 280 (Bankr. W.D. Mo. 2016)
The debtor's interest in a boat slip was personal property, not real property, because the slip does not have a legal description, is not sufficiently tied to real property owned by the debtor such that liens against it can be recorded with Recorder of Deeds, is taxed by the county as personal property, and is attached to land owned by the U.S. Army Corps of Engineers and the Corps could decide not to reissue the permit for the slip, at which point it would have to be removed. Even if the slip was a fixture, it was a fixture on the Corps' land, not the debtor's. Consequently a couple's recorded deed of trust did not perfect their lien on the slip. Accordingly, the couple was not entitled to any of the proceeds from a sheriff's sale of slip.

– Bogus Filings

56. *United States v. Johnson*,
2016 WL 7408832 (E.D.N.Y. 2016)
A financing statement filed by a taxpayer identifying as the debtors two IRS agents and the United States should be declared void and the taxpayer should be enjoined from filing any further financing statement against any official of the United States.

Priority Issues

– Tax Liens

57. *In re Riley*,
550 B.R. 728 (Bankr. N.D. Miss. 2016)
A county's ad valorem tax lien on the debtor's mobile home had priority, pursuant to statute, over a previously perfected security interest. Although the statute granting priority excepts taxes under the Motor Vehicle Ad Valorem Tax Law, mobile homes are excluded from the definition of "motor vehicle" under that statute.

– Buyers

58. *Crestmark Bank v. Electrolux Home Products, Inc.*,
155 F. Supp. 3d 723 (E.D. Mich. 2016)
A buyer that provided tooling and raw materials to the seller, which then manufactured component parts, was not a buyer in ordinary course of business of the parts still in the seller's possession. Consequently, the seller's lender, which had a perfected security interest in all of the seller's assets, had priority in the parts. The lender also had priority in the remaining raw materials, which were part of the seller's inventory, because the buyer did not have a purchase-money security interest in the materials.

59. *Kaw Valley Bank v. Kanza Capital, LLC*,
2016 WL 197718 (Kan. Ct. App. 2016)
Even if the guaranty of the entity which received an assignment of a pledged certificate of deposit was not supported by consideration, the certificate remained subject to the security interest that predated the assignment because the secured party did not authorize the assignment free of its interest.

60. *Overton v. Art Finance Partners LLC*,
166 F. Supp. 3d 388 (S.D.N.Y. 2016)
Summary judgment was not appropriate on whether the merchant-buyers of expensive works of art from a broker took the art free of the ownership rights of the individual who entrusted them. Factual issues remained about to whom the owner had entrusted the art, whether the buyers bought the art or merely acquired a security interest in it, and whether the buyers observed reasonable commercial standards of dealing in the trade or acquired the art in something other – and hence qualified as buyers in ordinary course of business.

61. *DZ Bank AG Deutsche Zentral-Genossenschaftsbank v. Connect Insurance Agency, Inc.*, 2016 WL 631574 (W.D. Wash. 2016)
Buyer of debtor's insurance business was liable in conversion to secured party that had a perfected security interest in the debtor's assets. The fact that the secured party did not re-file in the jurisdiction where the buyer's primary place of business is located is immaterial because the buyer purchased in the state in which the financing statement was filed.

62. *Source One Financial Corp. v. Road Ready Used Cars, Inc.*, 2016 WL 1657226 (Conn. Super. Ct. 2016)
Regardless of whether the secured party's security interest in a vehicle was perfected – the department of motor vehicles had refused to issue a certificate of title until it received proof that the vehicle had passed a salvage inspection – the interest was attached and could be enforced against the debtor and against the dealer that acquired the car in trade with knowledge of the security interest. However, because the secured obligation had been paid, the secured party was not entitled to a writ of replevin.

63. *Broadway Warehouse Co. v. Buffalo Barn Board, LLC*, 39 N.Y.S.3d 555 (N.Y. Sup. Ct. 2016)
Although a landlord's security interest in a tenant's equipment and inventory was unperfected, the buyers of that property were not entitled to summary judgment on the landlord's claim for conversion because the landlord raised triable issues of fact as to whether the principals of the buyers had actual knowledge of the security interest.

64. *Bryan's Car Corner, Inc. v. Magnum*, 2016 WL 8377117 (Okla. Ct. Civ. App. 2016)
A creditor with a security interest in a vehicle that the debtor wanted to trade in, and which provided to a dealership an erroneous amount needed to pay off the secured obligation, was obligated to release the certificate of title for the vehicle after the dealership tendered the erroneous amount. The creditor's payoff letter was an authorization to sell the vehicle free of the security interest and was an offer that the dealership accepted. Although the dealership tendered the amount a few days after the ten-day period provided for in the payoff letter, there was conflicting evidence about whether the dealership had been informed of the correct amount before it tendered payment.

– Competing Security Interests

65. *Bayer Cropscience LP v. Stearns Bank*,
837 F.3d 911 (8th Cir. 2016)
The bank with a perfected security interest in the debtor's commercial tort claim had priority in the debtor's rights under an agreement settling that claim over another lender with an earlier security interest in the debtor's existing and after-acquired general intangibles because § 9-108(e) requires a heightened description for a commercial tort claim and attachment of a security interest in a payment intangible arising from the settlement of a commercial tort claim would undermine the requirement of § 9-108(e). The same conclusion generally applies to any payment made under the settlement agreement. However, to the extent that payment was for damage to equipment in which the earlier lender had a perfected security interest, the earlier lender's security interest attached and had priority.

66. *In re Energy Future Holdings Corp.*,
548 B.R. 79 (Bankr. D. Del. 2016)
Even if the waterfall in an intercreditor agreement covered distributions under the debtor's bankruptcy plan – and it did not because the waterfall in the agreement dealt only with payments out of the proceeds of collateral pursuant to the exercise of remedies – the first-lien lenders who funded the debtor's Deposit L/C Loan Collateral Account did not have priority over the other first-lien lenders because the intercreditor agreement gives all the first-lien lenders *pari passu* priority in all the collateral. While the credit agreement gives priority in the Deposit L/C/ Loan Collateral Account to pay "Deposit L/C Obligations," the first-lien lenders who funded that account are not owed such obligations.

67. *In re Radio Shack Corp.*,
550 B.R. 700 (Bankr. D. Del. 2016)
The restructuring of an ABL credit facility that, pursuant to an intercreditor agreement, was supported by a first lien on the debtor's Liquid Collateral and a second lien on the debtor's Fixed Collateral, did not require the consent or impermissibly impair the position of the term-loan lenders who had the reverse priority. Specifically, the conversion of a revolving loan into a term-out revolver did not reduce the debt outstanding or ABL lenders' commitment. Because all of the debt was outstanding at the time of the restructuring, the term-loan lenders cannot show that the restructuring negatively affected them.

68. *WM Capital Management, Inc. v. Stejksal*,
2016 WL 6037851 (N.D. Ill. 2016)
A creditor that received an assignment from the original secured party of a 2011 note secured by all of the debtor's assets could not assert priority over a bank that received an assignment from the original secured party of a 2010 note secured by the same assets, even though the 2010 note had a cross-collateralization clause, because the creditor did not receive an assignment of the 2010 security agreement. The notes and security agreements were separately assigned to different entities and now exist as separate and distinct loan packages.

69. *Ford Motor Credit Co. v. First National Bank of Crossett*,
500 S.W.3d 188 (Ark. Ct. App. 2016)
The competing claims of a floor plan financier with a perfected security interest in the inventory of a car dealership and a lender that financed the purchase of a vehicle by the owner of the dealership from the dealership should not have been resolved on the parties' motions for summary judgment. Whether the dealership owner was a buyer in ordinary course of business or whether the dealership was authorized to sell the car without remitting the proceeds to the floor plan financier – each of which would have allowed the dealership owner to take free of the security interest of the floor plan financier – were disputed factual issues.

70. *Overton v. Art Finance Partners LLC*,
166 F. Supp. 3d 388 (S.D.N.Y. 2016)
The secured lenders who purported to obtain a security interest in the artworks of an art broker did not have priority over the rights of an individual who delivered expensive works of art to the broker for sale but failed to file a financing statement because the broker was generally known by his creditors to be engaged in selling the works of others and thus the transaction between the broker and the owner did not qualify as a "consignment" governed by Article 9.

71. *Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S.*,
365 P.3d 1033 (Id. 2016)
The trial court erred in ruling that the components of a marina were personal property, not fixtures, based on the debtor's subjective intent because the issue must be determined from the objective circumstances. As a result, the trial court should not have concluded that a law firm with a perfected security interest in equipment had priority in the marina assets over a lender with a recorded deed of trust.

72. *PHI Financial Services, Inc. v. Johnston Law Office, P.C.*,
874 N.W.2d 910 (N.D. 2016)
A lender with a security interest in the debtor's right to government payments under crop insurance programs and which perfected that security interest by filing a financing statement in the state where the debtor was located had priority over an earlier secured party that initially filed a financing statement in a different state, where the crops were located, and only after the lender perfected its interest filed in the state where the debtor was located.

73. *Liberty Sport Aviation, L.P. v. Texas Hill Country Bank*,
2016 WL 4626238 (Tex. Ct. App. 2016)
A bank with a security interest in an aircraft perfected by filing with the FAA had priority over a lender's unperfected security interest granted earlier by a prior owner. Even if the lender was successful in its fraudulent transfer action against the prior and current owners, that would not invalidate the bank's security interest or entitle the lender to priority.

– Other

74. *ACF 2006 Corp. v. Ladendorf*,
826 F.3d 976 (7th Cir. 2016)
The victims of a lawyer's theft of client trust funds had priority over a lender with a perfected security interest in the attorney's fees due to the lawyer's firm because an Indiana statute gives the victims a lien on the lawyer's rights as of the date of the theft, that date predated the security interest, and another Indiana statute indicates that a professional services corporation does not alter the rights of the clients.

75. *Stierwalt v. Associated Third Party Administrators*,
2016 WL 2996936 (N.D. Cal. 2016)
A secured party had a perfected security interest in the debtor's deposit account as proceeds of the debtor's service contracts with customers, even though most customers paid in advance of when the services were rendered. As a result, the secured party had priority in the deposit account over a levying judgment creditor. However, when the marshal received the funds, the judgment creditor took free of the security interest under § 9-332(b) because it did not act in collusion with the debtor.

76. *GMIR Inc. v. Independence Bank of Georgia*,
2016 WL 5844337 (N.D. Ga. 2016)
A bank that had made secured loans to a contractor was not liable to a project owner – which was also the assignee of subcontractors' rights – for exercising setoff against the contractor's deposit account and not honoring checks payable to the subcontractors. The bank had a perfected security interest in the contractor's accounts, which took priority over the subcontractors' claims and the subcontractors were not entitled to a constructive trust.

77. *State of Oklahoma v. Fifth Third Bank*,
2016 WL 7315372 (Okla. Ct. App. 2016)
A bank that had issued a letter of credit had a perfected security interest in the applicant's deposit account to secure the bank's right of reimbursement. Accordingly, the bank did not have to turn the funds over to the receiver for the applicant, even though the bank had not filed a claim in the receivership proceeding. Secured claimants who seek to recover only from the collateral are not required to file a claim.

78. *In re Tuscany Energy, LLC*,
2016 WL 7666480 (Bankr. S.D. Fla. 2016)
The bankruptcy debtor's law firm, to which the debtor had provided funds prepetition as a retainer, had a security interest in the funds perfected by possession. The debtor's secured lender lacked a security interest in the funds because the law firm took the funds free of the lender's security interest under § 9-332(b). Even if the lender had a security interest in the funds, the security interest was unperfected because the funds came from a deposit account over which the lender did not have control, and hence the lender's security interest would be junior to the law firm's security interest.

79. *Telecom Asset Management, LLC v. FiberLight, LLC*,
2016 WL 7188008 (N.D. Cal. 2016)
A judgment creditor was entitled to a court order assigning to it the debtor's accounts receivable even though the accounts were already subject to a perfected security interest.

80. *Continental East Fund IV, LLC v. Crockett*,
2016 WL 3530991 (Cal. Ct. App. 2016)
A secured party that claimed a perfected security interest in the debtor's securities account was denied due process by a trial court order requiring the intermediary to turn over the proceeds of the account to a judgment creditor's attorney without first allowing the secured party or the intermediary to be heard.

81. *Abbas Corp. (PVT) Ltd. v. Michael Aziz Oriental Rugs, Inc.*,
2016 WL 1574030 (D. Mass. 2016)
The entity that a guarantor formed and funded to buy a secured note from the secured party did not thereby acquire priority over a judgment creditor in the borrower's assets. Instead, the transaction was effectively – and would be treated as – a payoff of the secured obligation, leaving the collateral unencumbered and subject to execution by the judgment creditor.

82. *Windsor Properties, Inc. v. JPMorgan Chase Bank*,
2016 WL 1056810 (Cal. Ct. App. 2016)
The buyer who purchased stock in a residential cooperative apartment from the cooperative association, after the association terminated the previous owner's lease through an unlawful detainer action, stated claim for declaratory relief by claiming that it acquired its interest free of the rights of the previous owner's secured party even though the association's interest was subordinated to the secured party's. The secured party received notice of the prior owner's default and failed to cure it. As a matter of law, the lease and its associated stock interest are indivisible; an occupant of a unit in a stock cooperative who loses his leasehold interest also loses his stock ownership. Consequently, the secured party lost its interest in the stock when the lease was terminated.

83. *Cyber Solutions International, LLC v. Priva Security Corp.*,
634 F. App'x 557 (6th Cir. 2016)
A secured party with a perfected security interest in the debtor's intellectual property – including the copyrights associated with a specific semiconductor chip – and which security interest had priority over the rights of a subsequent exclusive licensee, also had priority over derivative products developed by the licensee even though the license agreement purported to grant the licensee "the right to pursue improvements to the Licensed Technology" and required the debtor "to assign" to the licensee all rights to any improvements created or financed by the licensee. The agreement did not contemplate that title to improvements would automatically vest in the licensee, thereby preventing the secured party's interest from attaching under the after-acquired property clause; it contemplated instead that the debtor would have to transfer the rights. Hence the security interest did attach to the improvements under the after-acquired property clause.

84. *Guaranty Bank & Trust Co. v. Agrex, Inc.*,
820 F.3d 790 (5th Cir. 2016)
A secured party with a production-money security interest in the debtor's crops, which was perfected by filing in a state with a centralized filing system for the purposes of the Food Security Act, had priority over the rights of a buyer that had failed to register with the Secretary of State in advance of the purchase. The fact that the secured party also had a security interest in the debtor's accounts – and its rights to the account due from buyer might be subject to the buyer's setoff rights under § 9-404 – was immaterial because the secured party had priority on the crops purchased. Accordingly, the buyer was liable to the secured party for all the proceeds the buyer received from its subsequent sale of the crops.

85. *Classic Harvest LLC v. Freshworks LLC*,
2016 WL 4607860 (N.D. Ga. 2016)
Although the factor that acquired accounts from a produce buyer, subject to a PACA trust, was enjoined from using the accounts or their proceeds, the injunction did not apply to amounts that the factor collected on accounts acquired from other customers, which might be subject to other PACA trusts.

86. *Northwest Bank v. McKee Family Farms, Inc.*,
2016 WL 552946 (D. Or. 2016)
The company that stored and cleaned the debtor's seed had a possessory lien that was prior to a bank's perfected security interest in the seed. Although the storage contract included language that indicating that title to the seed remained with the debtor and that the seed storage company "shall have no title therein or lien thereon of the variety itself," in context that language did not waive the storage company's right to a possessory lien. The debtor was a licensee of the seed variety and this language meant only that the storage company could get no lien on the proprietary licensing interest of the Licensor.

87. *Oyens Feed & Supply, Inc. v. Primebank*,
879 N.W.2d 853 (Iowa 2016)
Pursuant to Iowa agricultural lien statute, which grants priority over a perfected security interest to an agricultural supplier who files a financing statement "within thirty-one days after the date that the farmer purchases the agricultural supply," a feed supplier had priority in hogs that fed on the feed only to the extent of the price of feed provided within 31 days before the feed supplier's filing. The filing was not relevant to later sales; the statute requires agricultural suppliers to re-file within a month after every sale. Although the feed supplier's priority is limited to "the difference between the acquisition price of the livestock and . . . the sale price of the livestock," because the debtor operated a farrow-to-finish hog facility, and did not purchase piglets, there was no acquisition price; the debtor's overhead might be an "acquisition cost," but it was not an "acquisition price." Thus, the feed supplier was entitled to priority in the full proceeds of the hogs to recover the price of the feed sold within the relevant time periods.

88. *Northwest Bank v. McKee Family Farms, Inc.*,
2016 WL 2841205 (D. Or. 2016)
A supplier that had an Oregon grain producer lien and that, when extending the lien did not provide notice to a bank with a security interest in the debtor's crops perfected by a financing statement filed in Pennsylvania, nevertheless had priority in the crops because notification need be sent only to those required to register with the Oregon Secretary of State, and the bank was neither required to nor did so register.

89. *In re Leonard*,
2016 WL 4035736 (Bankr. D. Neb. 2016)
The feedlot that financed the debtor's acquisition of and had a perfected security interest in the debtor's cattle had priority over the reclamation rights of the unpaid seller. The fact that bill of sale did not comply with state law because the debtor, as buyer, did not sign it and it lacked the parties' addresses was irrelevant. The feedlot was a good-faith purchaser, and hence had priority.

90. *Sunshine Heifers, LLC v. Purdy*,
2016 WL 4392815 (W.D. Ky. 2016)
The bankruptcy court did not err in concluding that cattle sold were the debtor's, not a lessor's, and thus the debtor's secured party had priority in the sale proceeds. Although many of the cattle carried the lessor's brand, 289 of 415 cattle sold bore two indicia of ownership: the lessor's brand and the secured party's ear tags. Moreover the debtor testified to over branding the cattle. Thus, the bankruptcy court did not err in treating the branding evidence as inconclusive. Because the cattle were delivered to the debtor's farm and incorporated into his operation before the lessor had a signed lease with the debtor and, in some instances, third parties provided the cattle to debtor or the debtor provided the funds for the initial purchase of the cattle, the debtor had sufficient rights in the cattle for the secured party's security interest to attach. Although the lessor did buy some of the cattle, those cattle were sold long before the sale at issue on this case.

91. *Blanken v. Kentucky Highlands Investment Corp.*,
2016 WL 310363 (E.D. Ky. 2016)
An insider that, after the debtor defaulted on an equipment lease, received an assignment of the lessor's rights, did not thereby become the owner of the equipment because the lease included a $1 option to purchase and was in reality a sale with a retained security interest. The assignment transaction, to which the debtor consented, did not constitute a strict foreclosure because none of the parties understood that the debtor was consenting to a transfer of its interest (or that its debt was thereby satisfied). Consequently, another perfected security interest in the equipment survived the transaction. Because the insider's security interest became unperfected, the other security interest had priority and the other secured party was not liable in tort to the insider for repossessing and disposing of the equipment after default. Factual issues remained as to whether the disposition was commercially reasonable.

92. *Edward E. Gillen Co. v. Insurance Co. of Pennsylvania*,
825 F.3d 816 (7th Cir. 2016)
The issuer of a *supersedeas* bond, which was subrogated to the judgment creditor after the bond was used to satisfy the judgment debt, had priority over the judgment debtor's secured lender in the proceeds of the debtor's excess insurance policy. The policy proceeds were paid into the court, not to the judgment debtor, and thus were never property of the debtor.

93. *Sovereign Bank v. American Rowing Association, Inc.*,
2016 WL 283618 (Ill. Ct. App. 2016)
A creditor with a perfected security interest in a truck that was later damaged in a fire had priority over the debtor's law firm in the proceeds of the claim against the truck's insurer. Although the common fund doctrine allows a law firm that creates, preserves, or increases a fund in which others have an ownership interest to be paid its fees from that fund, that doctrine does not apply when, as in this case, a creditor's claim existed irrespective of the outcome of the litigation.

94. *Penglai Jinfu Stainless Steel Products Co. v. Geemacher, LLC*,
2016 WL 660920 (E.D. Pa. 2016)
The seller of kegs for which the buyer had not paid was not entitled to reclaim the kegs because it failed to send notice within ten days of the buyer's receipt of the kegs and because reclamation is subject to the rights of a good faith purchaser, which the buyer's secured party qualified as.

95. *Heany v. Bennett Street Properties, LP*,
785 S.E.2d 1 (Ga. Ct. App. 2016)
Secured party's security interest in the trade fixtures of a debtor continued for a reasonable period after the debtor abandoned its lease of real property where the fixtures were located. Whether a reasonable time had passed is a factual issue on which summary judgment was not appropriate.

96. *In re Pettit Oil Co.*,
2016 WL 3034753 (Bankr. W.D. Wash. 2016)
A prepetition consignor of oil whose interest was admittedly governed by Article 9 and was unperfected was subordinate to the rights of the consignee's bankruptcy trustee. The proceeds of the consigned oil were not held by the consignee in a constructive trust for the consignor so as to defeat the rights of the bankruptcy trustee. However, because the parties had not briefed either which state's law governed priority or whether a lien creditor has priority in accounts receivable under that law, summary judgment was not granted on the parties' priority in the proceeds of the oil.

Enforcement Issues

– Default

97. *Mahavier ex rel. Mahavier v. PNC Bank*,
632 F. App'x 238 (5th Cir. 2016)
Because the debtor's pledge agreement expressly provided that a disposition of collateral would not cure any default, and because the debtor remained liable for $93,000 after the secured party liquidated the debtor's brokerage account and applied the proceeds to the secured obligation, the secured party could thereafter foreclose its mortgage on the debtor's real property.

98. *Bob Smith Automotive Group, Inc. v. Ally Financial Inc.*,
2016 WL 3613402 (Md. Ct. of App. 2016)
Even though the debtor executed a demand promissory note and security agreement simultaneously, and the security agreement required the debtor to remit to the secured party the amount advanced on each vehicle as it was "sold or leased," that language did not alter the demand nature of the note. Accordingly, the secured party did not have to prove a default or demonstrate that it acted in good faith in demanding payment.

99. *Barnes v. Northwest Repossession, LLC*,
2016 WL 5373074 (N.D. Ill. 2016)
A debtor who paid the principal balance of a debt allegedly secured by a vehicle, plus all other amounts except several $50/month late charges, was not in default because the late charges exceeded the maximum permitted under the Illinois Motor Vehicle Retail Installment Sales Act, and thus the creditor was not entitled to collect any portion of them. Even if the debtor had been in default when the creditor gave final notice and threatened repossession, the creditor waived that default by subsequently accepting eight payments, releasing the certificate of title to the vehicle, and not thereafter giving notice that strict compliance was required. Consequently, repossession of the vehicle violated both Article 9 and the Fair Debt Collection Practices Act.

– Waiver, Estoppel & Other Defenses

100. *Randolph Brooks Federal Credit Union v. Gess*,
2016 WL 4162890 (Minn. Ct. App. 2016)
The guarantor of a secured car loan had no defense to the secured party's motion for summary judgment on its claim to enforce the security interest. Although the guarantor had sought to have a Texas court review the title certificate, there was no evidence that the Texas court questioned the validity of the title (or why that would matter). Although the guarantor also submitted an affidavit claiming a prior security interest, under the terms of the debtor's agreement with the secured party, the guarantor had agreed not to use the car as collateral for other indebtedness.

– Replevin & Repossession

101. *Israel Discount Bank of New York v. H.N. International Group, Inc.*,
2016 WL 6023155 (D.N.J. 2016)
A secured party was not entitled to a prejudgment writ of replevin for seizure of the collateral or a prejudgment writ of attachment covering the debtor's bank accounts because the debtor was current on the secured obligation, there was significant factual dispute about whether the debtor was otherwise in default, and thus the secured party had not shown a likelihood of success on the merits. The secured party also failed to show that it would suffer irreparable injury because it made no effort to show – and did not even alleged – that the debtor is or is likely to become insolvent or otherwise unable to satisfy any judgment the secured party might ultimately obtain.

102. *Watts v. Wells Fargo Dealer Services, Inc.*,
2016 WL 6248018 (N.D. Ala. 2016)
A secured party was entitled to a preliminary injunction ordering the debtor to surrender to the secured party possession of the car serving as collateral because the debtor had exhibited an unusual unwillingness to pay the secured obligation, going so far as to tender a fraudulent check as payment, and thus the secured party had demonstrated a likelihood of irreparable injury if not provided with possession and any harm the debtor might suffer from losing access to his car does not outweigh the injury to the secured party from the debtor's inability to pay.

103. *Rivera v. Dealer Funding, LLC*,
178 F. Supp. 3d 272 (E.D. Penn. 2016)
Even if repossession agents removed personal property from the debtor's repossessed vehicle, littered the vehicle with trash, and damaged the vehicle by improperly towing it, such actions did not constitute a breach of the peace because they occurred after the repossession occurred. The breach of the peace standard focuses almost entirely on the interactions of parties at the time and scene of the repossession.

104. *Brooks v. Leon's Quality Adjusters, Inc.*,
2016 WL 4539967 (E.D. Cal. 2016)
A repossession agent did not breach the peace by entering the employee parking lot where the debtor was employed, hooking the debtor's car up to a tow truck, and then exiting the driveway by going the wrong way on a one-way street. Although a security guard waived her arms and yelled for the agent to stop after the agent had hooked up the car and started to drive away, it was not clear that the agent heard or observed the guard and in any event the repossession was at that point already completed. Although the employer had posted signs stating "No Repo Vehicles," "No Trespassing," "Private Property," and "Check With Guard Before Entering Plant," California law provides that the owner of chattels does not commit trespass by going on the land of another to take them without breaching the peace and the agent did not enter a locked or closed structure.

105. *Cooley v. J.M. Smith Corp.*,
2016 WL 3391575 (Miss. Ct. App. 2016)
A secured party that brought a replevin action seeking possession of collateralized inventory was entitled to an award of contractual damages for the value of the inventory that was missing.

106. *BCL-Equipment Leasing LLC v. Tom Spensley Trucking, Inc.*,
2016 WL 3461603 (W.D. Wis. 2016)
The lessees of equipment in a transaction that might or might not be a true lease stated claims for conversion and trespass against the lessor by alleging the lessor injured them by coming onto a third party's property without a legal right to do so, remained there after the third party asked them to leave, and disabled and removed the equipment.

107. *Lee v. Toyota Motor Sales USA Inc.*,
2016 WL 4608220 (N.D. Cal. 2016)
An individual debtor adequately alleged that repossession agents violated the Fair Debt Collection Practices Act by repossessing his vehicle before he was in default.

108. *BMO Harris Bank v. Singh*,
2016 WL 5798841 (E.D. Cal. 2016)
A secured party was entitled to a default judgment against the debtor for the unpaid portion of the debt and to an order requiring the debtor to transfer possession of the collateral to the secured party. The secured party was not entitled to an order permanently enjoining the debtor from using the collateral or restricting the secured party's access to the collateral, or to an order requiring the debtor to disclose to the secured party the precise location of the collateral, because nothing in Part 6 of Article 9 provides for such relief.

– Notification of Disposition

109. *In re Knight*,
544 B.R. 141 (Bankr. E.D. Ark. 2016)
Because the debtor, not the secured party, orchestrated the sale of the collateralized crops and farm equipment, the secured party was not required to send the debtor advance notification of the dispositions. It was the debtor who assembled the equipment at a location where it was inventoried and appraised, selected the auctioneer, and chose the auction date.

110. *Local Government Federal Credit Union v. Disher*, 2016 WL 4608196 (N.C. Ct. App. 2016)
A secured party's notification of a private disposition of a vehicle, which mistakenly listed the vehicle identification number where it should have indicated the date after which the vehicle might be sold, was inadequate as a matter of law regardless of whether the transaction was a consumer-goods transaction. Because the debtor had a valid defense to liability for a deficiency, the trial court erred in refusing to give her relief from a default judgment without considering whether she moved for relief within a reasonable time.

111. *In re Godfrey*, 557 B.R. 469 (Bankr. N.D.W. Va. 2016)
A secured party that entered into an agreement to sell the collateral to a buyer, and delivered possession of the collateral to the buyer, before sending to the debtor notification that the secured party intended to conduct a private sale, and which received payment from the buyer one day after the notification was sent but more than two weeks before the date specified in the notification, did not provide reasonable notification of the sale. Equitable title passed to the buyer when the buyer completed performance by paying for the goods, and that was a disposition within the meaning of Article 9.

– Conducting a Commercially Reasonable Disposition

112. *395 Lampe, LLC v. Kawish, LLC*, 2016 WL 1449205 (W.D. Wash. 2016)
A secured party that purchased the debtor's minority interest in an LLC at a public auction conducted by the largest Pacific Northwest auction marketing firm, preceded by newspaper ads and direct marketing to 150 targeted prospects, and for which 15 prospective bidders signed confidentiality agreements allowing them access to the data room, was conducted in a commercially reasonable manner even though the secured party was the only bidder, it made a credit bid, and acquired a controlling interest. Although the sale was delayed by three years, because the debtors did not show that the collateral had declined in value during that period, the collateral generated more in income during that period than the amount of default-rate interest that accrued on the secured obligation, and much of the delay was attributable to the debtor's litigation, the delay did not cause the sale to be commercially unreasonable.

113. *Chase v. Wells Fargo Bank*, 24 N.Y.S.3d 673 (N.Y. Sup. Ct. App. Div. 2016)
A debtor who had granted a security interest in her shares in a cooperative apartment was not entitled to an injunction requiring the secured party to conduct a judicial sale. Shares in a cooperative apartment are personal property governed by Article 9, not real property, so that the law requiring a settlement conference before foreclosure on residential real property does not apply, and a private sale would not be commercially unreasonable because a disposition made at the price current in a recognized market is commercially reasonable.

114. *Icon Agent, LLC v. Kanza Construction, Inc.*,
2016 WL 197803 (Kan. Ct. App. 2016)
A foreclosure sale of railroad construction equipment conducted by the world's largest industrial auction company, which had experience auctioning heavy and rail equipment and a large database of equipment buyers was conducted in a commercially reasonable manner.

115. *Highland CDO Opportunity Master Fund, L.P. v. Citibank*,
2016 WL 1267781 (S.D.N.Y. 2016)
Neither party was entitled to summary judgment on the commercial reasonableness of conducting an auction sale of CDOs on December 31, 2008, allegedly when market participants are not fully staffed and do not have available balance sheet or appetite to purchase securities. Moreover, the secured party, which was the high bidder, might have been enticed by the lack of liquidity to reduce the prospect of competitive bidding.

116. *WM Capital Partners LLC v. Thornton*,
2016 WL 7477738 (Tenn. Ct. App. 2016)
Because a secured party has no obligation to repossess the collateral, a delay in acquiring possession or control has no bearing on the commercial reasonableness of a subsequent disposition. However, because a delay between the secured party's acquisition of possession or control of the collateral and the disposition can affect the commercial reasonableness of the disposition, and the debtor had put commercial reasonableness at issue, summary judgment was not appropriate.

117. *Neighbors Federal Credit Union v. Anderson*,
196 So. 3d 727 (La. Ct. App. 2016)
A debtor failed to raise an issue about whether the secured party's sale of his truck for $4,000 was commercially reasonable, even though he alleged that the buyer resold it nine weeks later for $18,750, because the debtor submitted no affidavits or other competent evidence. The debtor's document from the Department of Motor Vehicles indicating the subsequent sale, in addition to being unsubstantiated and incompetent evidence, failed to reveal the complete history of the vehicle in the interim period.

118. *Palestine Water Well Service, Inc. v. Washington International Insurance Co.*,
2016 WL 7616684 (W.D. Tex. 2015)
The issuer of a performance bond, which had a security interest in any claim the insured might have against the bond beneficiary, acted in a commercially reasonable manner when settling the insured's $150,000 conversion claim against the beneficiary for $3,200. The issuer retained outside counsel, routinely monitored the case, retained a surety consultant to investigate the beneficiary's claims against the insured, and retained an engineering expert to investigate the beneficiary's claims. It ultimately disposed of the conversion claim in connection with a settlement of the beneficiary claims for over $1.3 million in damages. The conversion claim was one piece of the aggregate settlement, the state court approved the settlement, and the insured did not contest the agreement.

– Collecting on Collateral

119. *Forest Capital, LLC v. Blackrock, Inc.*,
658 F. App'x 675 (4th Cir. 2016)
A secured party had no private right of action under § 9-404 or § 9-607 against an account debtor for paying the debtor after receiving instructions to pay the secured party. The secured party did not properly plead a case for simple breach of contract.

120. *Tempay, Inc. v. Tanintco, Inc.*,
2016 WL 192596 (Tex. Ct. App. 2016)
Summary judgment was improperly granted against a factor that brought an action against an account debtor that had paid the debtor. Although the factor's initial written instruction to an account debtor to pay the factor had four errors – (i) it misidentified the account debtor; (ii) it was directed to the "Accounts Payable Manager" but the account debtor had no one with that title; (iii) it instructed the account debtor to pay the debtor; and (iv) it used an incorrect entity designation for the debtor – the account debtor nevertheless paid the factor directly for a year after receiving wiring instructions. This created a factual issue about whether the instruction reasonably identified the rights assigned. Although the account debtor, for the following year, paid the debtor directly after being verbally so instructed by the debtor's president, a factual issue remained about whether such an instruction had to be in writing.

121. *Santander Bank v. Durham Commercial Capital Corp.*,
2016 WL 199408 (D. Mass. 2016)
The agreement by which a law firm sold its accounts receivable to a factor was not void as against public policy even though the agreement required the law firm to forward to the factor copies of invoices that contained information regarding the names of a bank client's borrowers, their addresses, their account numbers, and a description of actions taken by the firm in representing the bank. Even if these disclosure violated the firm's duty of confidentiality, it did not render the factoring agreement void. Although the factor's notification to the bank client instructing it to make payment to the factor included a signature line for the bank's representative to accept, and the bank did not, the notification was nevertheless effective. However, the bank client had a claim in recoupment for the law firms breach of its confidentiality agreement, and because the amount of the bank's damages were in dispute, summary judgment was not proper on the factor's claim against the bank for paying the law firm after it received the instruction to pay the factor. The bank's conduct in making payments to the firm did not unequivocally waive its right to recoupment, especially given that many of the facts giving rise to its recoupment claim had yet to occur.

122. *Durham Commercial Capital Corp. v. Select Portfolio Servicing, Inc.*, 2016 WL 6071633 (M.D. Fla. 2016)

The agreement by which the law firm sold its accounts receivable to a factor was not void as against public policy even though the agreement required the law firm to provide the factor with copies of the law firm's invoices to its clients. The law firm's client was not entitled to summary judgment that the law firm had breached its agreement with the client by disclosing confidential information to the factor because the client had consented to the factoring agreement, which implicitly required disclosure of the client's need for representation and the fees it was charged, and even if the law firm had breached its duty of confidentiality, the client had not shown that the breach was material. On the other hand, the factor was not entitled to summary judgment because the law firm might have breached the agreement with its client and the client had not waived its right to setoff by making payments to the law firm after being instructed to pay the factor, especially since it might not at that time have known of the alleged breach. The client also failed to establish that the amounts the client paid to the law firm – after being instructed to pay the factor – to reimburse the law firm for litigation expenses were excluded from the definition of "accounts" in the factoring agreement.

123. *Northwest Business Finance, LLC v. Able Contractors, Inc.*, 383 P.3d 1074 (Wash. Ct. App. 2016)

Summary judgment was properly denied on a factor's claim against an account debtor for paying the debtor directly. Although the factor's financing statement covered all accounts, and a notification attached to most of the debtor's invoices to the account debtor instructed the account debtor to remit all payments to the factor, the invoices on which the account debtor made direct payment to the debtor lacked that notification. Moreover, an instruction to pay must identify the accounts it covers and a statement that "all" accounts have been assigned does not reasonably identify the covered accounts. Finally, it was not clear that the factor had in fact purchased the accounts at issue.

124. *In re Gremillion*, 550 B.R. 307 (E.D. La. 2016)

A secured party with a security interest in the rights of a buyer under a contract to purchase a controlling ownership interest in an LLC was entitled, after default, to compromise for $5.8 million the buyer's rights even though the buyer had obtained an arbitration judgment for $8 million. Although the security agreement gave the secured party authority to settle only "disputed claims," and this right to payment of the arbitration judgment was not disputed, the secured party's authority under § 9-607 to enforce payment included the rights to settle and compromise. Moreover, the judgment was not proceeds of the collateral, it merely confirmed the rights under the purchase agreement, and thus the secured party retained these rights. The court improperly classified the collateral as an account.

125. *Porter Capital Corp. v. Horne*,
2016 WL 4197328 (N.J. Super. Ct. 2016)
A note maker's fraud claim against the debtor, which arose after the note was issued, did not necessarily give the maker a defense to payment good against the debtor's secured party. However, the secured party failed to show, so as to be entitled to summary judgment, that the debtor was in default and that the secured party therefore had the right to collect the note.

– Acceptance of Collateral

126. *Born v. Born*,
374 P.3d 624 (Kan. 2016)
Because the debtor timely objected to the secured party's proposal to accept the collateral in satisfaction of the secured obligation, no acceptance occurred; the debtor was not required to redeem the collateral to prevent acceptance. Even if the security agreement limited the secured party's rights after default to acceptance of the collateral, and thus the secured party could not conduct a disposition, that clause could effective waive the secured party's rights but it could not waive or modify the debtor's rights.

127. *Agri-Science Technologies, L.L.C. v. Greiner's Green Acres, Inc.*,
2016 WL 1072509 (Mich. Ct. App. 2016)
Although the junior secured party was not sent notification of the senior secured party's proposal to accept the collateral in satisfaction of the debt, the acceptance was nevertheless effective. The junior secured party was unable to show any damage from the failure to send it notification of the proposal because the collateral was worth less than the amount of the secured obligation owed to the senior secured party.

128. *Fagen, Inc. v. Exergy Development Group of Idaho, LLC*,
2016 WL 5660418 (D. Minn. 2016)
A secured party and debtor that, after default, entered into an agreement by which the secured party purchased 99 of the debtor's 100 membership units in a subsidiary and retained a security interest in the remaining membership, and which further provided that if the debtor failed to obtained sufficient financing to repay all loans by a specified date, the remaining membership unit automatically transferred to the financier, was a secured transaction with respect to the one remaining membership unit. Accordingly, the financier violated Article 9's rules on enforcement by relying on the automatic transfer provision instead of using the Article 9 rules regarding a disposition or acceptance of collateral. By agreeing to the transaction, the debtor did not agree to an acceptance of the remaining membership unit after default because the driving force behind that agreement was the need for further financing, not to effectuate a strict foreclosure.

– Statute of Limitations

129. *Coastal Federal Credit Union v. Brown*,
790 S.E.2d 417 (S.C. Ct. App. 2016)
A credit union that financed the debtor's acquisition of a vehicle by receiving from the dealer an assignment of the sales contract, and that sued the debtor for a deficiency after repossessing and selling the vehicle, was subject to the six-year limitations period applicable to an action relating to a sale of goods, not the three-year limitations period applicable to debt collection generally.

130. *Suntrust Bank v. Venable*,
791 S.E.2d 5 (Ga. 2016)
A lender's claim for a deficiency following a foreclosure sale of the collateral purchased under a conditional sales contract was governed by the four-year statute of limitations under Article 2, not the six-year period governing breaches of contract generally, and began running when the buyer defaulted. Although the contract granted a security interest in the vehicle, the transaction was primarily a sale of goods.

131. *Bank SNB v. Flemming*,
2016 WL 347709 (W.D. Okla. 2016)
Although the debtor's secured note matured more than six years before suit was brought, e-mail messages the debtor sent two years after maturity acknowledged the debt and therefore re-started the limitations period. Consequently, the creditor's action on the debt was not barred. Because the creditor's action to enforce the lien is subject to the same rules, that too was not time barred.

– Other

132. *First 100, LLC v. Omni Financial, LLC*,
2016 WL 2980673 (D. Nev. 2016)
A buyer of homeowner association receivables, which had granted a security interest in the receivables purchased and in future receivables to secure multiple debts, was not entitled to an injunction prohibiting the secured party from conducting a sale of the receivables because the forbearance agreement executed by the parties was expressly conditioned on a payment that the buyer did not make, the notices of sale identify the collateral with considerable specificity, there was no reason to believe that the planned sale would be commercially unreasonable. The secured party had a security interest and could also sell additional receivables that the buyer acquired with funding from another source after it entered into the security agreement with the secured party.

133. *Santander Bank v. Moody Leasing Co.*,
2016 WL 3906808 (W.D. Mo. 2016)
The secured party was entitled to summary judgment on the secured obligation even though it had possession of and had not yet sold some of the collateral.

134. *First 100, LLC v. Omni Financial, LLC*,
2016 WL 3511252 (D. Nev. 2016)
A secured party that purchased homeowner association receivables at a disposition was entitled to a temporary restraining order prohibiting the debtor from selling, dissipating or settling any of the receivables, even though the value of the receivables might exceed the secured obligation.

135. *Kinzel v. Bank of America*,
2016 WL 951531 (N.D. Ohio 2016)
A brokerage house did not breach the implied covenant of good faith and fair dealing by liquidating, without prior notice or demand, a couple's securities account – which at the time consisted principally of stock in the company in which one of the couple worked – when the value of the securities fell. Although the brokerage had previously accommodated the couple's preference to sell other collateral, and the value of the collateral remained above the maintenance ratio that the brokerage stated in its internal policies, neither the accommodation nor the brokerage's internal policies altered the discretion granted to the brokerage in the parties' agreement.

136. *Joy Group Oy v. Supreme Brands LLC*,
2016 WL 410272 (D. Minn. 2016)
The buyer of trademarks that filed an assignment in the Patent and Trademark Office was not entitled to a temporary restraining order prohibiting a secured party that previously filed a financing statement against the seller's general intangibles from selling the collateral. The buyer had not demonstrated a likelihood of success on the merits.

137. *Eidos Display, LLC v. AU Optronics Corp.*,
2016 WL 6680578 (E.D. Tex. 2016)
A secured party with a security interest in the debtor's patent was not a necessary and indispensable party to the debtor's infringement action against a third party even though the secured party claimed that the debtor lacked authority to settle and that payment to the debtor would violate its rights. The secured party, which has neither the right to sue for infringement nor the right to license or sublicense the patent, has insufficient property rights to have standing as a co-plaintiff in the infringement action. Whether the debtor could settle the case without the secured party's authorization or consent was not ripe for decision because there was no settlement framework in place.

138. *Edgerly v. Vanderbilt Mortgage & Finance, Inc.*,
492 S.W.3d 100 (Ark. Ct. App. 2016)
Even if the secured party's assignee did not have a perfected security interest in the debtor's mobile homes, it was nevertheless entitled to enforce the security interests.

139. *Hipple v. Hipple*,
2016 WL 320216 (E.D. Pa. 2016)
A disposition of collateral by the secured party, which was the principal owner of the debtor, was not an avoidable fraudulent transfer even though a judgment creditor obtained the judgment before the security interest was perfected. The judgment creditor had taken no steps to execute on the judgment prior to perfection of the security interest. Even though there were factors indicating actual fraud, because the collateral foreclosed upon was subject to a valid lien, there was no "transfer" within the meaning of the Uniform Fraudulent Transfer Act. However, the secured party had to return the surplus received from the disposition. The secured party was also liable in unjust enrichment for royalty payments he received even though the debtor, not the secured party, was the owner of the patents at issue.

140. *Jones v. American Credit Acceptance LLC*,
2016 WL 537987 (N.D. Ill. 2016)
Debtor who alleged that the secured party engaged in unfair and deceptive business practices by failing to comply with Illinois statutes governing the repossession process or by misrepresenting the requirements of those statutes was required to arbitrate that claim pursuant to a term in the parties' agreement providing for arbitration of "any claim, dispute or controversy between you and us that in any way arises from or relates to this consumer credit sale." Nothing in Illinois law prevents arbitration of such claims.

141. *Pool v. Drive Time Car Sales Co.*,
2016 WL 3416372 (N.M. Ct. App. 2016)
A car-purchase agreement that provided for arbitration of a wide array of claims but had a one-sided carve-out for the credit-seller's use of self-help remedies was substantively unconscionable even though it allowed the buyer to seek a court injunction against repossession or sale. Such relief is unlikely to ever be available to the buyer and thus the arbitration provision was unconscionably one-sided.

142. *Tuscan/Lehigh Dairies, Inc. v. Beyer Farms, Inc.*,
26 N.Y.S.3d 115 (N.Y. Sup. Ct. App. Div. 2016)
Trial court should have granted summary judgment on secured party's claim for breach of contract and recovery of chattels because the secured party established a prima facie case by submitting the parties' agreement, the promissory note, and evidence of the debtor's payment defaults.

143. *Bank of America v. Florida Glass of Tampa Bay, Inc.*,
2016 WL 6778877 (M.D. Fla. 2016)
Although the security agreements and mortgages in connection with six loans to related corporate entities each provided for the appointment of a receiver in the event of default, no receiver would be appointed because the secured party did not demonstrate: (i) fraudulent conduct on the part of the borrowers or guarantors; (ii) imminent danger that the collateral will be lost or squandered; (iii) that its legal remedies are inadequate; (iv) or there is a probability that the harm to the secured party from denying its motion would be greater than the injury to the borrowers.

144. *Courtland Capital, Inc. v. Fixed Income Solutions, LLC*,
2016 WL 792329 (N.D. Ill. 2016)
A prospective merger partner that made two secured loans and entered into two, non-binding letters of intent regarding a possible merger was entitled to summary judgment on its action for breach of the promissory note and security agreement after it terminated the letters of intent. The debtor had not raised any viable affirmative defense.

145. *Williams v. American Honda Finance Corp.*,
2016 WL 611131 (D. Mass. 2016)
Although, pursuant to the Massachusetts Motor Vehicle Retail Installment Sales Act, a deficiency is calculated based on the fair market value of the vehicle sold, not the sales price, the debtor whose car was repossessed and sold failed to present sufficient evidence to show that the secured party failed to obtain fair market value for the car. Moreover, without evidence that the sales price was less than fair market value, the secured party's pre-sale notification, which indicated that the debtor would be liable for a deficiency based on the difference between the secured obligation and the sales price, was not misleading.

146. *Joy Group Oy v. Supreme Brands LLC*,
2016 WL 2858794 (D. Minn. 2016)
The entity that held various international trademarks and international trademark applications for a particular name or acronym had no right to enjoin a secured party from selling collateral that included the debtor's domestic trademark to the same name or acronym, nor was it entitled, in the absence of an identifiable or immediate controversy involving the international trademarks, to a declaration that any such sale would not impair the entity's rights in the international trademarks.

147. *McWhorter v. Handy*,
2016 WL 4410095 (Ky. Ct. App. 2016)
Debtors who had provided corporate stock as collateral for a loan were not entitled to relief from a trial court's order requiring them to transfer the stock to the secured party – based on the fact that the security agreement provided for that remedy after default – because the debtor's did not timely appeal.

Liability Issues

– of the Secured Party

148. *Adams v. Regions Bank*,
2016 WL 71429 (S.D. Miss. 2016)
The bank that obtained a security interest in its own stock to secure a debt owed by a borrower for whom the stock was later placed in a trust with a spendthrift provision was not liable for conversion when the bank seized the stock after default because the security interest predated the spendthrift provision. Any claim that the bank as trustee of the trust, breached its fiduciary duties due to the conflict of interest or the failure to diversify trust assets was barred by the applicable statute of limitations.

149. *Sallaz v. Rice*,
384 P.3d 987 (Idaho 2016)
A secured party was not liable in conversion for repossessing the debtor's car in 2011 without prior notice or demand for the debtor's failure to repay a 1991 demand loan. Article 9 does not require notice before repossessing the collateral and a demand loan does not require a demand before a cause of action accrues. Even if the limitations period on an action to collect the debt had expired, that would not extinguish the debt or prevent enforcement of the security interest.

150. *Diers, Jones & Stark, Inc. v. Comerica Bank*,
2016 WL 1254237 (Tex. Ct. App. 2016)
A broker that had a contract with a secured party to arrange for the sale of vessels had no claim against the secured party for not paying the commission because the contract required a commission only on "completed sales" and the sales negotiated by the broker fell through when the secured party could not clear title.

151. *United States v. Krasicky*,
2016 WL 1242387 (E.D. Mich. 2016)
Neither the receiver for the debtor appointed at the request of a secured party nor the secured party, which received payment from the receiver while federal tobacco taxes remained unpaid, had liability for the taxes.

152. *Hana Financial Inc. v. Tony Jones Apparel, Inc.*,
2016 WL 3063773 (N.J. Super. Ct. 2016)
A secured party that was denied access to the collateral by the landlord of the warehouse in which the collateral was stored was not liable to the landlord for use and occupancy of the warehouse. The secured party did not profit from the collateral remaining in the warehouse but instead was delayed in liquidating the goods to pay down the secured obligation.

153. *New Tech Mining, Inc. v. THC Kentucky Coal Venture I, LLC*,
492 S.W.3d 895 (Ky. Ct. App. 2016)
A bank with a security interest in mining equipment installed in a mine was not liable to the purchaser of the mine for the costs allegedly incurred in storing and caring for the equipment. The purchaser was not entitled to a warehouse lien under § 7-209 because the purchaser was not engaged in the business of storing the goods others – and hence was not a warehouse – and the equipment was not covered by a warehouse receipt or storage agreement. The purchaser was also not entitled to an equitable lien because there was no agreement between the parties and general principles of right and justice did not warrant the creation of a lien given that the purchaser bought the mine site upon which the equipment was located and refused to permit entry to retrieve it.

154. *Mac Naughton v. Harmelech*,
2016 WL 3771276 (D.N.J. 2010)
Although the security agreement authenticated by the debtor purportedly granting a security interest in "all of [the debtor's] personal property wherever located" was ineffective because the super-generic language did not reasonably describe the collateral, by authenticating the security agreement, the debtor nevertheless authorized the putative secured party to file a financing statement. Therefore, the putative secured party was not liable under § 9-625(e)(3) of (4) for filing an unauthorized record or for failing to file a termination statement.

155. *Delaney v. First Financial of Charleston, Inc.*,
791 S.E.2d 546 (S.C. Ct. App. 2016)
A debtor's claim for statutory damages under § 9-625(c) based on alleged defects in the notification of sale sent by the secured party was subject to either a one-year limitations period applicable to statutory penalties or a different three-year limitations period for other statutory penalties – which began to run when the notification was sent, not when the sale occurred – not to the six-year statute of limitations under § 2-725 because the claim was not one for breach.

156. *Tiessen v. Chrysler Capital*,
2016 WL 6782776 (D. Minn. 2016)
The debtor's action against the secured party and its repossession agent for violation of the Fair Debt Collection Practices Act by repossessing the collateral on Tribal property in violation of Tribal law would be dismissed under the tribal exhaustion doctrine, which provides that federal court jurisdiction does not arise until available remedies in the tribal court system have been exhausted. However, the dismissal order would be stayed while the debtor pursued remedies in tribal court, in case that court determined that it lacked jurisdiction over the claims.

157. *Brooks v. Caswell*,
2016 WL 7473207 (D. Or. 2016)
The secured party in a secured transaction entered into as part of a settlement agreement did not violate the duty of good faith by: (i) suing the debtor for breach despite the nonrecourse nature of the transaction; or (ii) refusing to take possession of the collateral. Although the secured party lost her claim for misrepresentation, she acted in good faith in asserting the claim. A secured party has no duty to take possession of the collateral and no obligation to pay the costs of storing collateral that the secured party does not possess.

158. Pierre v. Planet Automotive, Inc.,
193 F. Supp. 3d 157 (E.D.N.Y. 2017)
The assignee of a consumer car loan from the dealership that originated the loan could be liable, under both 16 C.F.R. § 433.2 and the New York Motor Vehicle Retail Instalment Sales Act, for the fraud and false advertising allegedly committed by the dealership.

– of the Debtor

159. *Brooks v. Caswell*,
2016 WL 6305980 (D. Or. 2016)
The debtor in a secured transaction entered into as part of a settlement agreement did not violate the duty of good faith by: (i) failing to pay the nonrecourse promissory note, because imposing such a duty would change the terms of the deal; (ii) failing to use the collateralized sculpture molds to cast new sculptures for sale, because the settlement agreement required the debtor to remit the net proceeds of such sales but imposed no duty to cast additional sculptures; or (iii) informing customers that the molds were cast out because the agreement contains no provision requiring the debtor to refer customers to the secured party.

160. *Universal MRI and Diagnostics, Inc. v. Medical Lien Management Inc.*,
497 S.W.3d 653 (Tex. Ct. App. 2016)
A seller of accounts "without recourse" was liable to a remote buyer for collecting the accounts after the sale. The "without recourse" language would preclude liability if the account debtor did not pay but was irrelevant to the seller's collection actions, which essentially asserted ownership of the accounts after the sale. The seller had no liability for fraud because it was not shown that the seller lacked the intent to perform at the time of the sale and the seller had no liability under quasi-contract because the seller was liable under contract principles.

161. *Cooper v. Campbell*,
2016 WL 4487924 (Tex. Ct. App. 2016)
A promissory note that: (i) required the maker to apply all distributions from a specified partnership to payment of the note; (ii) indicated that the payee must look only to such distributions for payment; and (iii) provided for no deficiency judgment against the maker after the application of such distributions did not prevent the payee from obtaining a judgment against the maker for the amount of distributions, the maker received but failed to use to pay the note. The language did not address default and the prohibition on a judgment for deficiency applied only after the application of distributions, which did not occur.

162. *Suffolk Construction Co. v. Benchmark Mechanical Systems, Inc.*,
56 N.E.3d 138 (Mass. 2016)
Although an account debtor that improperly paid the debtor after receiving instructions to pay a secured party was liable to the secured party for the full amount it owed prior to payment, not merely for the remaining balance of the secured obligation, the account debtor had a claim in subrogation and unjust enrichment against the debtor for any surplus to which the debtor was entitled from the secured party. Although the account debtor's claim against the debtor resulting from its mistaken payment was time barred, its claim to the resulting surplus was not.

163. *Regions Bank v. Thomas*,
2016 WL 1719325 (Tenn. Ct. App. 2016), *appeal granted* (Oct. 21, 2016)
A secured party that failed to provide the guarantors with notification of its planned disposition of an aircraft did not rebut the resulting presumption that no deficiency was owning merely by submitted evidence of the fair market value of the collateral at the time of the disposition. The guarantors had claimed that, with notification, they would have satisfied the secured obligation and the secured party did nothing to disprove that contention. On the other hand, the guarantors were not entitled to a surplus due to their alleged lost equity in the debtor because the guarantors did not have an interest in the collateral: the aircraft.

164. *VFS Financing, Inc. v. Shilo Management Corp.*,
372 P.3d 582 (Or. Ct. App. 2016)
Even though, the secured party had, early in its post-default litigation against the debtor, obtained possession of the collateral – an airplane – but had not conducted a disposition, the secured party was nevertheless entitled to summary judgment on the debt because under New York law it is not commercially unreasonable or bad faith for a creditor to seek damages on the note or guaranty while continuing to hold the collateral.

165. *Autovest, LLC v. Nash*,
197 So. 3d 258 (La. Ct. App. 2016)
The assignee of a car loan agreement, which acquired the agreement after the original lender had repossessed and sold the car, was entitled to a judgment for the deficiency. The debtor failed to show that the action was barred by the five-year prescription period under Louisiana law because prescription is interrupted when the debtor acknowledges the creditor's rights and the debtor failed to show that the last payment was made more than five years before suit was brought and, in any event, had more recently surrendered the car voluntarily. The debtor also did not present admissible evidence that the original creditor had agreed to extinguish the debt upon surrender of the car.

166. *Santander Bank v. Moody Leasing Co.*,
2016 WL 3167259 (W.D. Mo. 2016)
A bank that had repossessed but did not dispose of some the collateral was nevertheless entitled to summary judgment against the debtor and the guarantors for the full amount remaining due on the secured obligation.

167. *Segal v. Shovlin*,
2016 WL 1450706 (Cal. Ct. App. 2016)
Although the debtor was liable for the unpaid balance of a loan, the jury had substantial evidence for its conclusion that the debtor was not liable for additional damages resulting from promissory fraud based on the debtor's false promise to provide a security interest in the debtor's membership interest in an LLC, given that the LLC operating agreement expressly required the consent of a majority of the membership interests of the other members and thus the lender could not have reasonably relied on the debtor's promise.

168. *Valley National Bank v. Cinemacar II, Inc.*,
2016 WL 1466568 (N.J. Super. Ct. 2016)
The car dealer that sold chattel paper to a bank breached its duty to repurchase chattel paper with respect to which the bank, in its sole discretion, determined that the dealer breached is representations and warranties. The bank, which had determined that the dealer breached representations and warranties by selling chattel paper created in transactions with car buyers who were not its clients, was not required to show that its determination was correct. The dealer presented no evidence that the bank had acted in bad faith.

169. *Beach Community Bank v. Disposal Services, LLC*,
199 So. 3d 1132 (Fla. Ct. App. 2016)
A secured party with a perfected security interest in containers had a conversion claim against the buyer of the containers after the original debtor defaulted on the secured obligation, the secured party demanded that the buyer either turn over the containers or pay the secured obligation, and the buyer failed to comply. The fact that the secured party might also have a cause of action for replevin did not negate its claim for conversion.

170. *Watkins v. State of Texas*,
2016 WL 7383825 (Tex. Ct. App. 2016)
An individual who purchased a used vehicle on credit, never made any of the payments, and less than a month later sold it to a buyer without informing the buyer of the seller's security interest was properly convicted of theft by deception with respect to the sale to the buyer.

– of Others

171. *Baik v. Oyang America, Inc.*,
2016 WL 128660 (Cal. Ct. App. 2016)
Although a creditor may have lacked authorization to file a financing statement against its debtors, the debtors failed to prove that they were damaged thereby because they did obtain financing from their primary lender.

172. *C.P. Motion, Inc. v. Goldblatt*,
193 So. 3d 39 (Fla. Ct. App. 2016)
Florida law distinguishes between the assignment of performance due under a contract and the assignment of a claim for damages arising from breach of contract, prohibiting the former but not the latter. Accordingly, a secured party that acquired the debtor's assets at a disposition could enforce the debtor's claim for accrued damages against a third party for breach of a covenant not to compete, even though the secured party could not obtain injunctive relief for violation of the covenant.

173. *In re Sandpoint Cattle Co.*,
2016 WL 73419 (Bankr. D. Neb. 2016)
The debtor, which operated a cattle farm severely impacted by drought stated a cause of action for malpractice against its bankruptcy lawyer for advising the debtor to abandon a large portion of the herd to the secured lender after incorrectly informing the debtor that its debt would be reduced by the appraised value of the cattle, rather than the sale price. The debtor was not judicially estopped from claiming that it could have maintained the cattle because the debtor had testified – and the court had found – that the debtor could not support the cattle on the ranch, not that Debtor could not have maintained the cattle at all.
553 B.R. 704 (Bankr. D. Neb. 2016)
The lawyer violated the standard of care to reasonably advise the debtor of: (i) the legal consequences, risks, and benefits of abandoning the herd to the secured party without getting the secured party's agreement as to the value of the herd; and (ii) other legal alternatives, such as a joint sale or a sale under § 363. The lawyer incorrectly informed the client that credit would be given for the value of the collateral abandoned, rather than the resale price. The debtor is entitled to damages for lost market value of the herd resulting from the lawyer's advice to abandon the herd: $1.8 million.

174. *Oakland Police and Fire Retirement System v. Mayer Brown, LLP*,
2016 WL 3459714 (N.D. Ill. 2016)
The law firm that represented the debtor in connection with the payoff of one loan, and in so doing prepared a checklist erroneously calling for the filing of a termination of a financing statement with respect to a different loan, was not liable for malpractice or negligent misrepresentation to the lenders injured thereby because the law firm owed no duty to the lenders.

175. *PHI Financial Services, Inc. v. Johnston Law Office, P.C.*,
874 N.W.2d 910 (N.D. 2016)
The law firm that deposited into a client trust fund account the proceeds of the debtor partnership's government crop insurance, and later used the funds to pay its bills for services to the partnership and its principals, was liable under the state's fraudulent transfer act for the portion of the funds used to pay the debts of the principals because the debtor did not receive reasonably equivalent value for that transfer. The firm was not liable for the portion of the funds the firm transferred to the father of one of the debtor's principals because, as to those funds, the firm was a mere conduit, not an initial transferee.

176. *Jones v. Westbrook*,
379 P.3d 963 (Alaska 2016)
A legal malpractice claim by the seller of a corporate business against his lawyer for structuring the transaction so that the seller had a security interest in the corporate stock but not in the corporation's assets accrued not when the sale was made or when the buyer first missed a payment, but when the IRS filed a notice of tax lien against the corporation, because that is when the injury first occurred. The seller's claim against the lawyer for violation of the state's Unfair Trade Practice and Consumer Protection Act for not informing the seller that the lawyer lacked malpractice insurance accrued no earlier and possibly not until later, when the seller first learned of the lack of insurance.

177. *Western Alliance Bank v. National Union Fire Insurance Company of Pittsburgh, PA*,
2016 WL 641648 (N.D. Cal. 2016)
Secured creditor of a defunct corporate debtor had no standing to bring a claim against the insurance company that insured the collateral against theft. Although the secured creditor has an Article 9 security interest in any amount that the insurer owes to the debtor, that is not the same thing as a right to bring a claim on the debtor's behalf. The debtor never assigned its interest in the insurance contract to the secured creditor and could not have done so because the contract prohibited assignment.

178. *Travelers Casualty and Surety Company of America v. Hunt*,
2016 WL 727285 (E.D. Cal. 2016)
An insurer that had a perfected security interest in the general intangibles of an individual to secure the individual's obligations under an indemnification agreement stated a claim for conversion and a claim for an avoidable fraudulent transfer against the individual's wife, to whom the individual had transferred $500,000 of a $3.9 million tax refund.

179. *AgSouth Farm Credit, ACA v. Gowen Timber Co., Inc.*,
784 S.E.2d 913 (Ga. Ct. App. 2016)
The trial court erred in not granting a directed verdict for a lender, which had a deed of trust on timberland and a perfected security interest in the timber, on the lender's conversion claim against the entity that harvested the timber. A state statute requires the written consent of the owner to harvest, so any verbal consent of the lender, even if given, was ineffective.

180. *Deere & Company v. Rebel Auction Company, Inc.*,
2016 WL 3181148 (S.D. Ga. 2016)
A secured party with a perfected security interest in some agricultural equipment was entitled to summary judgment on its conversion claim against an auction company that sold the equipment on behalf of the debtor without the knowledge or consent of the secured party. The fact that the auction company did not conduct a UCC search was irrelevant.

181. *BancorpSouth Bank v. 51 Concrete, LLC*,
2016 WL 1211433 (Tenn. Ct. App. 2016)
A secured party that brought a conversion claim against the buyers of the debtor's equipment for failing to turn over the proceeds they received upon resale was entitled to prejudgment interest beginning on the date the secured party demanded payment from the buyers, not the date the debtor defaulted or the date when the buyers purchased the collateral.

182. *DZ Bank Ag Deutsche Zentral-Genossenschaftsbank v. Connect Insurance Agency, Inc.*,
2016 WL 2620132 (W.D. Wash. 2016)
The buyer of the debtor's book of business for two insurance brokerages was liable for willful conversion to the lender that had a perfected blanked security interest in the debtor's assets, including client accounts and general intangibles.

183. *Murphy v. Blackjet, Inc.*,
2016 WL 3017224 (S.D. Fla. 2016)
A newly formed company that acquired the debtor's collateral from the secured party – a holding company owned and controlled by an individual who also served as a director of the debtor – had successor liability as a mere continuation of the debtor. The debtor orchestrated a premature default in order to effectuate a sale of its business as a going concern while shedding its unsecured obligations. The secured party acquired the collateral with a credit bid of $5,000, initially allowed the debtor to remain in possession and control of the collateral, and then entered into a funding arrangement with a newly formed entity to allow it to use the collateral to implement the original debtor's business plan. The newly formed entity initially operated in the same space that the debtor occupied and then moved to a different office suite in the same building. It operates same website and mobile application, and uses the debtor's customer lists, same mailing address, and business addresses. It conducts the same business operation and essentially follows the same business model. Although there is not a complete overlap of shareholders, the debtor and the new entity have a common identity of primary shareholders, officers and directors.

184. *Wells Fargo Bank v. Prime Partners Medical Group, Inc.*,
2016 WL 879964 (Cal. Ct. App. 2016)
An individual who owned the debtor and guaranteed its debt to a bank was liable for fraud, including punitive damages, for misrepresenting and actively concealing the identity of the entity buying the equipment intended to serve as collateral, the price paid for the equipment, and where it was to be kept.

185. *Ballistics Research, Inc. v. BRI Funding, LLC*,
783 S.E.2d 678 (Ga. Ct. App. 2016)
The entity to whom the debtor had fraudulently transferred the collateralized patents would not normally be liable for punitive damages to an LLC formed by the secured parties to receive an assignment of their interests and their claims because the LLC was formed after the allegedly tortious acts were performed, and thus the entity could not have intended harm the entity, and a claim for punitive damages is not assignable under Georgia law. However, because these issues were not raised during the parties' first appeal, the trial court's award of punitive damages would be affirmed to the extent it was within the statutory cap.

186. *Midwest Feeders, Inc. v. Regions Bank Inc.*,
2016 WL 5796894 (M.D. Ga. 2016)
A secured party with a security interest in the debtor's cattle and the proceeds thereof had no conversion claim under § 3-420 or claim under § 3-404(d) for failure to exercise ordinary care against the debtor's bank, based on the bank's honor of forged and fraudulently endorsed checks totaling $23 million. The secured party did not have the right to enforce any of the checks and was confusing an interest in the deposited funds with an interest in the checks. The secured party also had no claim against the bank for negligence because the bank did not owe a duty to the secured party, which was not the bank's customer.

187. *DS-Concept Trade Invest, LLC v. Morgan-Todt, Inc.*,
2016 WL 7116950 (N.D. Cal. 2016)
The entity that claimed to have a security interest in 573,000 lbs. of cheese in storage had no claim against the bailee for improperly storing the cheese in the freezer, rather than in a refrigerator, thereby rendering the cheese unfit for human consumption and diminishing its value. There was no claim for negligence because the bailee had neither a legal nor a contractual duty to the secured party. There was no claim for breach of contract because the secured party was not a third-party beneficiary of the storage agreement.

BANKRUPTCY

Property of the Estate

188. *In re WEB2B Payment Solutions, Inc.*,
815 F.3d 400 (8th Cir. 2016)
A retailer that offered check-cashing and payday loan services, and which had hired the debtor to process checks received from its customers, was not entitled to the $800,000 in check proceeds that the debtor had on the petition date. The funds were not held in an express trust because the agreement contained neither a requirement to segregate the retailer's funds nor an explicit declaration of trust. There was no resulting trust because the parties did not intend to create a trust. Imposition of a constructive trust was not warranted because the checks were properly negotiated to the debtor and thus the retailer had no property rights in them.

189. *In re Advanced Biomedical, Inc.*,
2016 WL 7188651 (9th Cir. BAP 2016)
Because a judgment creditor received a prepetition court order assigning to it the debtor's receivables "to the extent necessary to satisfy the judgment," those receivables were not property of the estate.

190. *In re Pettit Oil Co.*,
2016 WL 4132473 (Bankr. W.D. Wash. 2016)
Although the consignor that delivered goods to the debtor postpetition in a true consignment transaction was unperfected, and thus the debtor was deemed to have the consignor's rights "for the purpose of determining the rights of creditors," as between the consignor and the debtor the goods remained the consignors' and were not property of the estate.

191. *In re Jones*,
544 B.R. 692 (Bankr. M.D. Ala. 2016)
The estate of an individual debtor who, before the petition, failed to pay when her car title pawn contract matured, included only the unexpired statutory right of redemption. That redemption right could not be modified in Chapter 13; it could be exercised only by paying the full amount before the redemption period expired.

192. *In re Stanfield*,
2016 WL 669472 (Bankr. S.D. Ga. 2016)
The estate of a Chapter 13 debtor who filed her bankruptcy petition one day before payment came due under a car title pawn transaction initially included the vehicle. When the debtor defaulted postpetition, she had the right under non-bankruptcy law to redeem withing 30 days, and that right was extended an additional 60 days by § 108(b). However, when the right expired, the car ceased to be property of the estate. The debtor's rights in the car, once extinguished, could not be resurrected by a plan that has not yet been confirmed.

Claims & Expenses

193. *In re Beltway One Development Group, LLC*,
547 B.R. 819 (9th Cir. BAP 2016)
An oversecured creditor was entitled to postpetition, pre-confirmation interest at the contractual default rate because the plan did not cure the default.

194. *In re Catton*,
555 B.R. 713 (Bankr. S.D. Cal. 2016)
Although an oversecured creditor is not entitled to interest at the default rate if its claim is paid in full pursuant to the terms of a Chapter 11 plan that cures the default, because the debtor paid default-rate interest to a bank pursuant to pre-confirmation orders and the bank withdrew its notice of default, the debtor did not pay default-rate interest pursuant to a plan and was not entitled to a credit therefor or return thereof. The debtor was also not entitled to recover default-rate interest paid to another oversecured creditor pursuant to pre-confirmation orders from the proceeds of asset sales. Those payments were made pursuant to § 363, not a confirmed plan that cured default.

195. *In re Johnson*,
554 B.R. 448 (Bankr. S.D. Ohio 2016)
Even if a lender had a valid security interest in the debtor's right to payment under his contract to play hockey for the Columbus Blue Jackets, the debtor's postpetition salary under the contract would be after-acquired property, and thus the security interest in that salary would be cut off by § 552(a). The lender's security agreement did not purport to encumber the contract, merely the rights to payment. Even if the security agreement had encumbered the entire contract, the debtor's postpetition salary would not be proceeds of the contract.

196. *In re Sunnyslope Housing Ltd. Partnership*,
818 F.3d 937 (9th Cir.), *rehearing en banc granted,* 838 F.3d 975 (2016)
The restrictive covenants relating to affordable housing to which the debtor's real property was subject but which were subordinated to a lender's mortgage were not relevant in determining the amount of the creditor's secured claim.

197. *In re Packaging Systems, LLC*,
559 B.R. 123 (Bankr. D.N.J. 2016)
A factor whose prepetition agreement with the debtor was assumed postpetition and who was granted super-priority for its claim under § 364(c)(1) was entitled to priority over the trustee's claim for administrative expenses incurred after the case was converted to Chapter 7. Although § 726(b) states that post-conversion administrative expenses have priority over pre-conversion administrative expenses, § 364(c) states that the priority granted pursuant to that section supersedes all administrative expenses. However, the court would use its equitable powers to subordinate the factor's claim to the portion of the trustee's expenses incurred to successfully bring assets into the estate, in part because the factor filed the wrong claim form.

198. *In re Lyondell Chemical Co.*,
544 B.R. 75 (Bankr. S.D.N.Y. 2016)
The trustee failed to state a claim that the loans made to the debtor under a $750 million revolving credit facility entered into shortly after the debtor was the target of a leveraged buyout should be recharacterized as equity. Although some of the factors identified in *In re Autostyle Plastics, Inc.*, supported recharacterization – in particular, due to the debtor's overleveraged capital structure, that the parties could not have expected repayment except out of future profits – the other factors, including the loan documentation, the requirement of interest, and the fact that the loans were repaid indicate that the transaction was a loan.

199. *In re Eternal Enterprise, Inc.*,
557 B.R. 277 (Bankr. D. Conn. 2016)
Prepetition advances that former insiders made to a corporate Chapter 11 debtor, which were not repayable at any fixed rate of interest or over fixed period of time, for which repayment was conditioned on the debtor's success in operating its business, and which were not evidenced by promissory notes, were recharacterized as equity contributions.

200. *In re Noggle*,
2016 WL 3995174 (Bankr. C.D. Ill. 2016)
A secured creditor's three motions for relief from stay did not qualify as an informal proof of claim. Although the first motion provided details of the debt and some of the collateral, nothing in it suggested that it was intended to be a proof of claim; the second motion was withdrawn; and the third motion was filed after the claims bar date. Each of the motions sought relief only as to the specific collateral; none made a demand on the estate for the payment of creditor's claim.

201. *In re World Imports, Ltd.*,
549 B.R. 820 (E.D. Pa. 2016)
Goods shipped FOB from China to the debtor in the United States more than 20 days before the petition, and which arrived within the 20-day period, were "received" within the meaning of § 503(b)(9) when shipped. Under the CISG and the Incoterms definition of "FOB," goods are constructively received by the buyer when the goods are delivered to the carrier.

202. *In re Reichold Holdings US, Inc.*,
556 B.R. 107 (Bankr. D. Del. 2016)
Even though the reclamation rights of a prepetition seller of goods are subject to the rights of a prepetition secured party with a perfected security interest, and thus would be extinguished by foreclosure of the security interest, the existence of the security interest does not negate the seller's reclamation rights under § 546(c). The payment in full of the debtor's prepetition secured party with funds provided by a DIP lender extinguished the secured party's security interest, leaving the seller's reclamation rights intact and enforceable. As a result, the seller had a claim entitled to priority as an administrative expense under § 503(b)(9).

203. *In re City Sports, Inc.*,
554 B.R. 329 (Bankr. D. Del. 2016)
A individual's claim for an unredeemed gift card is a general, nonpriority claim, not a priority claim under § 507(a)(7) arising from the deposit of money in connection with the purchase of property or services because a "deposit" connotes the beginning of a transaction and a temporal relationship whereas the purchase of a gift card is completed once the card is issued.

Automatic Stay & Injunctions

204. *In re Perl*,
811 F.3d 1120 (9th Cir. 2016)
The purchaser of real property at a prepetition foreclosure sale who also recorded the deed and obtained a writ of possession prepetition did not violate the stay by changing the locks postpetition. At that point, the debtor had no legal interest in the property and the debtor's unlawful possession did not bestow equitable rights.

205. *In re Shree Meldikrupa, Inc.*,
2016 WL 235205 (Bankr. S.D. Ga. 2016)
A creditor with an unperfected security interest in the proceeds of the debtor's inventory was not entitled to adequate protection. The proceeds were either not cash collateral or they were cash collateral but, because the debtor could avoid the creditor's security interest in the proceeds, adequate protection was not required.

206. *In re Alliance Well Service, LLC*,
551 B.R. 903 (Bankr. D.N.M. 2016)
A secured party's right to adequate protection payments begins on the date it files a motion therefor, not the petition date.

207. *In re Flannery*,
556 B.R. 319 (Bankr. E.D. Mich. 2016)
A credit union with setoff rights against the debtors' account was not entitled to relief from the stay merely because the deposit agreement made filing for bankruptcy a default. There was no prepetition default, which is required to exercise setoff rights, the credit union was oversecured, and although the debtors' proposed plan proposed full payment to the credit union at a reduced interest rate, that proposal complied with the Bankruptcy Code.

208. *In re Nuckoles*,
546 B.R. 651 (Bankr. W.D. Va. 2016)
The debtor's substantial compliance with § 362(h) and § 521(a) voided an *ipso facto* clause in the agreement pursuant to which the debtor granted a security interest in her car, and thus secured party violated the discharge injunction by repossessing the car.

209. *In re Reilly*,
545 B.R. 435 (Bankr. D. Mass. 2016)
A judgment creditor did not violate the stay through its prepetition actions to begin the process of attaching the debtor's deposit and securities accounts, which the bank and brokerage froze postpetition, or its postpetition refusal to release the assets – at least some of which were nonexempt – until it had time to confer with the trustee and seek relief from the stay because the debtor would agreed not to dissipate the assets.

210. *In re Powell*,
555 B.R. 907 (Bankr. S.D. Ga. 2016)
A car dealer with a security interest in two of the debtor's cars and which repossessed one of them prepetition violated the automatic stay by refusing to return the car postpetition. Although the dealer claimed that it reached an agreement with the debtor to repossess only one vehicle, even though the debtor was in default on both secured obligations, there was no competent evidence of any such agreement or indication that any such agreement involved a surrender of the debtor's rights in the repossessed car. Indeed, a subsequent letter from the dealer acknowledged that the debtor still had the right to redeem the car. Consequently, the repossessed car was property of the estate and the dealer violated the stay by refusing to return it postpetition.

211. *In re Rivera*,
558 B.R. 36 (D.P.R. 2016)
A bank willfully violated the automatic stay by repossessing a motor vehicle that secured its claim after bank received notice of debtor's Chapter 13 bankruptcy filing.

Executory Contracts & Unexpired Leases

212. *In re Tempnology LLC*,
559 B.R. 809 (1st Cir. BAP 2016)
The debtor's rejection of an executory contract under which the debtor granted the counter-party the exclusive right to distribute its products and a license of its trademarks did not terminate the trademark license. Although the counter-party's election under § 365(n) did nothing to preserve the trademark licence because trademarks are not within the Bankruptcy Code's definition of "intellectual property," rejection of the contract was merely a breach, not a termination or rescission. However, rejection of the contract did, apparently, terminate the counter-party's exclusive distribution rights.

213. *In re Revel AC Inc.*,
2016 WL 6155903 (Bankr. D.N.J. 2016)
A lessee of commercial real property that elected to remain in possession, notwithstanding the debtor-lessor's sale of the property free and clear of claims and interests under § 363, retained its rights under § 365(h) and therefore could offset against its obligation to pay post-sale rent its damages for the debtor's breach, which include its right under the lease to the "Recoupment Amount," a mechanism to recapture all or a portion of its capital contribution.

Discharge, Dischargeability & Dismissal

214. *In re Collins*,
2016 WL 406223 (Bankr. E.D. Mich. 2016)
The debt an individual debtor incurred to buy a used car and extended warranty protection was excepted from the discharge under § 523(a)(6) because the debtor, knowing the car was collateral, sold it to a junk dealer after it broke down, in return for bus fare home.

215. *In re Steele*,
554 B.R. 272 (Bankr. S.D. Ind. 2016)
The debt of the individuals who guaranteed the secured obligation of a corporation of which they were, at the time of loan, officers, was not excepted from the discharge under § 523(a)(6) merely because, after the individuals parted ways with the corporation, the collateral disappeared. The secured party presented no evidence that the debtors ever had possession of the collateral or were in any way involved with its disappearance.

216. *In re Jenkins*,
2016 WL 3574081 (Bankr. S.D. Miss. 2016)
The obligation of an individual who borrowed $100,000 to purchase specified equipment was partially nondischargeable under § 523(a)(6) because the debtor did not purchase some of the items and, when entering into a loan modification agreement, failed to tell the lender that some items had never been purchased and most of the others had been sold. The amount not discharged is the value of items improperly sold – as determined by the sales price the debtor received – plus the price of the items never purchased.

217. *In re Curran*,
554 B.R. 272 (1st Cir. BAP 2016)
The debtor's obligation on a loan from a former lover was not nondischargeable under § 523(a)(2)(B) because the written statement he provided identifying the cost of items offered as collateral was not a statement about the debtor's financial condition due to the fact that it did not purport to value the property or indicate that the property was unencumbered. Moreover, the information was not false. The debt was also not nondischargeable under § 523(a)(2)(A) for false pretenses because there was no justifiable reliance given that the creditor failed to verify title, check for encumbrances, obtain and perfect a security interest.

218. *In re Wallace*,
2016 WL 6068809 (9th Cir. BAP 2016)
The bankruptcy court did not err in concluding that a judgment debt of an individual who, in arranging a loan for a lender, mislead the lender about whether she had inspected the collateral and failed to disclose that she had a financial interest in the transaction, that one of the guarantors for the loan had an outstanding $1.9 million judgment against him, and that she had authorized the release of certain loan proceeds without the lender's permission, was nondischargeable under § 523(a)(2) and partially nondischargeable under § 523(a)(4).

219. *In re Pitz*,
2016 WL 1530003 (Bankr. N.D. Iowa 2016)
The obligation of a debtor who allegedly sold collateralized crops without remitting any of the proceeds to the secured party could not be nondischargeable under § 523(a)(4) because such conduct does not involve property of another, and thus is not larceny or embezzlement. However, the obligation could be nondischargeable under § 523(a)(6).

Avoidance Powers

– Preferences

220. *In re Vasquez Vasquez*,
549 B.R. 304 (Bankr. D.P.R. 2016)
The security interest that the seller of a vehicle retained to secure payment of the purchase price, but which the seller waited more than three months to perfect and which perfection occurred perfect 18 days before the buyer filed for bankruptcy protection, was deemed to have been transferred on the date it was perfected and was avoidable as a preference.

221. *In re Haggerty*,
2016 WL 7912003 (Bankr. S.D. Ohio 2016)
The security interest that the seller of a vehicle retained on March 4 to secure payment of the purchase price and which the seller postpetition perfected on April 7, was avoidable as a preference. The transfer was deemed to occur on March 4, when the debtor received possession of the vehicle, and was on account of an antecedent debt because the purchase agreement was signed on March 2. The seller had no defense under § 547(c)(3) because perfection occurred more than 30 days after the debtor received possession.

222. *In re Resler*,
551 B.R. 835 (Bankr. D. Id. 2016)
A bank's security interest in a motor vehicle, which was perfected, at the earliest, 32 days after it attached, was avoidable as a preferential transfer.

223. *In re Rosich*,
558 B.R. 199 (Bankr. W.D. Mich. 2016)
A secured party with a perfected security interest in the debtor's car and who signed a lien release on the certificate of title to facilitate the debtor's sale of the car, and later received the sale proceeds, had a valid § 547(c)(1) defense to preference liability for the amount received because the lien release was effective when the signed certificate of title was delivered to the debtor, not weeks earlier when the secured party signed it, and that date was substantially contemporaneous with the payment.

224. *Unsecured Creditors Committee of Sparrer Sausage Co. v. Jason's Foods, Inc.*,
826 F.3d 388 (7th Cir. 2016)
In evaluating whether the debtor's prepetition payments to a creditor were made in the ordinary course of the parties' financial affairs for the purposes of the § 547(c)(2) defense, the bankruptcy court did not err in disregarding the parties' stipulation and truncating the period for comparison to seven months before the start of the preference period, because that was when the debtor's financial difficulties began. Nor did the bankruptcy court err in using the average-lateness method, rather than the total-range method, to evaluate the usualness of the allegedly preferential payments. However, the bankruptcy court did err in applying the average-lateness method by arbitrarily treating payments made more than six days before or after the 22-day average between invoice and payment as unusual. Only 64% of the debtor's payments during the comparison period were made within the 16-to-28-day baseline and by adding just two days to either end of the range, the analysis would have captured 88% of the invoices paid during the historical period.

225. *In re Pihl, Inc.*,
560 B.R. 1 (Bankr. D. Mass. 2016)
Sureties that issued performance bonds for the debtor and which at that time received an assignment of rights to payment under the bonded contracts but which did not file a financing statement until a few days before the debtor's bankruptcy petition were liable for an avoidable preference with respect to a payment the debtor received shortly before the petition date. Although the assignment was not for security, and thus was outside the scope of Article 9, pursuant to the terms of the indemnity agreement, the assignment was not effective until the debtor ceased work on the bonded projects a few days before the petition. On the other hand, as to payments still due to the debtor on the petition date, the sureties were equitably subrogated to the debtor's rights as soon as they incurred a legal obligation to pay, and thus the sureties rights were superior to the rights of the debtor's bankruptcy trustee.

226. *In re Net Pay Solutions, Inc.*,
822 F.3d 144 (3d Cir. 2016)
Prepetition payments of withholding tax obligations made by payroll processor to the IRS on behalf of different clients could not be aggregated for the purpose of the § 547(c)(9) defense. To be aggregated, the transfers must be made to or for the benefit of the same creditor and on account of the same debt, but the clients, who were the creditors, were different, as were the debts. A single payment to the IRS above the § 547(c)(9) threshold was also not avoidable because it was imbued with a statutory trust and thus was not property of the debtor.

227. *In re Big Drive Cattle, LLC*,
2016 WL 1270987 (D. Neb. 2016)
The owner of cattle who was a member of an LLC that operated a feedlot, who guaranteed the feedlot's line of credit, and who in his capacity as a member signed a security agreement granting a security interest in funds on deposit, thereby allowed the security interest to attach to the proceeds of cattle that the owner had delivered to the feedlot for feeding and sale. Because of that, the feedlot did not hold the proceeds as a bailee and the feedlot's prepetition payments to the owner were transfers of the feedlot's property and avoidable preferences.

228. *In re Parker*,
2016 WL 6783222 (Bankr. D. Id. 2016)
Although the trustee's normal remedy when a security interest is avoidable as a preference is to simply avoid and preserve the lien for the benefit of the estate, the trustee is alternatively entitled to the value of the security interest, and that is the appropriate remedy when, as in this case, the whereabouts of the collateral was unknown. For this purpose, value is not the original amount of the secured loan because payments had been made and the vehicle had almost certainly depreciated. Instead, the secured creditor's liability will be the value of the vehicle on the petition date, as listed in the debtor's schedules.

– Strong-Arm Powers

229. *In re Madeoy*,
551 B.R. 172 (D. Md. 2016)
A lender who made a $500,000 loan intended to be secured by the individual borrower's interest in an LLC, but who instead received a deed of trust on the LLC's real property, was not entitled in the borrower's bankruptcy to have the agreement reformed because reformation would leave the lender with an unperfected security interest in the LLC interest, which the bankruptcy trustee could avoid using his strong-arm powers.

230. *In re Ajax Integrated, LLC*,
2016 WL 1178350 (Bankr. N.D.N.Y. 2016)
A secured party that sent to the debtor notice of lien forms regarding 30 vehicles that served as collateral, but which forms the debtor never signed, did not have a perfected security interest in the vehicles. Even if the secured party were entitled to an equitable lien, that lien would not subvert the trustee's strong-arm powers. The secured party was not entitled to a constructive trust in part because it failed to take basic precautions and exercise due diligence when it made the loan without having the debtor sign the notice of lien forms at that time.

231. *In re Kipnis*,
555 B.R. 877 (Bankr. S.D. Fla. 2016)
Because § 544(b) gives the bankruptcy trustee has rights of unsecured creditors to avoid prepetition transfers, these rights are subject to non-bankruptcy statutes of limitations, and under federal law the IRS has ten years to collect taxes and may, during that period, avoid transfers under state law without being bound by state statutes of limitations, the trustee may avoid transfers as far back as ten years if the IRS holds an unsecured claim.

232. *In re Story*,
2016 WL 5210572 (Bankr. W.D.N.C. 2016)
A lender with an automatically perfected purchase-money security interest in consumer goods did not lose perfection when the goods were installed in the consumers' home and became fixtures. Thus, a bankruptcy trustee could not avoid the security interest by virtue of the trustee's status as a lien creditor. Although a secured party must have made a fixture filing to have priority over certain real estate interests, a bankruptcy trustee has the status of a bona fide purchase of real estate "other than fixtures."

233. *In re Rougier*,
558 B.R. 41 (Bankr. D.R.I. 2016)
A credit union with both a first and second mortgage on the debtor's home could not waive part of the claim secured by the first mortgage to ensure that the second mortgage was not completely underwater, and thereby prevent the second mortgage from being stripped off pursuant to § 1322.

– Fraudulent Transfers

234. *In re Sentinel Management Group, Inc.*,
809 F.3d 958 (7th Cir. 2016)
The bank that loaned hundreds of millions of dollars to a cash management firm and obtained a security interest in the assets that the firm maintained for its customers did not act in good faith because it had reason to know that the firm was pledging its customers assets. Accordingly, the bank had no good faith defense under § 548(c) to avoidance of the security interest as an intentionally fraudulent transfer.

235. *In re Petters Co.*,
557 B.R. 711 (Bankr. D. Minn. 2016)
Neither a claim to avoid a transfer under § 548(a)(1)(A) as one made with intent to defraud, nor one under § 548(a)(1)(B) as made for less than reasonably equivalent value while insolvent, is subject to equitable tolling.

236. *In re Worldwide Diamond Ventures, LP*,
559 B.R. 143 (Bankr. N.D. Tex. 2016)
The debtor's prepetition purchase of 6.32 carat pink diamond for $600,000 was not for reasonably equivalent value because it was based on inflated appraisals and because the diamond was sold for $250,000 one month before the debtor's purchase and for $190,000 three years later. For the purposes of the avoidance action, the diamond's value would be deemed to be $210,000, the highest bid for it at a well-advertised Sotheby's auction.

– Other

237. *In re Leonard*,
2016 WL 1417964 (Bankr. D. Neb. 2016)
A seller of cattle who prepetition obtained a writ of replevin for cattle sold but for which the buyer/debtor paid with checks that were dishonored was entitled to possession of the cattle even though the cattle were delivered to the debtor more than 45 days before the petition, and thus the seller lacked reclamation rights that were protected under § 546. The seller effectively exercised his reclamation rights prepetition, which voided the buyer's ownership rights. Moreover, reclamation is not a voidable preference because the title is voidable; thus, there is no transfer on account of an antecedent debt.

238. *In re Birch Grove Landscaping & Nursery, Inc.*,
547 B.R. 500 (Bankr. W.D.N.Y. 2016)
A Chapter 11 debtor's authority to use cash collateral in ordinary course of business did not provide authority for the debtor to use cash collateral to make an extraordinary payment of principal to a creditor with a junior lien.

– Protection for Settlement Payments

239. *FTI Consulting, Inc. v. Merit Management Group, LP*,
830 F.3d 690 (7th Cir. 2016)
The protection from avoidance for settlement payments by or to a financial institution does not protect a transfer that is conducted through a financial institution that is neither the debtor nor the transferee, but merely a conduit. Accordingly, a settlement payment the debtor made for the purchase of securities, which was handled by a bank as an escrow agent, was not protected and could be avoided as a fraudulent transfer to the seller of the securities.

240. *In re Tribune Co. Fraudulent Conveyance Litigation*,
818 F.3d 98 (2d Cir. 2016)
Even if creditors' state-law fraudulent transfer claims revert to creditors after the stay is lifted if the trustee has declined to pursue them, the immunity from avoidance provided by § 546(e) for settlement payments applies. It would be anomalous to interpret the Code as staying these claims in favor of the trustee, who is expressly barred from bringing them, only to allow the creditors to pursue them later, and such an interpretation is not consistent with the congressional purpose of protecting the finality of transactions in the financial markets.

241. *In re Motors Liquidation Co.*,
552 B.R. 253 (Bankr. S.D.N.Y. 2016)
The payment of interest on a promissory notes was not a "settlement payment," as that term is defined in § 101(51A), because the notes remained in place after payment; there was not sale or redemption. However, the payment might be to a financial institution in connection with a "securities contract."

Equitable Subordination

242. *In re Sentinel Management Group, Inc.*,
809 F.3d 958 (7th Cir. 2016)
The bank that loaned hundreds of millions of dollars to a cash management firm and obtained a security interest in the assets that the firm maintained for its customers did not act in good faith because it had reason to know that the firm was pledging its customers assets. Nevertheless, the bank's negligence was not a sufficient basis for equitably subordinating the bank's claim.

Reorganization Plans

243. *In re Electric Maintenance and Construction, Inc.*,
2016 WL 2985025 (Bankr. M.D. Fla. 2016)
A junior lienor was not entitled to have a confirmed plan modified to increase the debtor's payments to it after the senior lienor's claim was satisfied from non-debtor collateral. Only the plan proponent or the reorganized debtor may seek modification of a confirmed plan for a corporate debtor. Moreover, unlike individual debtors in Chapter 11 and Chapter 13 debtors, a corporate Chapter 11 debtor is not required to commit projected disposable income to the plan.

244. *In re New Investments, Inc.*,
840 F.3d 1137 (9th Cir. 2016)
Although a Chapter 11 plan may cure a default on a secured obligation, and thereby de-accelerate the debt, because § 1123(d) provides that the amount necessary to cure must be determined according to the agreement and applicable nonbankruptcy law, the debtor remains obligated to pay interest at the default rate. The court did not specify whether the default rate applies for the remainder of the loan or only until cure is achieved.

245. *Anderson v. Hancock*,
820 F.3d 670 (4th Cir. 2016)
Although a Chapter 13 debtor has the right to cure a home mortgage default, and thereby de-accelerate the debt, that right does not permit the debtor to reinstate the pre-default interest rate. Changing the interest rate would be an impermissible modification of the mortgagee's claim.

246. *HSBC Bank USA v. Zair*,
550 B.R. 188 (E.D.N.Y. 2016)
A Chapter 13 plan could not, over a secured party's objection, provide for the debtor's real property to be surrendered to and title vested in the secured party, in satisfaction of the secured claim.

247. *In re Cochran*,
555 B.R. 892 (Bankr. M.D. Ga. 2016)
The debtor's plan could provide for monthly adequate protection payments on a claim secured by the debtor's residence followed by a balloon payment of the remaining debt upon refinancing the loan. The requirement in § 1325(a)(5)(B)(iii)(I) that "periodic" payments be equal in amount does not apply to a balloon payment, because it is not periodic.

Other Bankruptcy Matters

248. *In re Intervention Energy Holdings, LLC*,
553 B.R. 258 (Bankr. D. Del. 2016)
An amendment to an LLC operating agreement, made as a condition to a secured lender entering into a forbearance agreement, that made the lender a member of the LLC, required the unanimous consent of all members to file a bankruptcy petition, and eliminated the lender's fiduciary duties as a member, was tantamount to an absolute waiver of the LLC's right to seek bankruptcy protection and was thus void as against federal public policy.

249. *In re Lake Michigan Beach Pottawattamie Resort LLC*,
547 B.R. 899 (Bankr. N.D. Ill. 2016)
A term in an LLC operating agreement making mortgage lender a "special member" of the LLC whose consent was required for the LLC to file a bankruptcy petition, and further providing that the lender in so doing had no duty to consider factors affecting the LLC or its members, was void as against public policy. Under Michigan law, a successful blocking structure requires that the manager be subject to normal fiduciary duties.

250. *In re Endresen*,
548 B.R. 258 (9th Cir. BAP 2016)
The lenders with properly recorded deeds of trust on the debtor's real property had a lien on the debtor's interest in the settlement of a post-petition claim against the builder of row homes on the property because the deeds of trust contained language purporting to encumber a settlement or proceeds paid by a third party for damage to the properties and such property was "proceeds" of the real property within the meaning of § 552(b). Because Article 9 did not apply to the lender's interest in the real estate, it did not matter that the lenders had not filed a financing statement.

251. *In re Energy Future Holdings Corp.*,
842 F.3d 247 (3d Cir. 2016)
First-lien and second-lien noteholders, who pursuant to their indentures were due a premium if the debtor voluntarily redeemed the notes, were entitled to the premium even though the debtor's obligation on notes was automatically accelerated by the bankruptcy filing and the bankruptcy court declined to lift the stay to permit the noteholders to de-accelerate the debt. The debtor's payment of the notes in bankruptcy was optional because the debtor could have reinstated the accelerated notes' original maturity date under § 1124(2). Indeed, the debtor's whole purpose in filing for bankruptcy was to pay the notes while avoiding the $431 million premium. Moreover, there was no conflict between the term of the indenture providing for the premium and the term providing for payment after acceleration. Although a premium contingent on "prepayment" cannot apply after the debt's maturity, a premium tied to "redemption" can.

252. *In re Energy Future Holdings Corp.*,
546 B.R. 566 (Bankr. D. Del. 2016)
The holders of the highest tranche of first-lien debt – the whole of which was undersecured – were not entitled to post-petition interest out of the adequate protection payments and plan distributions on the debt allocated to the lower tranches because the waterfall in the intercreditor agreement dealt only with payments out of the proceeds of collateral pursuant to the exercise of remedies. Neither the adequate protection payments nor the plan distributions constitute proceeds of collateral. Moreover, neither amounts resulted from the exercise of remedies under the loan documents. As a result, the intercreditor agreement did not speak to the allocation of payments and the payments were to be allocated pursuant to the Bankruptcy Code.

253. *In re Energy Future Holdings Corp.*,
551 B.R. 550 (Bankr. D. Del. 2016)
The first-lien noteholders, who were paid the full amount of the outstanding principal and interest in the debtors' bankruptcy, were not entitled to recover the amount of the prepayment premium from the second-lien noteholders, who received a partial payment on their notes from the debtor, because the first-lien noteholders were entitled to the prepayment premium from the debtor only if there was an optional redemption of the first-lien notes, and there was not. Instead, the notes were automatically accelerated when the debtors filed for bankruptcy protection.

254. *Lesa, LLC v. Family Trust of Kimberley and Alfred Mandel*,
2016 WL 6599912 (N.D. Cal. 2016)
Contractually subordinated creditors' cross-complaint to rescind their loan transaction did not violate the terms of their intercreditor agreement with the senior lender, which prohibited them from commencing or prosecuting any "legal or equitable action against Borrower" before the senior creditor was paid in full. That language had to be read in context as prohibiting only actions to collect the subordinated debt. A claim for rescission is not an act to collect the debt; rescission restores the parties to their position before contracting whereas collecting a contractual debt involves enforcing expectation interests.

255. *In re Aeropostale, Inc.*,
555 B.R. 369 (Bankr. S.D.N.Y. 2016)
Secured lenders' statutory right to credit bid at a § 363 sale could not be denied merely because that right might chill bidding by others.

256. *In re Christensen*,
2016 WL 7366769 (Bankr. D. Utah. 2016)
The trustee lacked authority under § 363(f) to sell fully encumbered property despite carve-out agreement with the senior lienor because the debtors claimed a homestead exemption, which claim could be applied to the carve-out amount, and because the exemption was not subject to bona fide dispute and the debtors could not be compelled to accept a money satisfaction of their interest.

257. *In re Republic Airways Holdings Inc.*,
547 B.R. 578 (Bankr. S.D.N.Y. 2016)
The debtor who wishes to surrender to the secured party some encumbered aircraft and engines need not comply with the terms of the security agreement that required the debtor to simultaneously return the aircraft records or to reinstall the engines in the proper airframes. The debtor had already made the records available for the secured party to pick up and the secured party could file a claim for the costs associated with reinstalling the engines in the proper airframes. The debtor would, however, be required to maintain insurance on the collateral to be surrendered for 15 days from the date the court ruled on the motion to surrender, so as to give the secured part a reasonable time to retrieve the collateral.

258. *In re Hall*,
559 B.R. 456 (Bankr. W.D. Va. 2016)
A lender with a deed of trust on property held by the entireties but signed only by the husband, and which was therefore unenforceable, did not violate the couple's discharge injunction by bringing an action to reform the deed of trust. A reformation action is an *in rem* proceeding and, as long as the lender does not pursue an unjust enrichment claim against the couple, the discharge injunction would no be implicated by proceeding against the property.

259. *In re Delta Produce, LP*,
817 F.3d 141 (5th Cir.), *revised*, 845 F.3d 609 (5th Cir. 2016)
Despite the provisions in a bankruptcy court order appointing a special counsel to adjudicate and pay PACA claims, the special counsel was not entitled to an award of fees from the portion of the trust allocated to objecting trust beneficiaries because the PACA does not permit trust assets to be used to pay other creditors of the produce buyer ahead of the PACA claimants. The special counsel was, in essence, performing a duty of the produce buyer, the PACA trustee.

260. *In re Harris*,
2016 WL 4072805 (Bankr. N.D. Ga. 2016)
Even though the finance company with a non-purchase-money security interest in the debtor's car was not entitled to pre-confirmation payments under § 1326(a)(1)(C), the finance company was entitled to adequate protection – in the form of monthly payments – against depreciation of the collateral.

Guaranties & Related Matters

261. *Bank of America v. Garden District Pet Hospital, Inc.*,
2016 WL 952250 (E.D. La. 2016)
An individual's agreement to guaranty a loaned made to an LLC of which the individual was the sole member, and which agreement was not amended after the loan agreement was modified to reflect that the loan was made to a corporation of the same name owned by the same individual, covered the debt of the corporation. The amendment to the loan agreement was not a novation and did not substitute one party for another; instead, the amendment's language suggested that the parties intended to modify the existing agreement to reflect the existing borrower's actual business structure.

262. *York v. RES-GA LJY, LLC*,
784 S.E.2d 96 (Ga. Ct. App. 2016)
The statutory rule limiting a creditor's ability to obtain a deficiency judgment following a nonjudicial foreclosure are waivable by a guarantor. A guarantor's waiver of "any and all rights or defenses based on suretyship" was sufficient to waive the benefit of this statutory rule.

263. *Tri-Town Construction Co. v. Commerce Park Associates 12, LLC*,
139 A.3d 467 (R.I. 2016)
The individual who signed a promissory note twice, once as the manager of the borrower and once as a guarantor, was liable for balance due. There is no requirement that a guaranty be in a separate writing and the note was supported by consideration even though none of it flowed directly to the individual.

264. *Broadbent v. Fifth Third Bank*,
59 N.E.3d 305 (Ind. Ct. App. 2016)
A guaranty that limited the guarantor's liability to fifty percent of the outstanding balance of principal and accrued interest on the guaranteed note but provided further that "any reduction of the Liabilities whether prior to or after the occurrence of an Event of Default shall be applied first to that portion of the Liabilities not guaranteed by Guarantor hereunder," meant that the proceeds the creditor received from foreclosing on the collateral were to be applied first to half of the debt not guaranteed, and only the residual proceeds after so doing reduced the guarantor's obligation.

265. *Torin Associates, Inc. v. Perez*,
2016 WL 6662271 (S.D.N.Y. 2016)
A lender was entitled to summary judgment on its claim against two guarantors even though the borrower failed to execute the promissory note because the guaranty agreements expressly provided the guarantors would be liable regardless of whether the "indebtedness or liability may otherwise be or become unenforceable" and the guarantors did not dispute either that the loan was made or the terms of the loan.

266. *CP III Rincon Towers, Inc. v. Cohen*,
2016 WL 6989480 (2d Cir. 2016)
A term in a bad boy guaranty providing that the creation of any voluntary lien on the collateral triggered the guarantor's liability rendered ambiguous another term triggering liability on any "transfer" of the collateral, a term defined to include the creation of any lien, whether voluntarily or involuntarily. Therefore summary judgment was inappropriate on whether the imposition of involuntarily created mechanics' liens on the collateral triggered the guarantor's liability.

267. *RCG LV Debt IV Non-Reit Assets Holdings, LLC v. Ringel*,
2016 WL 7666117 (N.Y. Sup. Ct. 2016)
The guarantors of the debtor's recourse liability under a mezzanine note, which was initially nonrecourse but became recourse if the debtor permitted its subsidiary's real property to become an asset in a bankruptcy proceeding, were liable for the debt. It did not matter that the real property was sold without objection in the bankruptcy proceeding because recourse liability was triggered when the bankruptcy petition was filed. For the same reason, it did not matter whether the lender was damaged by the bankruptcy proceeding. Similarly, it did not matter that some the bankruptcy proceeding was commenced without the consent of some of the guarantors.

268. *Callidus Capital Corp. v. Smith*,
2016 WL 4699700 (E.D. Ky. 2016)
An individual guarantor of debt incurred by a limited liability company had no defense based on the lender's alleged promise, prior to execution of the guaranty, that it would release the guarantor if the borrower obtained an equity infusion of $2 million because the written agreement provided that the lender "may," in its discretion, release the guarantor and thus the guarantor could not reasonably rely on a representation in direct contradiction to the written agreement. The guarantor had no defense based on the failure to provide him with notification of the sale of the collateral because the lender did not sell the collateral, the debtor did in its bankruptcy proceeding, and the lender was not in control of the debtor's actions and in fact had objected to the sale. The guarantor had no defense based on the lender's failure to dispose of collateral in a commercially reasonable manner because the guaranty was absolute and judgment could be entered on the debt regardless of whether the lender has acted in a commercially reasonable manner.

269. *United States v. Kumar*,
2016 WL 7369863 (N.D. Cal. 2016)
Individuals who guaranteed an SBA loan to their limited liability company, secured by a deed of trust, raised a potentially valid defense to a deficiency claim by alleging that the guaranty was a sham intended to evade the anti-deficiency statute. They claimed that the lender asked for the financial information of only the guarantors, not the borrower, and that it required that the loan be made to a special purpose entity, which was formed for the purpose of taking title to the real property.

270. *PNC Bank v. Pataskala Town Center, LLC*,
2016 WL 7049249 (S.D. Ohio 2016)
A guaranty is not a negotiable instrument and is therefore not governed by U.C.C Article 3. Even if it were, the creditor complied with the rules of § 3-309 applicable to a lost instrument and could enforce the guaranty despite having lost the original.

LENDING, CONTRACTING & COMMERCIAL LITIGATION

271. *Lexmark International, Inc. v. Impression Products, Inc.*,
816 F.3d 721 (Fed. Cir. 2016)
A re-sale buyer of printer cartridges that the manufacturer/patentee had initially sold pursuant to agreements that prohibited re-use and resale, prohibitions of which the resale buyer had actual knowledge, infringed the patent by engaging in restricted resale and use. The first-sale doctrine does not protect a buyer who purchases directly from the patentee with knowledge of the restrictions, or any subsequent buyer with knowledge.

272. *MVB Bank, Inc. v. Stifel Bank & Trust*,
164 F. Supp. 3d 825 (E.D. Va. 2016)
Seller of loans containing cross-default clauses and guaranties breached a representation that the loans were cross-collateralized because there was no common collateral. The guarantor's pledge of his stock in one borrower to secure the debt of the other borrower was also not cross-collateralization. Moreover, the misrepresentation was material – entitling the buyer to exercise its contractual right to make the seller repurchase the loans – because the cross-default provision and the stock pledge do not provide the buyer with post-default rights functionally equivalent to the rights that cross-collateralization would have.

273. *Zaretsky v. William Goldberg Diamond Corp.*,
820 F.3d 513 (2d Cir. 2016)
Although the fashion stylist to whom a diamond wholesaler had delivered a 7.35 carat diamond was a merchant within the meaning of Article 2 by virtue of the fact that he held himself out as having knowledge or skill peculiar to jewelry, because he did not regularly sell diamonds, he was not a merchant "who deals in goods of that kind," and thus could not and did not transfer the wholesaler's rights in the diamond to a buyer pursuant to the entrustment rule of § 2-403(2).

274. *Alcoa Materials Management, Inc. v. Niagara Worldwide, LLC*,
2016 WL 7292934 (Ohio Ct. App. 2016)
A buyer that had paid the total $4.3 million contract price for carbon anodes but which had not picked them up by the end of the time period specified in the sales contract was nevertheless entitled to complete pick up from the entity that had purchased the real property and remaining assets of the seller. Under the sales agreement, title passed on the date of the sales agreement. Even if title did not pas then, the buyer received a special property interest in the goods at that time and this was sufficient because the purchaser of the remaining assets knew of the prior sale to the buyer.

275. *O.F.I. Imports Inc. v. GECC*,
2016 WL 5376208 (S.D.N.Y. 2016)
A secured party that allegedly facilitated the debtor's sale of assets and financed the buyer's purchase of them was not liable for fraud even though the buyer paid approximately $5.6 million more than the assets' value. The asset purchase agreement between the debtor and buyer provided that the sale was on an "as-is, where-is" and "without representation or warranty of any kind," and included the buyer's acknowledgment it was relying "solely on its own investigation and not on any information provided or to be provided by any other Party." The credit agreement between the secured party and the buyer contained a term by which the buyer released "any and all claims . . . in respect of all prior discussions and understandings, oral or written, relating to the subject matter of" the transaction. Such a release is enforceable even if the claims are unknown at the time. Consequently, the buyer had no claim for the secured party's alleged misrepresentation of the value of the debtor's accounts receivable or for breach of an alleged oral promise to make a post-closing purchase price adjustment.

276. *Ameriserv Trust v. United States*,
125 Fed. Cl. 733 (Ct. Fed. Cl. 2016)
The lender with a security interest in the borrower's lease of property to the United States stated a claim against the government for breach of a subordination agreement pursuant to which the government warranted that the lease was in good standing, and that "no events have occurred which, with notice, the passage of time, or both, would constitute a default" under the lease because the events leading to the government's later termination of the lease all preceded the execution of the subordination agreement. When the government learned of the events was immaterial; by providing a warranty, the government assumed the risk that these facts would prove untrue. Even if the lease was void or voidable due to the borrower's fraud, that did not render invalid the subordination agreement.

277. *Portland Development Corporation v. M/V Nova Star*,
2016 WL 4660914 (D. Me. 2016)
The funds loaned by a development authority to improve premises on the waterfront so as to restore international ferry service, and which funds were used to provide a trailer for the use of the Border Patrol and to improve the sewer and communication systems – all of which property was owned by the city – were not necessaries provided to a vessel, and thus the development authority had no maritime lien on the vessel that benefitted from the improvements. Even if the improvements had been delivered to the vessel, it was clear from the parties' negotiation history that the loan was to be unsecured, and this any maritime lien to which the development authority might otherwise be entitled was waived.

278. *McDonald Data Services, Inc. v. Secure One Data Solutions, LLC*,
2016 WL 866731 (E.D. Tex. 2016)
A subordination agreement that provided in one provision that "[t]he Junior Lender shall not (i) exercise any of the remedies with respect to the Junior Debt, or (ii) take any action to enforce any of its liens on the Junior Lender's Collateral," but in another provision provided that "[o]nce the Blockage Period has expired, Junior Lender may, at its option, during any time period that Junior Debt is in default, take any enforcement action it dee[m]s appropriate with respect to all or any part of the Junior Debt" was ambiguous, creating a factual issue as to the agreement's meaning. Accordingly, summary judgment was not appropriate on claim for breach of the agreement.

279. *Lesa, LLC v. Family Trust of Kimberley and Alfred Mandel*,
2016 WL 1446770 (N.D. Cal. 2016)
A term in a debt subordination agreement by which the junior lenders promised not to "commence, or cause to commence, prosecute or participate in any administrative, legal or equitable action against Borrower" until the senior debt was paid in full covered only claims relating to the subordinated debt; it did not prohibit the junior lenders from bringing a cross-claim against the debtor for fraud and negligent misrepresentation.

280. *Arizona v. Landmarc Capital & Investment Co.*,
2016 WL 7477720 (Ariz. Ct. App. 2016)
Summary judgment was improperly granted on a claim that buyers of a participation interest in a loan were, pursuant to letters sent by the originator prior to execution of the participation agreement, entitled to first-out priority. While there was evidence to support the buyers' promissory estoppel claim, there was also evidence to the contrary, including that fact that the participation agreement made no reference to first-out priority and contained a merger clause, thus making any reliance on the letters unreasonable.

281. *In re Caesars Entertainment Operating Co.*,
2016 WL 7451305 (Bankr. N.D. Ill. 2016)
Although a term in a collateral agreement by which the lenders agreed that "no recourse shall be had . . . under any law," against the borrowers or their assets, other than the specified collateral, might by itself be sufficient to waive the lenders' right to make the election under § 1111(b) of the Bankruptcy Code, because the collateral agreement had to be read consistently with the contemporaneously executed intercreditor agreement, which expressly referred to the collateral agent making the election, the lenders had not waived their right to make the election.

282. *Becker v. The Bank of New York Mellon Trust Co.*,
172 F. Supp. 3d 777 (E.D. Pa. 2016)
The indenture trustee for revenue bonds could be liable to bond holders for both negligence and breach of contract for its failure to maintain the perfected status of the security interest in the debtor's collateral after the debtor changed its name. While an indenture trustee's fiduciary duties are normally defined by the agreements, after the debtor's default, an indenture trustee's fiduciary duties become more like those of a traditional trustee.

283. *Western Surety Co. v. Futurenet Grout, Inc.*,
2016 WL 3180188 (E.D. Mich. 2016)
Although an agreement by which a contractor, its principals, and related entities promised to indemnify the issuer of performance bond for losses incurred on the bond provided that the indemnitors would put up collateral if the issuer determined the need therefor, and the issuer had established that it is entitled to such collateral and to be indemnified for its demonstrated costs thus far, a preliminary injunction ordering the indemnitors to provide collateral would be denied because it would likely cause the contractor to go out of business, costing at least 200 jobs, and was therefore not in the public interest. Instead, the contractor would be preliminarily enjoined from transferring or encumbering assets except in the ordinary course of business.

284. *Koch v. Boxicon, LLC*,
2016 WL 1254048 (Tex. Ct. App. 2016)
An agreement purporting to be a purchase of future business income – and which expressly stated that it was not a loan – but which included an unconditional promise to repay a fixed sum at a specified date, was really a disguised loan. Because the rate of return was 100% over 88 months, the transaction was usurious.

285. *In re Sabine Oil & Gas Corp.*,
547 B.R. 503 (Bankr. S.D.N.Y. 2016)
When applying the collapsing doctrine in connection the application of fraudulent transfer law to a corporate merger, all the planned steps of an integrated transaction – specifically, the share exchange and the debt refinancing – must be collapsed and viewed as a single transaction. When so viewed, the constructive fraud claim for debt incurred by the merger survivor was untenable. However, the upstream guarantees and security interests granted by insolvent subsidiaries were potentially constructively fraudulent transfers.

286. *ADP Commercial Leasing, LLC v. Obeid*,
2016 WL 74880 (E.D. Mich. 2016)
Judgment creditor of LLC that operated a car dealership had no cause of action against an insider who received a $1.15 million payment when Ford terminated the dealership because even if the LLC had a right to that payment, that right would have been fully encumbered by the security interest of the LLC's principal lender. Consequently, the payment was not an "asset" within the meaning of the Michigan Uniform Fraudulent Transfer Act.

287. *In re Fair Finance Co.*,
834 F.3d 651 (6th Cir. 2016)
Because the debtor and secured party structured their refinancing agreement so that it might have been a novation, which would have extinguished the existing security interest and created a new one, the creation of the new security interest would have related to unencumbered assets and thus constituted a "transfer" under the Uniform Fraudulent Transfer Act. The debtor's trustee therefore stated a claim for avoidance of the security interest and all payments thereafter made on the secured obligation. The trustee's claim that the transfer was constructively fraudulent was time barred. However, a claim to avoid an intentionally fraudulent transfer under the Uniform Fraudulent Transfer Act must be brought within four years after the transfer was made or, if later, within one year after the transfer was or could reasonably have been discovered, and for purpose of latter part of the rule, it is when the creditor did or should have discovered the fraudulent nature of the transfer, not the existence of the transfer.

288. *National Auto Service Centers, Inc. v. F/R 550, LLC*,
192 So. 3d 498 (Fla. Ct. App. 2016)
A claim to avoid an intentionally fraudulent transfer under the Uniform Fraudulent Transfer Act must be brought within four years after the transfer was made or, if later, within one year after the transfer was or could reasonably have been discovered, and for purpose of latter part of the rule, it is when the creditor did or should have discovered the transfer, not the facts showing the transfer to be fraudulent. Because the rule is a statute of repose, not a statute of limitations, it is not subject to equitable tolling based on the debtor's alleged concealment of the fraudulent nature of the transfers.

289. *KB Aircraft Acquisition, LLC v. Berry*,
790 S.E.2d 559 (N.C. Ct. App. 2016)
A claim to avoid an intentionally fraudulent transfer under the Uniform Voidable Transactions Act is extinguished four years after the transfer was made or, if later, one year after the transfer was or could reasonably have been discovered; the latter part of this rule refers to the date that the transfer actually occurred, not the date that the fraudulent nature of the transfer becomes apparent. Because the rule is a statute of repose, not a statute of limitations, it is not subject to equitable tolling.

290. *Lewis v. Taylor*,
375 P.3d 1205 (Colo. 2016)
Although claim to avoid under the Uniform Fraudulent Transfer Act payments made by the operator of a Ponzi scheme is extinguished four years after the transfers were made or, if later, one year after the transfers were or could reasonably have been discovered, that period could be and was effectively tolled by agreement between the transferee and the receiver for the transferor.

291. *Janvey v. The Golf Channel, Inc.*,
487 S.W.3d 560 (Tex. 2016)
The payments made by an entity that operated a Ponzi scheme to a broadcaster pursuant to a contract for media-advertising services were for reasonably equivalent value, and thus not avoidable under the Uniform Fraudulent Transfer Act. Value need not be something that can be sold to satisfy the claims of the transferor's creditors and should not be examined from the subjective perspective of the creditors or retroactively. Instead, it is based on market value and exists if the transferee: (i) fully performed under a lawful, arm's-length contract for fair market value; (ii) provided consideration that had objective value at the time of the transaction; and (iii) made the exchange in the ordinary course of its business.

292. *Grosse Pointe Law Firm, PC v. Jaguar Land Rover North America, LLC*,
2016 WL 5266724 (Mich. Ct. App. 2016)
A claim by a buyer of goods against a manufacturer for breach of a promise to repair defective parts of a car is not a claim for breach of warranty and therefore accrued when the manufacturer failed to repair, not at tender of delivery of the car. As a result, the 4-year limitations period under § 2-725 had not expired.

293. *McFarland v. Wells Fargo Bank*,
810 F.3d 273 (4th Cir. 2016)
A mortgage refinancing transaction in which the homeowner borrowed $40,000 more than the value of the property and used that amount to pay down student loans and an automobile loan was not substantively unconscionable.

294. *Coker v. JPMorgan Chase Bank*,
364 P.3d 176 (Cal. 2016)
California Code of Civil Procedure § 580(b), which prohibits actions for a deficiency to collect a purchase-money loan, applies after any sale, not merely a foreclosure sale, and thus prohibits actions for a deficiency following a short sale arranged by the debtor and consented to by the lender. It does not matter that the debtor purports to waive this protection in the short-sale documents because the protections afforded by the statute, which are designed to benefit the public by stabilizing the state's economy, cannot be waived.

295. *Maybank v. BB&T Corp.*,
787 S.E.2d 498 (S.C. 2016)
The term in a wealth management agreement between a bank and its customer that disclaimed liability "for any incidental, indirect, special, consequential or punitive damages" with respect to the services provided was not against public policy and was sufficient to bar liability for punitive damages. However, because the term did not mention "statutory" or "multiple" damages, it did not prevent the trebling of the jury's damages award for willful violation of the state Unfair Trade Practices Act.

296. *VLM Food Trading International, Inc. v. Illinois Trading Co.*,
811 F.3d 247 (7th Cir. 2016)
Because contracts for the sale of goods between a Canadian supplier and an Illinois purchaser were, pursuant to the CISG, made when the supplier sent email confirmations in response to the purchaser's purchase orders, and none of those documents referred to the purchaser's duty to pay the supplier's attorney's fees, the contract included no provision on such fees. References to such fees in the invoices that the supplier mailed after the purchaser received the goods were not part of the contract. The invoices were not counter-offers because the contract had already been formed. The supplier did not assent to the terms expressly and its actions in paying the invoices did not signify assent because it was already obligated to pay. Moreover, there would have been no consideration for a modification because the supplier had already completely performed.

297. *In re WBH Energy, LP*,
2016 WL 3049666 (Bankr. W.D. Tex. 2016)
Even though a party to a joint operating agreement with the debtor prevailed in its action to prevent the debtor from continuing to act as the operator under that agreement, it was not entitled to attorney's fees pursuant to a provision in the agreement awarding attorney's fees to the prevailing party in legal proceedings "to enforce any financial obligation," because the litigation was not about enforcing a financial obligation.

298. *In re Graves*,
555 B.R. 603 (Bankr. W.D. Tex. 2016)
Although a cause of action normally merges into a judgment on the claim, with the result that res judicata would normally prevent a subsequent claim for attorney's fees incurred in pursuing the claim, because a promissory note expressly obligated the maker for the payee's "post-judgment" costs and expenses, the payee's claim for attorney's fees incurred post-judgment survived.

299. *Mortgage Grader, Inc. v. Ward & Olivo, LLP*,
139 A.3d 30 (N.J. 2016)
An attorney who withdrew from a law firm – that was structured as a limited liability partnership – after another attorney in the firm gave a client allegedly deficient advice was not liable to the client even though the firm allowed its malpractice coverage to lapse when winding up its affairs. The requirement in the rules of court that law firms organized as LLPs maintain malpractice insurance does not extend to a firm's windup period when the firm has ceased to provide legal services and it does not require purchase of tail insurance coverage. Moreover, violation of such a disciplinary rule does not result in automatic conversion of a law firm organized as an LLP into a general partnership.

300. *Capefirst Funding, LLC v. Botanical Skin Works, LLC*,
2016 WL 901259 (E.D. Va. 2016)
Viewing as a whole the mutual release agreement executed by, among others, a factor and the person who guaranteed the validity of the borrower's representations, the clause terminating the factoring agreement and all obligations and rights related thereto was conditioned on payment of the Settlement Amount, even though clause such an express condition and another clause releasing the borrower and guarantors of liability contained such a condition.

301. *Volvo Group North America, LLC v. Truck Enterprises, Inc.*,
2016 WL 1479687 (W.D. Va. 2016)
Because a truck manufacturer had both contractual and statutory rights of first refusal to buy its authorized dealerships, entities that owned several dual dealerships – that is, authorized dealerships of more than one manufacturer – would be enjoined from selling the dual dealerships in a package deal because such a transaction requires the manufacturer either to forego its right of first refusal or purchase the dealerships of another manufacturer.

302. *Smith v. Ashford*,
782 S.E.2d 251 (Ga. 2016)
A husband with a testamentary power of appointment to designate income and principal beneficiaries under a trust did not exercise that power in his will by purporting to transfer the power to his wife, but did properly exercise the power through a clause designating his children as contingent beneficiaries.

303. *FdG Logistics LLC v. A & R Logistics Holdings, Inc.*,
2016 WL 703887 (Del. Ch. Ct. 2016)
The choice-of-law clause in a merger agreement, which provided that "all disputes . . . be resolved according to Delaware law," did not subject the transaction to the Delaware Securities Act even though the target was a Delaware corporation. There was no allegation that the buyer was solicited to purchase the securities in Delaware or that any of the negotiations occurred in Delaware. The contractual choice of law covers matters of contract formation and interpretation, but does not subject the transaction to Delaware statutory law or taxation that would otherwise not apply. The integration clause in the agreement, by which the seller disclaimed the existence of representations or warranties outside the written agreement did not bar a claim based on fraud; to do that the buyer must have represented that the buyer was not relying on any statements outside the agreement.

304. *In re First Farmers Financial Litigation*,
2016 WL 6647923 (N.D. Ill. 2016)
Although the guaranty and security agreements relating to a $2 million loan contained a clause selecting Florida law, the court would apply Illinois law to the promissory note, which lacked such a clause, in part because the note would be usurious – and unenforceable – under Florida law and parties presumably intended to be bound by a valid contract.

305. *Gordian Group, LLC v. Syringa Exploration, Inc.*,
168 F. Supp. 3d 575 (S.D.N.Y. 2016)
A contractual clause in which one party "consents to venue and jurisdiction in any court in which [the counter-party] is sued or otherwise found or brought" was unenforceable because it does not identify an ascertainable forum.

306. *Irsik & Doll Feed Services, Inc. v. Roberts Enterprises Investments, Inc.*,
2016 WL 3405175 (D. Kan. 2016)
The forum selection clause in each of 27 security agreements covered actions to enforce each of the 27 related promissory notes – which lacked a forum selection clause – because each note and security agreement expressly referenced each other and were part of a single, integrated transaction. The clauses, by referring to "courts of the State of Kansas," rather than to "courts in the State of Kansas," were limited to state tribunals.

307. *Power UP Lending Group, Ltd v. Murphy*,
2016 WL 6088332 (E.D.N.Y. 2016)
Both the chief executive officer and the general counsel of a corporate borrower were bound by the forum selection clause in the loan agreements in connection with the lender's claims against them for fraudulent inducement and intentional interference with contract. The forum selection clause was clearly communicated to each of the individual defendants, is mandatory, and broadly covers "[a]ny suit, action or proceeding arising [under the loan agreements]," and the defendants are principals of, and therefore "closely related" to the signatory corporation, so that it was or should have been reasonably foreseeable to them that the forum selection clause might be enforced against them in the event of a breach.

308. *1st Source Bank v. Neto*,
2016 WL 7187247 (N.D. Ind. 2016)
A guaranty agreement between a U.S. lender and a Brazilian individual guarantor that made federal and state courts in Indiana the exclusive fora for litigating any dispute but also permitted the lender, in its sole and exclusive discretion, to additionally institute legal proceedings against the guarantor "in any jurisdiction where the guarantor maintains temporarily or permanently, any asset" did not prevent the lender from bringing an action against the guarantor in Brazil while an earlier action was pending in federal court in Indiana. The language of the agreement did not require that a judgment be entered in the domestic action before commencing the action in Brazil, and the Brazilian action was not vexatious or oppressive because it permitted prejudgment attachment of assets located there.

309. *Schwartz-Earp v. Advanced Call Center Technologies, LLC*,
2016 WL 899149 (N.D. Cal. 2016)
By providing her cell phone number in the application for a store credit card, the applicant consented to being contacted on her cell phone about matters related to her credit card, including by third-party debt collectors. Therefore, the debt collector who called her on her cell phone using an automated dialing system did not violate the Telephone Consumer Protection Act.

310. *Wolverine Flagship Fund Trading Ltd. v. American Oriental Bioengineering, Inc.*,
134 A.3d 992 (N.J. Super. Ct. 2016)
A judgment creditor was not entitled to an order requiring a corporation in which the judgment debtor owned certificated shares of stock to cancel the certificate, reissue the shares in the judgment creditor's name, and transfer possession to the sheriff for execution. Because the judgment creditor did not have possession of the existing certificate, which was allegedly in China, under § 8-112 the judgment creditor could not reach the shares represented by the certificate.

311. *James v. National Financial, LLC*,
132 A.3d 799 (Del. Ch. Ct. 2016)
An agreement for a $200 loan which required 26 bi-weekly payments of $60 followed by a final payment of $260, for a total of $1,820 with an APR of 838.45%, was unconscionable. Although the lender had structured the transaction to avoid the statutory restrictions on payday loans, the transaction was substantively unfair and was procedurally unconscionable due to the borrower's lack of sophistication, education, and lack of bargaining power.

312. *Galloway v. Santander Consumer USA, Inc.*,
819 F.3d 79 (4th Cir. 2016)
Even though the lender did not sign the form that the borrower completed and returned to refinance an auto loan, an agreement was reached either when the lender lowered the monthly payment to an amount 86¢ more than what the borrower request or when the borrower made payments in that amount, and the resulting agreement included the arbitration clause contained in the form.

313. *Hunter v. Citibank*,
2016 WL 1169279 (N.D. Cal. 2016)
Assignment of " all of Seller's right, title, benefit and interest in and to any and all of Seller's prepetition claim or claims, . . . against [the "Debtor"], in bankruptcy proceedings in the United States Bankruptcy Court for the Southern District of New York, . . . and all rights to received interest, penalties, fees, and any damages from any cause of action, litigation or rights of any nature against Debtor, . . . which may be paid or issued with respect to and/or in satisfaction of the Claim" covered not merely the right to payment in the debtor's bankruptcy but also claims against various defendants in a class action relating to the debtor's Ponzi scheme.

314. *In re Minton*,
2016 WL 1554995 (Bankr. C.D. Ill. 2016)
Provision in $930,000 promissory note indicating that the debt would be forgiven if the debtor fully paid two other notes, one for $1,250,000 and another for $350,000 was not an unenforceable penalty because the debtor actually borrowed the amount represented by the notes.

315. *In re Abound Solar Manufacturing, LLC*,
547 B.R. 611 (Bankr. D. Del. 2016)
A term in an agreement with an auctioneer prohibiting assignment without the express written consent of the other party did not prohibit assignment of a claim for breach.

316. *Meyer v. Kalanick*,
2016 WL 2659591 (S.D.N.Y. 2016)
A sentence purporting to waive the right to bring or participate in a class action but which was placed between two sentences dealing with arbitration was limited to disputes that were arbitrated and does not apply to disputes as to which arbitration was waived.

317. *Parsons v. Associated Banc-Corp.*,
881 N.W.2d 793 (Wis. Ct. App. 2016)
To be enforceable under Wisconsin law, a pre-litigation, contractual jury waiver must be knowingly and voluntarily made. Factors to consider in this include: (i) the parties' negotiations concerning the waiver provision, if any; (ii) the conspicuousness of the provision; (iii) the relative bargaining power of the parties; and (iv) whether the waiving party's counsel had an opportunity to review the agreement. Applying this standard, a term in a promissory note relating to a construction project that purported to waive the borrower's and the lender's rights to a jury in any action relating to the relationship of the parties was not enforceable. Although the term was in all capital letters, there was no negotiation about the term and the borrower was given no time to review the documents or to consult with his lawyer about the documents. In addition, the jury waiver was both procedurally and substantively unconscionable.

318. *Liberty Mortgage Corp. v. Fiscus*,
379 P.3d 278 (Colo. 2016)
Even if a deed of trust is a negotiable instrument, so that an assignee could qualify as a holder in due course, the property owner was still entitled to a defense based on the fact that his name was forged. By its plain terms, § 3-405 identifies the defenses to which a holder in due course is subject in connection with an action "to enforce the obligation of a party to pay the instrument." However, this language presupposes that an obligation exists and a forgery defense denies the existence of the obligation.

319. *Tri-Town Construction Co. v. Commerce Park Associates 12, LLC*,
139 A.3d 467 (R.I. 2016)
Developer that borrowed $4,3 million to turn unimproved wooded lot into a 140-unit condominium complex for people over age 55, but whose plans were thwarted by the financial crisis, was not entitled to relief based on frustration of purpose. Frustration applies only when both parties share the same purpose and when the frustration is substantial, but that the developer had not shown that the lender shared the developer's purpose or that the difficulty in obtaining requisite financing made the development impossible.

320. *1301 Properties v. Abelson*,
37 N.Y.S.3d 207 (N.Y. Sup. Ct. 2016)
Even though a lease of commercial property contained a clause prohibiting waiver of contractual rights unless in a signed writing, the landlord was equitably estopped from claiming defects in the financial certifications that the tenant had provided more than nine years earlier and about which the landlord had never complained until it brought suit. As a result, the former partners of the tenant were released from liability. The current partners of the tenant, now a limited liability partnership, were insulated from liability by Partnership Law § 26. Although the partners of an LLP can agree to personal liability of a majority of them so agree, there was no such agreement and even though the lease predated enactment of the LLP statute, the parties had ample time to amend the lease and comply with the law.

321. *Kirton McConkin PC v. ASC Utah, LLC*,
383 P.3d 446 (Utah Ct. App. 2016)
The law firm that represented a lessor of real property and which obtained a security interest in the lessor's right to rent secure the firm's right to fees was not entitled to collect rent from the tenant who later obtained a $60 million judgment against the lessor and was expressly granted by he court a right to set off its rent obligation against the judgment. Although the lease expressly prohibited set off, it also contained a provision indicating that it was a binding obligation of the lessor "subject to equitable principles." Thus, although the tenant could not withhold rent as a self-help remedy, once the judgment was entered, the court could set off as a matter of equity; because the law firm, as an assignee, stepped into the shoes of the lessor, the law firm's rights were subject to the tenant's set off rights.

322. *Pelusio Canandaigua, LLC v. Genesee Regional Bank*,
2016 WL 7421571 (N.Y. Sup. Ct. 2016)
A landlord that had signed waivers subordinating its landlord's lien to the security interest of the tenant's lender had no claim for unjust enrichment against the lender for the time the goods were stored in the leased premises. The landlord also had no claim for breach of contract against the lender because the waivers were signed only by the landlord.

323. *In re Kitchens Brothers Manufacturing Co.*,
2016 WL 3699341 (Bankr. S.D. Miss. 2016)
Because the parties' loan and security agreement expressly provided that the Termination Date could be extended "in the sole and unrestricted discretion" of the lender, and that the lender "shall be under no obligation whatsoever to extend the initial Termination Date, or to further extend any subsequent Termination Date to which the Lender has previously agreed," the parties had rendered inapplicable the general obligation of good faith and fair dealing. Accordingly, the lender's refusal to accept the debtor's dirt-for-debt proposal could not be a breach of the implied duty of good faith. Even if the general obligation of good faith did apply, the lender's refusal did not violate it.

324. *In re Aeropostale, Inc.*,
555 B.R. 369 (Bankr. S.D.N.Y. 2016)
A sourcing agreement that permitted the vendor, after a reduction in the buyer's liquidity, to adjust the payment terms to require payment up front if "deemed prudent by Vendor in the exercise of it[s] reasonable credit judgment" did not require the vendor to act in an objectively reasonable manner. Instead, "the vendor had the right to apply *its* reasonable credit judgment in light of *its* determination of what was prudent for *it*." Consequently, the vender did not breach the agreement when it required payment up front given that the vendor itself depended upon debt financing that had financial covenants, the vendor had substantial exposure as an unsecured creditor of the buyer, and based on that exposure, the vendor concluded that a default by the buyer could cause the vendor to default on its own obligations.

325. *Coles v. Glaser*,
205 Cal. Rptr. 3d 922 (Cal. Ct. App. 2016)
A creditor that issued a release when the debtor paid the debt in full pursuant to a settlement agreement, but who had to return the payment as a preference when the debtor shortly thereafter filed for bankruptcy, was entitled to collect the debt from the guarantors who co-signed the settlement agreement. Courts uniformly agree that guarantors must make good on their promise to pay following avoidance of payments previously made by the principal obligor. The fact that the creditor sued for breach of the settlement agreement, rather than breach of the guaranty, was immaterial. The obligations of someone directly making a promise to pay are at least as strong as those of someone making a guaranty. The release is otherwise effective.

326. *Gault v. Sass Electric, Inc.*,
2016 WL 5539872 (Cal. Ct. App. 2016)
A term in a settlement agreement and promissory note providing that the creditor "shall waive the remaining amount owed" if the obligor paid $386,000 within three years was not contingent on the absence of default. Accordingly, even though the debtor defaulted and the creditor obtained a stipulated judgment for the unpaid portion of the entire $692,000 debt, the debtor's obligation was fulfilled when the debtor brought the total amount paid to $386,000 within three years.

327. *In re Outer Banks Ventures, Inc.*,
556 B.R. 199 (Bankr. E.D.N.C. 2016)
A general release of liability that the borrowers signed in connection with a restructuring of their debt was enforceable and warranted dismissal of the borrowers' claims for breach of fiduciary duties. The release was not invalid due to economic duress, resulting from the lender's refusal to release some collateral to facilitate a sale, because the lender had no duty to facilitate the sale, did not act wrongfully or illegally, and merely took advantage of his superior bargaining position created by his contractual rights.

328. *Regions Bank v. Gator Equipment Rentals, LLC*,
2016 WL 4429947 (E.D. La. 2016)
Even if, as the debtors and guarantors alleged, the bank that had extended several secured loans was responsible for the Small Business Administration's withdrawal of its guaranty, the debtors and guarantors did not have a defense to their liability. The SBA guaranty was for the benefit of the bank, not the debtors and guarantors, and thus its withdrawal was not a breach by the bank or evidence of the bank's lack of good faith.

329. *In re Kang*,
2016 WL 6958438 (4th Cir. 2016)
Restrictions in a limited liability company's operating agreement on the encumbrance of LLC property and the transfer of membership interests – which were added to protect the interests of a lender – were enforceable and rendered a transfer of membership interests in violation of the restriction void.

330. *In re White*,
556 B.R. 489 (Bankr. N.D. Okla. 2016)
A limited liability company that failed to file its annual certificate and pay its annual fees, so that its registration had been cancelled, lacked standing to sue and be sued under Oklahoma law at the time it filed a nondischargeability complaint in a bankruptcy case. Even though the LLC was reinstated while the adversary proceeding was pending but after the deadline to file such a complaint has passed, reinstatement was not retroactive. As a result, the adversary proceeding had to be dismissed.

331. *Gulf Coast Bank & Trust Co. v. Mingo Tribal Preservation Trust*,
2016 WL 4499376 (W.D.N.C. 2016)
A bank that received from the FDIC an assignment of all of a failed bank's "right, title, and interest" in a specified loan, and "all rights arising therefrom and appurtenant thereto" acquired thereby the failed bank's fraudulent transfer claim associated with the loan because such a claim is not personal to the failed bank but connected to its status as creditor.

332. *In re Simoukdalay*,
557 B.R. 597 (Bankr. E.D. Tenn. 2016)
An attorney's fees clause in a promissory note, which was written in the passive voice and which did not specify who was responsible for the fees, was unenforceable.

333. *Wilmington Savings Fund Society v. Swanson*,
2016 WL 6948454 (Del. Super. Ct. 2016)
A confession-of-judgment clause in guaranty agreement was not superseded when the lender entered into a forbearance agreement to allow the guarantors to sell their business because the forbearance agreement expressly provided that the guarantors "unconditionally ratify, confirm and reaffirm, without condition or reservation, all of the terms, covenants and conditions set forth in the . . . Guarantees" and because the guarantors simultaneously entered into an agreement reaffirming the guaranty.

334. *Stonehill Capital Management, LLC v. Bank of the West*,
2016 WL 7348990 (N.Y. 2016)
A lender that accepted a high bid for a syndicated loan breached the resulting contract when – after the debtor decided to refinance the loan and hence the value of the loan increased substantially – it refused to consummate the transaction. Although the parties had not completed the sale documentation, completion of the sale documentation was not a condition precedent to the transaction and there was no significant dispute about the form of the documentation. Although the offering memorandum stated that the "seller reserves the right, at their sole and absolute discretion, to withdraw any or all of the assets from the loan sale, at any time," that language apparently applied only up to the time of the auction.

335. *McClendon v. United States*,
2016 WL 6804864 (S.D. Tex. 2016)
A physician who loaned $100,000 to his practice to make payroll after the practice's CFO embezzled $10 million was liable for $4.3 million in tax penalties resulting from the practice's failure to pay withholding taxes. The physician was a "responsible person" within the meaning of I.R.C. § 6672 and he acted willfully when he used the loaned funds to make payroll rather than to pay the withholding taxes. Even if the loan was for the express purpose of making payroll, the funds were not encumbered in the hands of the practice.