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Commercial Law Developments: 2019-2020



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2019-2020 COMMERCIAL LAW DEVELOPMENTS

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I. *PERSONAL PROPERTY SECURED TRANSACTIONS

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

1. *General*

- *Cachet Financial Services v. C&J Associates, Inc.*, 373 F. Supp. 3d 1303 (N.D. Cal. 2019) – A company that: (i) processed electronic funds transfers for a payroll processor; (ii) had a claim against the payroll processor for the overdraft resulting from reversed transactions; (iii) exercised setoff against the payroll processor's account; and (iv) then pursuant to court order, deposited the setoff amount with the court, was not entitled to summary judgment on its claim to priority in the funds over the rights of the payroll processor's clients. The company did not have a security interest in the funds.

2. *Insurance*

- *In re Anderson*, 599 B.R. 504 (D. Md.), *appeal filed*, (4th Cir. July 24, 2019) – A bank with a mortgage on real property and a security agreement covering insurance proceeds had a security interest in the proceeds of an insurance claim for damage to the real property because UCC § 9-108(d)(8) provides that the exclusion from Article 9 for an assignment of an interest in an insurance policy or claim under an insurance policy does not apply to “proceeds and priorities in proceeds.” The court appears to misunderstand the exception for proceeds, thinking it refers to proceeds of the insurance policy rather than to proceeds of other Article 9 collateral.
- *Wheeling & Lake Erie Railway Co. v. Keach*, 606 B.R. 1 (D. Me.), *appeal filed*, (1st Cir. 2019) – Because the railway was a connecting carrier under a uniform bill of lading, the railway could enforce against the shipper the indemnity clause in the bill by which shipper promised to pay for any damages caused

* We remember our good friend Jeff Turner.

by its mislabeling of the goods. Because such a claim was a contractual claim, the security interest of the railway's secured lender, which included after-acquired accounts and payment intangibles, attached to the claim and the proceeds thereof. However, the secured lender failed to identify what portion, if any, of a global settlement of claims against the shipper were its collateral. The aggregate amount of all claims against the shipper was at least \$2.5 billion but the claims were settled for \$110 million. Moreover, the railway might have been contributorily negligent, which would have negated its right to recover.

- *United Bank v. Buckingham*, 761 F. App'x, 1856 (4th Cir. 2019) – A bank did not acquire a security interest in several life insurance policies because the insured man was suffering from dementia when he purported to grant it, as the bank knew, but the bank was not barred by the doctrine of unclean hands from asserting that the man's son fraudulently transferred some policies for less than reasonably equivalent value and changed the beneficiary of other policies with intent to hinder, delay, or defraud creditors.

3. *Consignments*

- *In re TSAWD Holdings, Inc.*, 601 B.R. 599 (Bankr. D. Del. 2019) – Although the debtor's principal lender with a perfected security interest in the debtor's inventory had actual knowledge that the debtor was selling the goods on consignment, the lender did not have actual knowledge of either: (i) that consigned goods comprised 20% or more of the value of the debtors' inventory, and thus the debtor was "substantially engaged" in the business of selling the goods of others; or (ii) that the debtor was selling a particular consignor's goods. Consequently, the debtor's transaction with that consignor was governed by Article 9.
- *Santo Domingo Motors, Inc. v. Shamrock Finance, LLC*, 2019 WL 3976051 (Mass. Land Ct. 2019) – A used car seller's delivery of

approximately 50 vehicles to an auto dealer, which sold seven of them, was a consignment even though the used car seller retained the certificates of title. The fact that the dealer sold seven vehicles belied the used car seller's claim that the delivery was for storage rather than for sale. Accordingly, the security interest of the dealer's floor plan financier attached to the consigned vehicles. The used car seller was not liable in conversion for refusing to turn over the certificates of title to the dealer's floor plan financier, whose security interest attached to the vehicles, because at the time the financier demanded the certificates there was reasonable doubt as to whether the transaction was a consignment and thus whether the financier was entitled to the certificates.

4. *Real Property*

- *Clancy v. Green Tree Servicing, LLC*, 2019 WL 3988033 (Ky. Ct. App. 2019) – A lender that had a mortgage on the borrower's real property did not have a lien on the manufactured home parked on the property, even if permanently affixed thereto, because the borrower had not filed an affidavit of conversion to real property and surrendered the certificate of title, and thus the home remained personal property.
- *In re Hodgins*, 2019 WL 4296859 (Bankr. E.D. Mich. 2019) – A security agreement in siding survived installation of the siding on the debtors' property. The siding was a fixture and the security interest was perfected by recording with the county Register of Deeds. Even if the siding constituted ordinary building material, rather than fixtures, the lien was perfected by the real property recording.
- *In re Musteen*, 2019 WL 1992624 (Bankr. W.D. Ark. 2019) – A lender had a perfected security interest in the debtors' mobile home even though the recorded deed of trust used an incorrect vehicle identification number when describing the home because the deed of trust properly described the real property and the mobile home had become real property when the

certificate of title for the home was cancelled and home permanently affixed to the real property.

- *Mattlage v. Dividend Solar Finance, LLC*, 2019 WL 6464006 (W.D. Tex. 2019) – A debtor did not state a cause of action for quieting title to or slander of title to his real property based on a secured party's fixture filing covering solar panels. The fixture filing clearly states the security agreement does not create an interest in the real property. The fact that potential buyers of the real property might choose not to proceed with a purchase of the property because of the properly filed financing statement does not mean that a cloud exists on the debtor's title. It does not matter that the parties stipulated in the security agreement that the solar panels would not become fixtures because a precautionary filing is permitted, due to the difficulty in determining if goods are or are about to become fixtures, and desirable to protect the secured party against the rights of purchasers. The agreement's stipulation did not limit the secured party's discretion to make a fixture filing because the agreement also expressly stated that the secured party may, in its sole discretion, file financing statements to perfect its interests.
- *In re Motors Liquidation Co.*, 2019 WL 387334 (Bankr. S.D.N.Y. 2019) – A security agreement describing the collateral as all "equipment and fixtures" now owned or at any time hereafter acquired, and which adopted the definitions used in the state whose law governed attachment, did not encumber fixtures previously attached to a Louisiana facility because: (i) the security agreement expressly excluded property to the extent that the grant of a security interest in it is prohibited law; and (ii) Louisiana law defines fixtures differently from the U.C.C., as a component of immovable property, so that fixtures in Louisiana are real property, not goods, and thus a security interest in existing fixtures cannot be created under Article 9. The security agreement did not create an interest in the fixtures under Louisiana real property law because to encumber

fixtures, which are indivisible component parts of the realty, requires a mortgage over the entire real property.

5. *Personal Property Leasing*

- *In re Green Parts International, Inc.*, 2019 WL 3713691 (Bankr. N.D. Ga. 2019) – A three-year equipment lease that called for total payments of \$82,868.50 - which equaled the \$65,000 price plus 9.163% interest - and included an option to purchase at the end of the lease term for fair market value was not shown to be a “sale.” Although, prior to executing the lease, the lessee received a letter indicating that the option price would be \$3,250, that letter was inadmissible under the parol evidence rule and, without that letter, the lessee had not shown that the option price was nominal or that the lease term was for the entire useful life of the goods.
- *In re Royal T Energy, LLC*, 596 B.R. 525 (Bankr. E.D. Tex. 2019) – A forty-month TRAC lease of equipment, which required the lessee to pay \$100,000 up front and \$9,520 per month, was a true lease. The lessee had no right to terminate and the equipment’s 20-year useful life far exceeded the lease term. Although at the end of the lease term the lessee could either return the equipment to the lessor or exercise any of four different purchase options, and if the debtor returned the equipment, the equipment was to be sold to a third party and the debtor liable for the difference between a predetermined amount and the sale price, this did not take away the debtor’s option. There is no evidence that the purchase option price was less than the anticipated fair market value of the equipment.
- *Blair v. Rent-A-Center, Inc.*, 2019 WL 529292 (N.D. Cal. 2019) – A rent-to-own transaction in which a consumer leases personal property for personal, family, or household purposes for a renewal term of four months or less, and which provides for the option for the consumer to become the owner is, pursuant to state statute, not a secured transaction. Accordingly, the transaction was not a loan and could not be usurious, even if the lessor exceeded the price caps in the state statute.

- *In re McQuaig*, 2019 WL 1470891 (Bankr. S.D. Ga. 2019) – A lease of a portable barn for a renewable one-month term was a true lease even though the lessee would automatically become the owner if the lessee renewed the lease and paid the rent for a total of 48 consecutive months. Although the agreement was titled a “48 Month Purchase Agreement & Disclosure Statement,” it was clear that the term was for only one month and that the lessee had no obligation beyond that period.
- *California First National Bank v. Boh Bros. Construction Co.*, 2019 WL 585285 (E.D. La. 2019) – A bank that financed a plant expansion project through a transaction structured as a lease with a \$1 purchase option at the end of the lease term was not liable to the contractor for breach of contract with respect to unpaid invoices. The bank was a secured lender, not the owner of the property, and it never entered into a contract with the contractor even though it instructed the contractor to state on the invoices that property was “sold to” the bank.

6. *Sales*

- *In re GMI Group, Inc.*, 606 B.R. 467 (Bankr. N.D. Ga. 2019) – A transaction structured as a sale of 17% of future receivables for \$75,000 until \$111,750 was paid (through daily debits of \$1,117) was a usurious loan under New York law, not a “sale”, because agreements included a personal guaranty and confession of judgment, each triggered on default, and default was defined to include the failure to maintain on deposit at least twice the amount of the daily payment obligation. As a result, the debtor and guarantor’s liability was full and unconditional. Although the agreements also contained a reconciliation provision by which the daily payment obligation could be adjusted, the debtor had no right to reconciliation after default and the agreement specified no time frame for how quickly the financier must respond to a request to reduce the daily amount.
- *In re GMI Group, Inc.*, 2019 WL 3774117 (Bankr. N.D. Ga. 2019) – A transaction structured as a sale of 5% of future receivables for \$150,000 until \$210,000 was paid (through daily debits of

\$1,400) was a sale, not a usurious loan, under New York law. Although the debtor's owner executed a personal guaranty and confession of judgment at the inception of the transaction, there was no liability under those documents absent a default, and the agreements made neither nonpayment nor filing for bankruptcy a default. The debtor was obligated to either have the necessary funds on hand to make the daily payment or to provide 24-hours' notice that there were insufficient funds on hand.

- *Funding Metrics, LLC v. D & V Hospitality, Inc.*, 91 N.Y.S.3d 678 (Sup. Ct. 2019) – A transaction structured as a sale of \$29,200 of future receivables for \$20,000, to be repaid in daily increments of \$265.45 was a usurious loan. The putative buyer had no risk of nonpayment because, when unforeseen circumstances arose, which prevented the putative seller from making the required payments, the buyer had the right to - and did - seek and obtained a judgment by confession.
- *In re Polk*, 2019 WL 7342458 (Bankr. M.D. Ga. 2019) – Two transactions structured as a sale of future receivables were really loans secured by receivables because, even though there was a reconciliation provision and the agreement had an indefinite term, the agreement made bankruptcy an event of default, putting liability on the putative seller, and thus provided for guaranteed payment.
- *Power Up Lending Group, Ltd. v. Cardinal Energy Group, Inc.*, 2019 WL 1473090 (E.D.N.Y. 2019) – A transaction in which a business sold 18% of its future accounts receivable for \$128,000, to be collected by way of daily automatic withdrawals from the business's bank account until a total of \$172,800 was collected, was a true sale and hence not subject to state usury law.
- *In re Ortega's Mexican Restaurant, LLC*, 597 B.R. 442 (Bankr. D. Conn. 2019) – A transaction in which a restaurant sold 19% of its future accounts receivable for \$20,000, to be collected by way of daily automatic withdrawals from the restaurant's bank

account until a total of \$27,600 was collected was a true sale and hence not subject to state usury law.

- *In re Cornerstone Tower Services, Inc.*, 2019 WL 127359 (Bankr. D. Neb. 2019) – A transaction structured as a sale of a specified percentage of all future receivables for \$75,000 “until” \$105,000 was paid was a true sale because the transaction documents described it as such, there was no obligation to repurchase the accounts, the buyer acquired the right to enter into compromises with the account debtors, and the buyer could take no more than a specified amount each day. However, because the buyer did not file a financing statement to perfect its interest until after the debtor filed for bankruptcy protection, the accounts became property of the seller’s bankruptcy estate.
- *In re Steele*, 2019 WL 3756368 (Bankr. E.D.N.C. 2019) – A transaction structured as a sale of 12% of future receivables was a sale, not a loan because the terms of the agreement were clear.
- *SE Property Holdings, LLC v. Unified Recovery Group, LLC*, 2019 WL 4752054 (E.D. La. 2019) – A debtor’s sale of accounts was not excluded from the scope of Article 9 by UCC § 9-109(d)(4) as a part of sale of the business out of which they arose because less than all of the debtor’s business was sold. The transaction was also not excluded by UCC § 9-109(d)(5) as a sale for the purposes of collection only because the buyer plainly received all of the debtor’s right, title, and interest to the accounts. Because the buyer failed to perfect its interest, the debtor retained the power to grant a security interest in the accounts to a secured party, and because that secured party did perfect, it had priority.
- *In re Briggs*, 2019 WL 1266386 (Bankr. D. Kan. 2019) – Although the Retail Installment Contract that the buyer of a vehicle on credit executed incorporated a Conditional Delivery Agreement stating that the transaction was not complete until the Retail Installment Contract was assigned to a third party financier, and requiring the buyer to return the vehicle if no assignment

was made within three days, the buyer nevertheless became the owner of the vehicle even though the Retail Installment Contract was not assigned. Accordingly, the vehicle later became part of the buyer's bankruptcy estate.

- *In re Hawaii Island Air, Inc.*, 2019 WL 2041705 (Bankr. D. Haw. 2019) – An airline sold spare parts to the lessor of its aircraft, but retained possession of the spare parts. The court considered whether the transaction was a true sale or a secured loan. Several facts suggest that the transaction was a loan: (i) the transaction occurred only because the airline needed an immediate cash infusion; (ii) the lessor had no need for the spare parts, would not have bought them if the airline had not needed cash, had no interest in them other than liquidating them as rapidly as possible, and apparently was not in the business of dealing in such items; (iii) neither party seemed concerned about whether the parts were worth the purchase price; and (iv) the lessor apparently did not expect or demand payment contemporaneously with the sale. However, some facts suggest that the transaction was a true sale: (i) the airline also had no use for the parts and apparently never intended to regain full control of them; and (ii) the lessor had no contractual guarantee of repayment. The court denied summary judgement on the issue of whether the payment for the spare parts was a preferential transfer under Section 547 of the Bankruptcy Code because there were genuine issues of material fact.
- *In re Spiech Farms, LLC*, 2019 WL 6872874 (E.D. Mich. 2019) – A financier that purported to buy produce from a grower pursuant to transactions in which the produce was left with the grower for resale and the grower was obligated to “repurchase” the produce whether or not there was a resale, did not in fact acquire an interest in the produce and was not the beneficiary of a Perishable Agricultural Commodities Act (PACA) trust because, before each purported sale to the financier, the grower had already sold and delivered the produce to a customer.

7. *Intellectual Property and Licenses*

- *GLH Communications, Inc. v. FCC*, 930 F.3d 449 (D.C. Cir. 2019) – When the FCC cancels radio spectrum licenses for nonpayment, it is acting as a regulator, not as a creditor, and hence even though the licensee had authenticated a security agreement, Article 9 does not apply to the FCC’s actions. Accordingly, the licensee had no right to any surplus obtained when the spectrum was re-auctioned. The licensee might, however, under the federal Debt Collection Act and Federal Claims Collection Standards be entitled to have its debt forgiven to the extent of the amount of the re-auction proceeds.

8. *Torts*

- *DB NPI Century City, LLC v. Legendary Investors Group No. 1, LLC*, 2019 WL 2082039 (Cal. Ct. App. 2019) – Even though a lender’s security agreement covered after-acquired general intangibles, the security interest did not attach to the debtor’s rights under an agreement settling a commercial tort claim that arose after the security agreement was authenticated. Because a security interest cannot attach under an after-acquired property clause to a commercial tort claim, it cannot attach to the rights under a settlement agreement relating to such a claim.

9. *Government Debtors*

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B. *Security Agreement and Attachment of Security Interest*

1. *Security Agreement*

- *Ron Miller Enterprises, Inc. v. Lobel Financial Corp.*, 244 Cal. Rptr. 3d 621 (Cal. Ct. App. 2019), 2019 WL 1930512 (Cal. Ct. App. 2019) (on rehearing) – A lender that provided floor plan financing to used car dealers and took possession of the certificates of title, filed financing statements, and had the dealers execute a Collateral Agreement with respect to each car financed, had a security interest in the financed vehicles. Each

Collateral Agreement was “for” a specified vehicle and required repayment of the loan upon earlier of the sale of the vehicle or a specified date. These terms established the intent for the vehicles to serve as collateral. This conclusion was corroborated by the lender’s possession of the title certificates and filing of financing statements.

- *Stamey Cattle Co. v. Wright*, 2019 WL 722597 (S.D. Ga. 2019) – The invoices of a credit seller of cattle, which provided that “[t]itle will transfer when full payment is received” could function as a security agreement but only if the invoices were authenticated by the buyer. Because the buyer authenticated some of the invoices after the buyer had already resold some of the cattle, no security interest attached to those cattle. With respect to the other cattle, there was a material dispute of fact about whether the debtor or the debtor’s authorized agent authenticated the invoices, precluding summary judgment.
- *United States v. Butt*, 930 F.3d 410 (5th Cir. 2019) – A convict’s sister, who claimed to have loaned money to the convict, but who produced no authenticated security agreement, did not have security in the convict’s 452 electronic devices over which the federal government had sought a forfeiture order. However, another purported creditor of the convict did produce a loan agreement pursuant to which the convicted had purported to grant a security interest in the devices, and thus the trial court erred in dismissing his petition challenging the forfeiture.
- *In re the Assignment for the Benefit of Creditors of William Szczepanski*, 2019 WL 3293801 (Minn. Ct. App. 2019) – An individual who owned shares in a coop, each of which had an associated right to payment of “unit remains,” and who contributed those shares to various entities, granted a security interest in the shares and “unit remains” by authenticating security agreements on behalf of the entities. It did not matter that documents were signed after the individual commenced an assignment for the benefit of creditors. Even if the individual

lacked authority to authenticate the security agreements at that time, the secured parties' earlier notices of security interest that the individual signed on behalf of the entities and sent to the coop satisfied the requirements for authenticated security agreements.

- *In re Barsir*, 608 B.R. 457 (D. Md. 2019) – A term in the agreement between a medical care provider and a patient stating that the provider may “petition the appropriate circuit court for an order directing the [patient] to pay the [provider] from the funds determined by [a] medical assistance program to be available” did not create a security interest in the patient’s § 403(b) retirement account. The language requires the issuance of a court order and no such order was ever entered.
- *Autumn Health Care v. Peoples Bank*, 2019 WL 5704779 (Ohio Ct. App. 2019) – The parol evidence rule prevented an individual who had provided a certificate of deposit to secure a home mortgage loan made to others from admitting evidence of a memorandum indicating that the CD would serve as collateral for only five years. The memorandum predated by a month and contradicted the security agreement, which expressly stated that bank had no duty to release the security interest “until the secured debts are paid in full.”
- *First Technology Federal Credit Union v. Sanders*, 2019 WL 4168919 (N.C. Ct. App. 2019) – Because an individual and a credit union agreed that the vehicle financing agreement that the individual signed was not a binding contract, the credit union was not a “secured party” and therefore could not be liable for failing to send proper notification of its disposition of the vehicle.
- *Royce v. Michael R. Needle, P.C.*, 381 F. Supp. 3d 968 (N.D. Ill. 2019) – Article 9 contains no choice-of-law rule for issues involving the attachment of a security interest. Accordingly, under general choice-of-law principles, attachment of a security interest was governed by the law of Illinois, where the secured party was located and the collateral was generated, not

Pennsylvania where the debtor is located. A law firm that provided services to a client gave value for another firm's grant of a security interest in its right to an award of attorney's fees in a case involving the client. Attachment requires that value be given, not that it be given to the debtor.

- *In re Jarvis*, 2020 WL 211406 (Bankr.W.D.N.C.) – Security interest granted to one person does not grant a security interest to affiliate of person named as “secured party” in security agreement.

2. *Value and Obligation Secured*

- *In re Castillo*, 2019 WL 2553610 (Bankr. N.D. Cal. 2019) – A debtor's down payment made in connection with the purchase of a new car and the trade-in of a used car with negative equity was, pursuant to the terms of the contract, properly allocated toward reducing the negative equity. Because the financier's security interest in the new car is not a PMSI to the extent of the negative equity, this increased the purchase-money nature of the security interest, thereby reducing the portion of the security interest that the debtor could treat as unsecured in his Chapter 13 bankruptcy. The court would not determine how payments on the loan should be allocated between the PMSI and non-PMSI portions because that issue was not properly raised or briefed.
- *Scott v. PNC Bank*, 785 F. App'x 916 (3d Cir. 2019) – An assignment of a life insurance policy “as collateral security for any and all liabilities . . . to the Assignee, both those now existing and those that may hereafter arise in the ordinary course of business between . . . the undersigned and the Assignee” did not survive the repayment of the original loan, and did not persist for another thirteen years, during which the assignee was acquired by another entity, and then applied to the acquiring entity's new and unrelated loan.
- *Schwartz v. J.J.F. Management Services, Inc.*, 922 F.3d 558 (4th Cir. 2019) – An insider failed to prove that it had a security interest

in two deposit accounts of the debtor that a judgment creditor had sought to garnish. The insider and debtor had engaged in a lengthy series of action to try to thwart collection by the judgment creditor, and while the insider did produce a security agreement, it provided no evidence that it ever made a loan to the debtor.

3. *Rights in the Collateral*

- *In re Mason*, 600 B.R. 765 (Bankr. E.D.N.C. 2019), *reversed* *Landress v. Sparkman*, 2020 WL 561893 (E.D.N.C. 2020)– The debtor’s purported grant of a security interest in his ownership interest in a Delaware limited liability partnership was, pursuant to the “internal affairs doctrine,” governed by Delaware law even though the security agreement chose New York law to govern and the debtor was a resident of North Carolina. Because the partnership agreement stated that any attempt by a partner to grant a security interest in the partner’s interest without the consent of the other partners was void, and Delaware law enforces such a restriction, no security interest attached. It did not matter that the debtor represented to the secured party that the debtor had authority to grant the security interest. On appeal, the District Court reversed, based solely on the idea that the internal affairs doctrine, which governs “intra-firm relationships,” should be not “stretche[d]” so as to govern the rights of the lender, which in this case was not a partner. Instead, thought the court, the validity of the anti-assignment clause should be controlled by the governing-law clause in the security agreement. In this case, the security agreement provided for New York law to govern, and New York does not have a non-uniform exception for partnership interests.
- *In re Pettit Oil Co.*, 917 F.3d 1130 (9th Cir. 2019) – A consignor that did not file a financing statement was not the owner of the cash and accounts constituting proceeds of the consigned fuel, but instead had an unperfected security interest in those

proceeds, which the consignee's bankruptcy trustee could avoid.

- *Executive Cars, LLC v. Western Funding II, Inc.*, 826 S.E.2d 370 (Ga. Ct. App. 2019) – A salesman who stole cars from a used car dealer and then sold one car to a consumer through another dealership, transferred no rights in the car to the consumer, who in turn transferred no rights in the car to the lender that financed the purchase. Accordingly, the lender, which had repossessed the car, was liable in trover and for conversion for its refusal to return the car to the used car dealer.
- *Church Crop Insurance Services, Inc. v. GemCap Lending I, LLC*, 2019 WL 1057095 (Iowa Ct. App. 2019) – An intermediary insurance broker, which had a right to receive commissions from an insurance company and an obligation to pay commissions to the agency that solicited applications for the insurance policies issued, could and did grant to an accounts financier a security interest in the right to receive future commissions. The language of the relevant agreements made the broker “solely responsible for all commissions” owed to the agency, indicating that the broker was not a mere conduit and thus had sufficient rights in the future payments from the insurance company for a security interest to attach. Moreover, the insurance company had acknowledged that the grant of the security interest did not constitute a default of the broker's agreement with the insurance company, further indicating that the broker had the right to the payments.
- *Foundation One Banking Corp. v. Svoboda*, 931 N.W.2d 431 (Neb. 2019) – A lender that purported to receive from a struggling auto dealer a security interest in two trucks, and obtained a manufacturer's certificate of origin for the older truck and a certificate of title for the new truck, did not in fact obtain a security interest in either truck, each of which was in the possession of a third party. The certificate of origin itself showed a transfer to the third party and no transfer from that third party. The certificate of title for the newer truck was

issued after the third party purchased and obtained its own certificate of title for that truck.

- *FOMB v. Andalusian Global Designated Activity Company*, 948 F.3d 457 (1st Cir. 2020) – Security interest does not attach to “expectancy” to future employer contributions to an employee retirement system because “expectancy” is not “property.” Bankruptcy Code § 552.
- *In re Solberg*, 604 B.R. 355 (8th Cir. BAP 2019) – The bankruptcy court erred in awarding summary judgment to a bank on its claim to priority in crop proceeds because an issue remained about whether the crops were owned by the debtor individually or by a partnership in which the debtor was a partner.

4. *Restrictions on Transfer*

- *In re National Football League Players’ Concussion Injury Litigation*, 923 F.3d 96 (2d Cir. 2019) – The assignment by individual class members of their rights to payment under a settlement agreement with the NFL were void because the court-approved settlement agreement expressly prohibited assignment and stated that any attempted assignment was void. The cash advance agreements were not void in their entirety. Some of the agreements contained severance clauses or alternative loan agreements, and thus there are portions of the cash advance agreements that might be enforceable, because once the funds are disbursed to the players, the district court’s power over the funds - and any contracts affecting the funds - ends. Whether any terms are enforceable is for later determination by a court or arbitrator, after considering the full array of standard contract defenses, such as capacity, unconscionability, fraud, and usury.
- *In re Woodbridge Group of Companies, LLC*, 606 B.R. 201 (D. Del. 2019) – A promissory note that prohibited assignment without consent and stated that any attempted assignment without the required consent was void could not be assigned. A buyer of

promissory notes does not have a “security interest” and therefore UCC § 9-408 does not apply and does not override a restriction on assignment of the notes.

- *Landress v. Sparkman*, 2020 WL 561893 (E.D.N.C 2020) – Ability to create security interest in partnership interest is governed by law that governs the security agreement, not the law that governs the LLP agreement.

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

- *In re Aluminum Extrusions, Inc.*, 2019 WL 5677572 (Bankr. N.D. Miss. 2019) – Summary judgment could not be issued on whether a secured party’s security interest in the debtor’s inventory attached to steel dies and aluminum racks. The debtor used the dies to mold aluminum into finished products for sale and used the racks to store molded products waiting to be painted or shipped, but the evidence was conflicting about the useful life of the dies and the racks. Thus it could not be determined at this stage whether the dies and racks were used up or consumed in business, and thus inventory, or whether they had a longer useful life and were therefore equipment.
- *Cheniere Energy, Inc. v. Parallax Enterprises LLC*, 585 S.W.3d 70 (Tex. Ct. App. 2019) – A promissory note describing the collateral to include “[a]ll other tangible and intangible property and assets of” the debtor did not adequately describe “general intangibles,” and therefore did not include the debtor’s only asset: its interest in a wholly owned limited liability company. “Intangible property” is a super-generic term that encompasses things other than general intangibles, and hence is not an adequate description.
- *1st Source Bank v. Minnie Moore Resources, Inc.*, 2019 WL 2161679 (N.D. Ind. 2019) – A security agreement sufficiently described the equipment that the debtor purchased with financing from a bank even though the agreement did not identify the items by their model year and even though there was an error in the serial

- number of one item. The model of each item was listed and the debtor did not claim to own more than one of that model.
- *In re Bates Drug Stores, Inc.*, 2019 WL 2763356 (Wash. Ct. App. 2019) – A bank’s security interest in “[a]ll accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section” covered general intangibles only if they arose from the disposition of the described Collateral: of inventory, accounts, and equipment. The bank’s security interest in “[a]ll records and data relating to any of the property described in this Collateral section” was similarly limited to records and data that relate to inventory, accounts, and equipment.
 - *In re Ollis*, 2019 WL 1313397 (Bankr. D.S.C. 2019) – A lender’s security interest in a farmer’s “farm products, including crops grown, growing or to be grown,” covered the farmer’s hay, which was both “crops” and “supplies used or produced in a farming operation,” and hence farm products.
 - *In re Alliance Insurance Group of Akadelphia, Inc.*, 2019 WL 1992622 (Bankr. W.D. Ark. 2019) – Lenders’ security interests did not attach to any commercial tort claims the debtor might have against third parties for converting or interfering with the debtor’s book of business (also known as referrals) because, even if the claims were proceeds of collateral, the claims were not specifically described in the security agreements and did not exist when the security agreements were entered into.
 - *Mantle v. North Star Energy & Construction LLC*, 441 P.3d 841 (Wy. 2019) – Because of the heightened requirements for describing a commercial tort claim in a security agreement, a security interest covering after-acquired “general intangibles” is insufficient to encumber the debtor’s rights under an agreement settling a commercial tort claim.
 - *Shamrock Sod & Landscaping, Inc. v. O’Brien*, 2019 WL 4594677 (Minn. Ct. App. 2019) – A security agreement covering “[a]ll

- equipment including, but not limited to . . . vehicles” sufficiently described a Honda Pilot even though it might have been consumer goods. The debtors had not preserved the argument that the description was inadequate under UCC § 902(e)(2) and, in any event, that provision was unlikely to apply because the transaction was not a consumer transaction. Although the security agreement provided that the property was to be used for business or agricultural purposes, not personal purposes, that provision was intended to limit the debtors’ use of the property, not the type of property serving as collateral.
- *Kearney Construction Co. v. Travelers Casualty & Surety Co. of America*, 2019 WL 5957361 (11th Cir. 2019) – A security agreement describing the collateral as “all assets and rights of the Pledgor, wherever located, whether now owned or hereafter acquired or arising, and all . . . investment property” was sufficient to create a security interest in the debtor’s individual retirement account. No discussion of the sufficiency of the collateral description pursuant to UCC § 9-108(e)(2) or whether the transaction was a consumer transaction.
 - *United States v. LaBatte*, 2019 WL 858638 (D.S.D. 2019) – A security agreement describing the collateral as specified farm and other equipment, some of which was “[t]o be purchased,” together with “all replacements, substitutions, additions, and accessions” thereto, was sufficient to cover items that the debtor purchased instead of those listed.
 - *In re Ollis*, 2019 WL 1313397 (Bankr. D.S.C. 2019) – A lender’s financing statement covering farmer’s “equipment” was effective to perfect a security interest even though no serial numbers for the equipment were listed. Financing statements do not need to include specific descriptions or serial numbers of equipment for the security interest to be perfected.
 - *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 914 F.3d 694 (1st Cir.), cert. denied sub nom. *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Andalusian Glob. Designated Activity Co.*, 140 S. Ct. 47, 205 L. Ed. 2d 29 (2019) – Filed financing statements that described the

collateral as “[t]he pledged property described in the Security Agreement attached as Exhibit A hereto,” and which attached the security agreement, were nevertheless ineffective to perfect the security interest because the attached security agreement did not define the pledged property and instead referenced a bond resolution that defined the term but which was not attached. It did not matter that the bond resolution was a publicly available document because it was not filed with the UCC records. Amendments to the financing statements that did describe the collateral were effective.

- *ARA Incorporated v. City of Glendale*, 2018 WL 1411787 (D. Ariz., 2018) – Because Minnesota law does not require an explicit after-acquired clause when the collateral is rotating collateral such as accounts, a factoring agreement that granted the factor a security interest in “all accounts” of the debtor and which defined “Accounts Receivable” to include accounts “arising . . . from time to time” was sufficient to cover accounts acquired after execution of the agreement.
- *In re I80 Equip., LLC*, 938 F.3d 866 (7th Cir. 2019) – A filed financing statement that described the collateral solely as “[a]ll Collateral described in First Amended and Restated Security Agreement dated March 9, 2015 between Debtor and Secured Party” but which did not attach the referenced security agreement sufficiently described the collateral.

D. *Perfection*

1. *Automatic*

- *In re Cornerstone Tower Services, Inc.*, 2019 WL 127359 (Bankr. D. Neb. 2019) – A transaction structured as a sale of a specified percentage of future receivables was a sale of accounts, not a sale of payment intangibles. Even if the buyer did not have the right to sue any specific account debtor for non-payment, and instead only a right to a “carved-out payment stream,” the transaction was still one in accounts because the underlying

assets were accounts. Therefore, the buyer's interest was not automatically perfected.

- *MDQ, LLC v. Gilbert, Kelly, Crowley & Jennett LLP*, 244 Cal. Rptr. 3d 211 (Ct. App. 2019) – A judgment creditor that obtained a charging order against various LLCs in which the judgment debtor was a member had priority in the distributions those entities owed to the debtor over the law firm that, prior to the judgment, received an assignment of \$175,000 of those rights to payment to satisfy a portion of the legal fees due because the law firm's interest was a security interest and was unperfected. The court did not discuss whether the security interest secured an obligation or whether the law firm's interest was automatically perfected under § 9-309(3).

2. *Certificates of Title*

- *In re Riddlesprigger*, 603 B.R. 824 (Bankr. M.D. Ala. 2019) – A car dealership did not perfect a security interest in a vehicle it sold when it submitted a title application that incorrectly identified its own name as “Dothan Chrysler Dodge Jeep Ram Fiat,” instead of “Dothan Chrysler Dodge, Inc.,” prompting the Department of Revenue to reject the application due to discrepancies in the papers. Because the error was not corrected until after the debtor filed for bankruptcy protection, and was more than 30 days after the sale, the security interest was avoidable.
- *In re Johnson*, 2019 WL 4410351 (Bankr. D. Kan. 2019) – Under Kansas law, perfection of a PMSI in an individual's vehicle can be obtained by having the security interest noted on the certificate of title or by filing with the Division of Motor Vehicles a notice of security interest within 30 days after the purchase. A secured party that did neither of those things, but filed a notice during the debtor's bankruptcy and 69 days after the purchase, did not properly perfect.

3. Control

- *In re Cruz Rivera*, 600 B.R. 132 (1st Cir. BAP 2019) – If a bank’s security interest in its customer’s deposit account was governed by Article 9, then it was perfected by control even though the document granting the security interest was not notarized pursuant to the Puerto Rico Civil Code. If, however, the transaction was a consumer transaction, and thus excluded from the scope of Article 9 by § 9-109(d)(13), then the security interest was not perfected because of the lack of notarization. Because the lower court did not determine whether the transaction was a consumer transaction, the lower court’s decision that the bank’s interest was perfected had to be reversed and the case remanded for further consideration.
- *McMillon v. European Service, Inc.*, 275 So. 3d 375 (La. Ct. App. 2019) – A bank that had a security interest in two certificates of deposit issued by the bank to secure loans made to the owner of the CDs had priority over the rights of judgment creditors who had sought to garnish the CDs. If the CDs were instruments, the bank’s security interest was perfected by possession. If the CDs were deposit accounts, the bank’s security interest was perfected by control because the bank was the depository.
- *In re Ortlepp*, 2019 WL 2488125 (Bankr. M.D. Tenn. 2019) – A nonnegotiable certificate of deposit, which indicated that it could not be transferred without the issuing bank’s written consent, was not transferrable in the ordinary course of business with only an endorsement, and hence was a deposit account, not an instrument. As such, the issuing bank’s security interest was perfected by control.
- *Royce v. Michael R. Needle, P.C.*, 381 F. Supp. 3d 968 (N.D. Ill. 2019) – A law firm that had a security interest in another firm’s right to an award of attorney’s fees perfected the security interest by filing a financing statement. Although the funds had been paid into a court registry, the collateral was not a deposit account; it remained in essence an escrow account, and an escrow account is not a deposit account.

- *In re Anderson*, 599 B.R. 504 (D. Md.), *appeal filed*, (4th Cir. July 24, 2019) – A woman who was treasurer of and a secured lender to a corporation did not have control of the corporation’s deposit account merely because she was a signatory on the deposit account. She did not have a control agreement and she had not become the depository bank’s customer.

4. *Possession*

- *In re Liddle*, 608 B.R. 356 (Bankr. S.D.N.Y. 2019) – A secured party with a security interest in the debtor’s assets, including money and deposit accounts, and which obtained a temporary restraining order requiring that the proceeds of the debtor’s sale of a cooperative apartment be held in escrow by the debtor’s lawyer, did not thereby have a security interest in the funds perfected by possession. The lawyer was holding the funds in the lawyer’s IOLA account as an agent of the debtor, not as an agent of the secured party, even though the lawyer was acting pursuant to the stipulated order. Although the lawyer’s possession might serve the goal of providing notice of a potential encumbrance, it did not provide the secured party with the control that perfection by possession requires. The secured party’s interest was also not perfected under UCC § 9-313(c)(2) because the lawyer never acknowledged that she was holding for the secured party’s benefit.

5. *Authority to File Financing Statement*

- *United States v. Crawford*, 2019 WL 5677750 (D. N.J. 2019) – The financing statements filed by a criminal defendant against prosecutors and an IRS agent were *void ab initio* and the defendant would be permanently enjoined from filing any similar document against government employees who are authorized to enforce or have enforced the internal revenue laws against the defendant.
- *Thomas Hospitality Group, Inc. v. Bree Enterprises, LLC*, 2019 WL 6519148 (Mich. Ct. App. 2019) – A broker that was entitled to payment of a commission under an exclusive listing agreement

for finding during the exclusive term a buyer who, after the term expired, bought the listed property, was authorized to file a financing statement against the client. In the listing agreement, the client granted the broker a security interest in its general intangibles and expressly authorized the filing of a financing statement covering those assets, and neither the contractual authorization nor the authorization provided by § 9-509 expired when the exclusive term expired.

6. *Financing Statements: Debtor and Secured Party Name; Other Contents*

- *In re Financial Oversight and Management Board for Puerto Rico*, 914 F.3d 694 (1st Cir. 2019) – The English translation of the enabling legislation for the debtor described its name in English as “Retirement System for Employees of the Government of the Commonwealth of Puerto Rico,” rather than the name used on the financing statements – “Employees Retirement System of the Government of the Commonwealth of Puerto Rico” – the legislation also referred to the debtor by the name used in the filed financing statements. The court held that entire enabling legislation is the relevant public organic record and there is no reason to regard one name as the debtor’s correct name and the other as merely a trade name.
- *Fishback Nursery, Inc. v. PNC Bank*, 920 F.3d 932 (5th Cir. 2019) – The lien notice filed in Oregon by an agricultural lienholder was ineffective because such a notice expires 45 days after final payment is due and, while the effectiveness of notice can be extended, the lienholder’s extension was filed after the notice became ineffective. The financing statement the lienholder filed in Oregon did not substitute for a proper lien notice because it was not supported by the required affidavit, was not in the prescribed form, and lacked some of the information required for an effective lien notice.
- *Northside Elevator, Inc. v. Ossmann*, 2019 WL 2291631 (Wis. Ct. App. 2019) – A filed financing statement identifying the debtor as “Jeffrey A. Ossmann,” the name on the debtor’s driver’s

license at the time the financing statement was filed, remained effective to perfect a security interest in collateral acquired more than four months after the debtor was issued a new driver's license under the name "Jeffrey Alan Ossmann" because even though a search under the new name would not disclose the filing, a search using the debtor's middle initial - which the filing office's regulations describe as "the logical equivalent" of the debtor's middle name - would disclose the filing.

- *In re Wastetech, LLC*, 605 B.R. 264 (Bankr. N.D. Ga. 2019) – A factor that filed a financing statement identifying the debtor as "NTC Waste Group, LLC," approximately four months after the debtor had changed its name to "Wastetech, LLC," did not have a perfected security interest. A search under the debtor's correct name at the time the financing statement was filed would not have disclosed the financing statement. Although a search under the name "wastetech" in the state's corporate records revealed Wastetech LLC, which was formerly known as NTC Waste Group, LLC, such a search was not relevant under UCC § 9-506. It did not matter that the factor was unaware of the name change or had begun its relationship with the debtor prior to the change in name. It also did not matter that the financing statement was allegedly filed less than four months after the name change. UCC § 9-507(c)(1) gives efficacy to a filed financing statement with respect to a debtor whose name has changed only if the financing statement was filed against the debtor's then correct name and the name change occurred afterwards. The financing statement's collateral description - "[c]ertain future receivables . . . purchased by Crown Funding Group, Inc., . . . pursuant to that certain purchase and sale of future receivables agreement between seller and purchaser dated 8/7/2017" - was also inadequate to perfect the security interest because none of the agreements between the debtor and the factor bore that date and the factor was not Crown Funding Group, Inc.

- *Bailey v. Rose*, 2019 WL 2710209 (Cal. Ct. App. 2019) – A financing statement that listed the debtor’s first name in the box for last name and the debtor’s last name in the box for a middle name, and which therefore would not be disclosed in response to a search against the debtor’s correct name, was seriously misleading and ineffective until it was amended.
- *In re Preston*, 2019 WL 7604710 (Bankr.D.Kan.) – Error in debtor’s name on financing statement makes financing statement ineffective.

7. *Filing of Financing Statement – Manner and Location*

- *Fishback Nursery, Inc. v. PNC Bank*, 920 F.3d 932 (5th Cir. 2019) – Because under UCC § 9-302 the law of the jurisdiction where farm products are located governs the perfection and priority of an agricultural lien on the farm products, the law of Michigan, Tennessee, and Oregon governed, respectively, the priority of the agricultural liens of the farm products shipped to those states, even though the debtor’s contracts with the agricultural lienholders purported to select only Oregon law. The priority issue among the lienholders was not a contractual dispute to which the contractual choice-of-law did or could apply. The result would be the same if the court applied federal choice-of-law rules to determine which state’s law controlled.
- *In re Trinity Investment Group, LLC*, 2019 WL 2004760 (Bankr. N.D. Ind. 2019) – A seller that sold several Subway restaurants located in Ohio to the debtor and retained a security interest in the equipment and accounts did not perfect the security interest by filing a financing statement in Ohio because the debtor is an Indiana limited liability company and thus is located in Indiana.
- *In re First River Energy, LLC*, 2019 WL 1103294 (Bankr. W.D. Tex. 2019) 2019 WL 1782628 (Bankr. W.D. Tex. 2019) (certifying the matter for direct appeal to the Circuit Court) – The law of the jurisdiction where the debtor is located - Delaware - governs the perfection and priority of security interests in the debtor’s

inventory of fuel, not the law of Texas, which provides for an automatically perfected PMSI in favor of oil producers.

Because the Texas producers did not file a financing statement in Delaware, their security interests in the inventory and its proceeds were unperfected and subordinate to the rights of a secured party that did perfect its security interest. In contrast, Oklahoma law governs the perfection and priority of an Oklahoma statutory lien in favor of oil producers.

8. *Amendments, Termination, Lapse of Financing Statement, and Post-Closing Changes*

- *JNMedical Corp. v. Auro Vaccines, LLC*, 597 B.R. 879 (Bankr. D. Neb. 2017) – A properly perfected security interest in the debtor’s general intangibles, including patents, was not rendered unperfected by the assignment of the security interest. Accordingly, the assignee’s filing during the preference period of an amendment identifying the assignee as the secured party was not a preferential transfer.

E. *Priority*

1. *Lien Creditors*

- *Producers Livestock Credit Crop. v. Benson*, 2019 WL 1105203 (Minn. Ct. App 2019) – A feedlot operator who had waived “all rights and claims” against a customer’s cattle thereby waived his feedlot lien on the cattle. Nothing in the language limited the waiver to specified obligations owed to the secured party with a perfected security interest in the customer’s cattle. No consideration is needed for a waiver and even if consideration were needed, the secured party provided it by its forbearance from exercising its default remedies.
- *Royce v. Michael R. Needle, P.C.*, 381 F. Supp. 3d 968 (N.D. Ill. 2019) – A law firm that had a perfected security interest in another firm’s right to an award of attorney’s fees had priority over the rights of another lawyer who provided services to the debtor firm. The lawyer did not have a charging lien on the proceeds of the award because the amount of the award had

been settled years before the lawyer became involved, the lawyer's efforts augmented the portion of the award to which the debtor firm was entitled by at most 10%, and thus the lawyer's services did not substantially or primarily contribute to the fund. Although the lawyer was entitled to 10% of the award under the common fund doctrine because the lawyer had helped preserve the fund and increase the debtor firm's portion by 10%, that entitlement did not enable the lawyer to have priority over the law firm's perfected security interest.

- *Yaddehige v. Xpert Technologies, Inc.*, 2019 WL 1746077 (Mich. Ct. App. 2019) – A judgment creditor that received payment from the debtor's deposit account and that admittedly was a "transferee" did not act in collusion with the debtor, took free of a secured party's security interest pursuant to UCC § 9-332(b). It did not matter that the secured party claimed to have a security interest in the funds as proceeds of accounts receivable because UCC § 9-332(a) also allows a transferee of "money" to take free of a security interest.
- *SE Property Holdings, LLC v. Unified Recovery Group, LLC*, 2019 WL 4752054 (E.D. La. 2019) – A lender with a security interest in the debtor's accounts, and which perfected that security interest years before the IRS filed a notice of tax lien, had priority over the IRS only to the extent that the security interest in the disputed account became choate before or within 45 days after the tax lien notice was filed. Even though the debtor had, before the tax lien notice was filed, fully performed the services giving rise to the account at issue, the debtor's obligations also included providing the account debtor with the documentation needed to substantiate the work performed. Until the account debtor gave its approval of that documentation, the account was inchoate. Because the lender provided no evidence that the account debtor gave its approval before the 45-day period expired, the IRS tax lien had priority.
- *Baruth v. Stellar Recovery, Inc.*, 2019 WL 4597871 (D. Colo. 2019) – A secured party that had a perfected security interest in

accounts, and then purchased the accounts at judicial sale, had priority over the rights of a judgment creditor that, after the judicial sale, obtained a writ of garnishment against an account debtor.

- *Tennessee Funding, LLC v. Worley*, 2019 WL 6331243 (Tenn. Ct. App. 2019) – A bank that financed a real estate developer, and which had a mortgage on the real property and a security interest in related personal property, including the developer’s rights under the Declaration of Covenants to govern and control the property during development, and which later purchased the personal property at a foreclosure sale, had priority over a later judgment creditor that purported to purchase the rights from a receiver. Even though the bank had subordinated its mortgage and security interest to the lien of the Declaration, and hence to the developers’ rights under the Declaration, the bank had acquired the developer’s rights at the foreclosure sale.

2. *Statutory Liens; Forfeiture*

- *AES-Apex Employer Services, Inc. v. Rotondo*, 924 F.3d 857 (6th Cir. 2019) – Even if the debtor’s subsidiaries were “alter egos” of the debtor, so that the security agreement authenticated by the debtor might encumber property of the subsidiaries, unless and until a judicial determination to that effect is made, the security interest would be at best inchoate. Because no such determination had been made, the alleged security interest did not have priority over a federal tax lien.
- *SE Property Holdings, LLC v. Unified Recovery Group, LLC*, 2019 WL 4752054 (E.D. La. 2019) – A lender with a security interest in the debtor’s accounts, and which perfected that security interest years before the IRS filed a notice of tax lien, had priority over the IRS only to the extent that the security interest in the disputed account became choate before or within 45 days after the tax lien notice was filed. Even though the debtor had, before the tax lien notice was filed, fully performed the services giving rise to the account at issue, the debtor’s obligations also

included providing the account debtor with the documentation needed to substantiate the work performed. Until the account debtor gave its approval of that documentation, the account was inchoate. Because the lender provided no evidence that the account debtor gave its approval before the 45-day period expired, the IRS tax lien had priority.

- *Bennet v. Bascom*, 2019 WL 4412477 (6th Cir. 2019) – A tax lien had priority over a security interest in the proceeds of a partnership interest because notice of the tax lien was filed and the security interest was never perfected.
- *CHS Capital, LLC v. Hellebrand Farms, LLC*, 2019 WL 5067780 (W.D. Wis. 2019) – Because, under Wisconsin law, an entity that performed harvesting services and thereby acquired an agricultural lien on the debtor's crop had priority over a lender with a previously perfected security interest in the crop, the lender violated the harvester's rights by refusing to release the auction proceeds from the sale of the crop. Although the ag lien statute authorizes the lienholder to foreclose within six months, the lienholder does not forfeit its rights if it fails to do so and, moreover, because the crops had been sold there was nothing remaining to foreclose.
- *United States v. Chowaiki*, 369 F. Supp. 3d 565 (S.D.N.Y. 2019) – The United States, whose civil forfeiture claim against the proceeds of fraud is akin to a lien, had priority over the rights of a buyer that bought a consigned painting from a felonious art dealer and then resold the painting to the dealer, retaining title. The buyer's retained interest was merely an unperfected security interest, which is insufficient to defeat forfeiture to the government. The court could not determine whether a lender to which the painting was transferred in satisfaction of a secured debt - and which was a purchaser for value but not a buyer in ordinary course of business - had rights in the painting superior to the initial consignors because the court could not, in connection with a motion to dismiss, examine the terms of the consignment agreement.

3. *Buyers and Other Transferees*

- *Fox Valley Finance, Inc v. Gholston*, 2019 WL 1339526 (Wis. Ct. App. 2019) – A buyer of a car at an auction conducted by the storage company at which the vehicle had been stored did not take free of a lender’s perfected security interest in the car. Although the statute providing storage companies with a lien on stored goods allows a good faith purchaser at a sale by the storage company to take free of other liens, the buyer had constructive notice of the security interest by virtue of its notation on the certificate of title for the car, and therefore the buyer was not a good faith purchaser.
- *Potts v. Maryland Games, Inc.*, 2019 WL 4750339 (D. Md. 2019) – A buyer that purchased gaming equipment subject to a perfected security interest was liable in conversion to the secured party for the value of the collateral as of the date of the purchase but was not also liable for the revenues that the buyer generated after that date by using the collateral.
- *Hallmark Industries, Inc. v. Hallmark Licensing, LLC*, 2019 WL 4740516 (W.D. Mo. 2019) – A buyer of trademarks and associated goodwill (collectively, “trademarks”) from a secured party that has a perfected security interest in the trademarks and that had purchased the trademarks at a public disposition, had priority over the rights of a company that indirectly acquired the trademarks from the debtor after the security interest was created and perfected.

4. *Subordination and Subrogation*

- *In re Kappa Development and General Contracting Inc.*, 2019 WL 2867110 (S.D. Miss. 2019) – The issuer of surety bonds on two construction contracts, which paid subcontractors, suppliers, and workers’ compensation premiums after the contractor failed to, had priority in the retainage payments due to the contractor on the projects over a bank with a security interest in the contractor’s accounts, even though the security interest was perfected before the bonds were issued. The surety was

equitably subrogated to the contractor's rights to payment, with the result that the surety, not the contractor, was entitled to the payments, and thus the bank's security interest did not attach to them.

- *Liberty Mutual Insurance Co. v. SBN VFNBC LLC*, 2019 WL 346707 (E.D.N.C. 2019) – A secured party with a perfected security interest in a contractor's accounts, who acknowledged that its interest in the receivable due on any bonded project was subordinate to the rights of the insurer that both issued the performance bond for the project and incurred expenses to complete that project, had superior rights to the net receivables due on each bonded project. The insurer was not entitled to offset losses on some projects against net receivables on other projects, even if the account debtor on the projects was the same.

5. *Competing Security Interests*

- *In re TSAWD Holdings, Inc.*, 601 B.R. 599 (Bankr. D. Del. 2019) – A consignor whose rights in the consigned goods was governed by Article 9 did not have priority pursuant to UCC § 9-324 over the debtor's principal lender, which had a perfected security interest in inventory, because the consignor failed to send notification of the consignment transaction to the lender. The consignor did send notification to the lender's predecessor, but that notification was insufficient because one month earlier the lender had amended the financing statement to identify it as the secured party of record.
- *Semark Associates, LLC v. RCL, LLC*, 2019 WL 1294831 (Pa. Super. Ct. 2019) – The trial court improperly awarded summary judgment in a priority dispute against the secured party that sold a liquor license to the debtor but filed its financing covering the license after another lender filed. The record did not establish when the Liquor Control Board approved the transfer to the debtor, such that the debtor would have rights in the license so that a security interest could attach.

- *Berkheimer v. Test*, 2019 WL 3385186 (Md. Ct. App. 2019) – Even if a family with a security interest in corporate stock had returned the certificate to debtor, the security interest remained perfected by a filed financing statement. Therefore, even if another creditor of the debtor had an unperfected security interest in the stock, the family’s security interest had priority.
- *Branch Banking and Trust Co. v. HealthGrowth Credit, LLC*, 2019 WL 6015317 (W.D. Tex. 2019) – A secured party with a security interest in guarantors’ accounts stated causes of action for conversion, money had and received, unjust enrichment, civil theft, and tortious interference with contract against a factor that later purchased but refused to return the accounts or their proceeds. Conversion claims for accounts receivable are allowed under Texas law provided the intangible accounts are merged into documents, such as invoices. A claim for conversion also lies for the cash proceeds of the accounts because those proceeds were specifically identifiable. Texas also recognizes causes of action for unjust enrichment, civil theft, and tortious interference with contract.
- *CoFund I LLC v. Hitachi Capital America Corp.*, 2019 WL 6167952 (D.N.J. 2019) – A financier that acquired participation interests in the debtor’s factoring transactions and which, pursuant to an intercreditor agreement with a lender, had priority over the lender’s security interest, stated a claim for breach of contract against the lender for entering onto a blocked account agreement with the debtor that prevented the debtor from paying the financier. However, the financier’s tort claims against the lender for breach of fiduciary duty, tortious interference with contract, and conversion were barred by the economic loss doctrine, and the financier’s claim against the lender for unjust enrichment was barred by the fact that it has a contract claim.

6. *Purchase-Money Security Interests*

- *In re Dennis*, 604 B.R. 690 (Bankr. D.S.C. 2019) – A security interest created in a vehicle when, after the debtor’s 4-year lease

expired, the debtor exercised a purchase option, was a PMSI. The interest was for value given to enable the debtor to acquire rights in the vehicle.

7. *Proceeds*

- *In re Aerogroup International, Inc.*, 2019 WL 2120735 (Bankr. D. Del. 2019) – A secured party with a senior security interest in the debtor’s intellectual property was not entitled to any portion of the proceeds of a settlement agreement that the debtor entered into with a buyer after the buyer breached an asset purchase agreement even though the agreement included a transfer of rights in trademarks. Another creditor had priority in the debtor’s claims against the buyer and nothing in the settlement agreement allocated a portion of it to the alleged diminution in value of the intellectual property. As a result, even if some portion of the settlement were for loss to the value of the intellectual property, that portion was not *identifiable* proceeds of the intellectual property.
- *NCC Financial, LLC v. Shilen*, 2019 WL 1458606 (Conn. Super. Ct. 2019) – A secured party was not entitled to the proceeds of a life insurance policy that was purchased with the liquidated proceeds of the collateral. The secured party had not alleged that the recipient of the proceeds - the debtor’s widow - was aware of the loan agreement or cited any authority that would support a cause of action if she were.
- *Potts v. Maryland Games, LLC*, 2019 WL 1543233 (D. Md. 2019) – A secured party with a perfected security interest in the debtor’s video lottery gaming machines was entitled to a preliminary injunction requiring the buyer of the machines to deposit with the buyer’s counsel all monies generated by the machines. The secured party had shown a likelihood of success on the merits of its claim to recover the machines; it did not matter whether the buyer purchased in good faith. There was no discussion of whether such funds are proceeds of the machines but the security agreement did encumber “fees,

payments, revenues, income . . . [and] all contracts and contract rights.”

- *RWI Construction, Inc. v. Comerica Bank*, 583 S.W.3d 269 (Tex. Ct. App. 2019) – The trial court did not err in issuing a preliminarily injunction enjoining the debtors from dissipating funds during the pendency of a secured party’s action against the debtor to the extent that those funds were proceeds of an account in which the secured party had a security interest, even though the court did not find that the debtor controlling those funds was insolvent. Other funds, which were proceeds of a capital call were not collateral for the secured obligation.
- *Commerce Insurance Co. v. First Help Financial, LLC*, 2019 WL 1769828 (Mass. Super. Ct. 2019) – A lender with a security interest in a motor vehicle was entitled to recover collision damages from the insurance company that had issued a policy insuring the vehicle. Although the damage occurred while a friend of the insured used the vehicle to transport three Uber passengers, and the policy included a clause denying coverage for damage incurred while the vehicle was being used in connection with a transportation network company, such as Uber, the policy also contained a clause stating that a “secured lender[’]s right of repayment will not be invalidated by [the insured’s] acts.”

F. *Default and Foreclosure*

1. *Default*

- *Meicher v. Asset Recovery Specialists, Inc.*, 2019 WL 95620 (W.D. Wis. 2019) – A repossession company did not violate the Fair Debt Collection Practices Act by repossessing the debtor’s vehicle or by refusing to return it immediately after she made a payment to the secured party because the debtor was in default at the time of the repossession and the payment she made was less than the full, accelerated debt and therefore did not cure the default. Even if, as the debtor claimed, the secured party had a practice of releasing repossessed collateral on payment of

the arrearage, the debtor did not allege that the secured party agreed to release her vehicle immediately upon payment of that amount.

- *Hendrickson v. Fifth Third Bank*, 2019 WL 652417 (D. Minn. 2019) – A debtor stated a cause of action against both her lender and the repossession agent that repossessed her vehicle by alleging that the lender had accepted late payments for several months and then, following another late payment, ordered that her vehicles be repossessed without providing advance notification of its intent strictly to enforce the terms of the loan agreement. However, another debtor in substantially the same position but whose personal liability on the loan had been discharged in bankruptcy had no such claim because the lender had no duty to send notification to her.
- *Hussein v. UBS Bank USA*, 446 P.3d 96 (Utah Ct. App. 2019) – Because the loan documents expressly gave the bank the right to accelerate the debt and liquidate the collateral - shares of stock in a corporation - whenever the bank deemed “itself or its security interest in the Collateral insecure,” the debtor had no cause of action against the bank for accelerating the debt and liquidating the collateral after the collateral had declined in value. It did not matter that the debtor had substantial assets because the clause dealt with whether the security interest had become insecure, not the insecurity of the loans.
- *Cox v. Community State Bank*, 2019 WL 3047722 (Kan. Ct. App. 2019) – Despite the debtors’ claims that the secured party misapplied payments and that the debtors were not in default on some loans, there was no dispute that the debtor’s various loans from the secured party were all cross collateralized and even the debtor’s own evidence showed that the debtor was in default on some loans. Therefore, the secured party had the right to proceeds against all the collateral.
- *1st Source Bank v. Minnie Moore Resources, Inc.*, 2019 WL 2161679 (N.D. Ind. 2019) – A bank that financed the debtor’s acquisition

of equipment was entitled to summary judgment on its actions on the debt and to foreclose even though the equipment delivered by the seller might not have been what the debtor ordered and might have been defective.

- *Sysinformation Healthcare, Services, LLC v. Pauls Valley Hospital Authority*, 2019 WL 3069420 (W.D. Okla. 2019) – A secured party did not waive its security interest by bringing an action on the secured obligation.
- *Mahajan v. Boxcar Holdings, LLC*, 2019 WL 399230 (D. Colo. 2019) – A secured lender was entitled to summary judgment on its claims based on a promissory note and guaranty even though the lender had not yet gone after the collateral.
- *In re Lawson*, 598 B.R. 243 (Bankr. E.D. Ark. 2019) – The debtor failed to prove that a lengthy list of personal property, including two gold bracelets, allegedly in the debtor's car at the time of repossession, were converted by the secured party. The debtor's credibility was strained by her demonstrated falsehoods about not borrowing money from or granting a security interest to the secured party, and by the debtor's failure to complain about the allegedly missing property until weeks after the car was returned.
- *MW Capital Funding, Inc. v. Magnum Health and Rehab of Monroe, LLC*, 2019 WL 3451221 (E.D. Mich. 2019) – A secured party that successfully petitioned for a receiver to take control and operate the debtors' nursing home facilities was not liable for the Medicaid overpayments made to the receivership estate. The secured party was entitled to the equitable remedy of the receivership, despite the lack of unencumbered assets and there was no basis for surcharging the proceeds of the secured party's collateral because there was no evidence that the overpayments increased the amount of proceeds.
- *Kohn v. Muhr*, 2019 WL 6358433 (Iowa Ct. App. 2019) – A harvester who filed a financing statement against a debtor who contracted for the harvesting services, took possession of the

harvested crop, and commingled it with his other crops was authorized to do so under Iowa law, which creates an agricultural lien against the person for whom the harvester renders such harvesting services. Even though the debtor's son owned some of the land harvested, the harvester dealt only with the debtor and the debtor was more like a contractor hiring a subcontractor than an agent for his son.

2. *Repossession of Collateral*

- *Hyundai Capital America v. Nemet Motors, LLC*, 2019 WL 6337526 (E.D.N.Y. 2019) – A lender with a security interest in a car dealer's inventory was entitled to a prejudgment writ of replevin due to the dealer's default even though the dealer claimed to have found a buyer for its dealership and that the lender would be better off if the sale were consummated. The issue is not what would be better for the lender, but which party had a superior right to possession. The dealer did not have a valid unclean hands defense based on the lender's alleged actions in directing manufacturers to withhold funds due to the dealer because the lender's right to possession accrued upon the dealer's default, which was before those alleged misdeeds, and thus the right to possession could not be attributable to the alleged misdeeds. The lender was not required to post a bond because the requirement of a bond was waived in the loan agreement.
- *Wells Fargo Commercial Distribution Finance, LLC v. 6th Gear Holdings, Inc.*, 2019 WL 6683056 (N.D. Cal. 2019) – A secured party was not entitled to a prejudgment writ of possession for the collateral because the application for it was facially deficient. The secured party failed to explain the discrepancy between the amount claimed due in the acceleration notification it sent to the debtor and a later notification of default, and there was a dispute as to whether the debtor was in default. Moreover, the application failed to comply with California law because it failed to describe the value of the 41 items the secured party sought, to identify the location of those

items, or include a statement that the items have not been seized for a tax, assessment, or fine.

- *GEOMC Co. v. Calmare Therapeutics Inc.*, 768 F. App'x 1 (2d Cir. 2019) – If the trial court determines that the debtor defaulted in its payments to a secured party, the court may issue an order authorizing the secured party to repossess and sell all the collateral even if the value of the collateral far exceeds the amount owed.
- *People's United Equipment Finance Corp v. TAK, LLC*, 2019 WL 2744481 (E.D. La. 2019) – Because courts have discretion, under Louisiana law, to order sequestration of property without bond, and the parties' security agreement expressly entitled the secured party to issuance of a writ of possession without the need to post a bond, a writ of seizure for the collateral - a wheel loader - would be issued without the secured party having to post a bond.
- *In re Lewis*, 2019 WL 2158832 (Bankr. W.D. La. 2019) – A secured party that repossessed the debtor's car without sending advance notification of its right to take possession violated Louisiana law. As a result, the secured party wrongfully seized the car.
- *Goodwin v. His Choice Towing & Recovery, LLC*, 2019 WL 1212119 (N.D. Ga. 2019) – Because the debtor had brought the loan current two days before her car was repossessed, the debtor was not in default at the time of repossession and the repossession was wrongful. Moreover, the repossession breached the peace because it was made while the debtor's husband orally protested and waived a receipt showing that payment had been made. The events could have easily devolved into a more dangerous situation, and that is sufficient for a breach of the peace to occur. Accordingly, the creditor and the repossession agent were liable under the Fair Debt Collection Practices Act and for wrongful repossession.

- *Barry v. Consolidated Assets Recovery Systems, Inc.*, 2019 WL 351339 (D. Minn. 2019) – The debtor whose vehicle was repossessed by a subcontractor of a repossession agent could amend her complaint against the subcontractor to include a claim for punitive damages for the subcontractor’s alleged conduct in deliberate disregard of her rights, which included pounding and yelling outside her apartment door for 20 minutes, pounding on a patio door for ten minutes, and incessantly calling the debtor on her cell phone using the apartment building’s intercom system. The debtor would not be permitted to add a claim for punitive damages against the repossession agent because there was no allegation that it was involved in the subcontractor’s wrongful conduct.
- *Oliver v. ARS Ohio LLC*, 2019 WL 343249 (N.D. Ohio 2019) – The individuals whose vehicle was damaged during a wrongful repossession stated a claim against the secured party and the repossession company under the Fair Debt Collection Practices Act. Even though the secured party claimed to be owed a debt by a prior owner of the vehicle, not the individuals, some provisions of the Act, including § 1692k(a) protect anyone injured by a debt collector’s improper conduct, not merely “consumers.” Even though neither the secured party nor the repossession agency qualifies as a “debt collector,” the individuals stated a claim under § 1692f(6). The individuals did not, however, state a claim for violation of the Ohio Consumer Sales Practices Act or for civil theft.
- *Westbrook v. NASA Federal Credit Union*, 2019 WL 1056356 (N.D. Ala. 2019) – Although the debtor’s widow and her son got into a “heated conversation” with the repossession agent, because the agent was “very professional,” did not curse or threaten, and merely made sarcastic comments to the son, who engaged in threatening behavior, the agent’s conduct did not amount to a breach of the peace. Accordingly, the repossession did not become improper and the repossession agent had no liability for violation of the Fair Debt Collection Practices Act.

- *Hyman v. Devlin*, 2019 WL 2271113 (W.D. Pa.), *appeal filed*, (3d Cir. July 3, 2019) – A police officer who arrived at the scene of an automobile repossession and threatened to arrest the debtor if she did not exit her vehicle violated the debtor’s civil rights. The jury properly awarded \$5,000 in compensatory damages and the debtor was also entitled to \$190,000 in attorney’s fees. The jury’s award of \$500,000 in punitive damages was excessive and would be reduced to \$30,000.
- *Russell v. Santander Consumer USA, Inc.*, 2019 WL 4572882 (E.D. Wis. 2019) – Summary judgment could not be issued on a couple’s claim that a repossession company and its agent breached the peace during a repossession of the couple’s car while the husband was in custody in the back of a police car because it was unclear whether the police were present to investigate the agent’s allegation that the husband had threatened him with a gun or to assist in the repossession. The fact that the creditor had obtained a judgment of replevin did not make the events an execution immune from the breach-of-the-peace standard.
- *The Huntington National Bank v. Sakthi Automotive Group USA, Inc.*, 2019 WL 2537547 (E.D. Mich. 2019) – A bank was entitled to the appointment of a receiver to take control over the collateral regardless of whether the clause in the security agreement purporting to entitle the bank to such a remedy was dispositive or merely one factor for the court to consider. The bank had demonstrated that the debtor was in default, the collateral was in danger of being diminished in value, and that appointment of a receiver was necessary to protect the bank’s interest in the collateral.
- *Nash Finch Co. v. Gordy’s Chippewa Foods, Inc.*, 2019 WL 2099033 (Wis. Ct. App. 2019) – A secured party may initiate a receivership proceeding against the debtor even if there is no reasonable possibility that there will be a distribution to unsecured creditors, and thus the secured party does not thereby waive its security interest.

- *Keybank v. Fleetway Leasing Co.*, 2019 WL 5102206 (E.D. Pa.), *appeal filed*, (3d Cir. Oct. 29, 2019) – Court could and would re-appoint a receiver over the objection of one of the debtor’s secured lenders and authorize the receiver to sell assets free and clear of the liens.
- *In re Marriage of Spinola*, 2019 WL 1417278 (Cal. Ct. App. 2019) – The trial court did not err in concluding that a man with a security interest in his former wife’s manufactured home had no right to evict her for nonpayment because that was a term of the loan and security agreement and UCC § 9-601 subjects a secured party to those rights provided for by agreement of the parties.

3. *Notice of Foreclosure Sale*

- *Autovest LLC v. Weatherly*, 2019 WL 1308126 (Del. Ct. Com. Pl. 2019) – A notification of disposition stating that the collateral would be sold at a public sale sometime after August 13, 2015 was insufficient because a notification of a public sale must state the time and place of the sale.
- *Manshadi v. Bleggi*, 134 N.E.3d 695 (Ohio Ct. App. 2019) – A notification of disposition stating that the collateral would be sold privately sometime after August 3, 2014 was not reasonable because the collateral was sold earlier, on July 23, 2014. This created a genuine issue regarding the validity of the sale and whether the buyers were *bona fide* purchasers.
- *Chase v. Wells Fargo Bank*, 2019 WL 4658247 (N.Y. Sup. Ct. App. Div. 2019) – A bank gave proper notification under New York’s non-uniform § 9-611(f) of the bank’s sale of the collateral - an interest in a cooperative apartment - by sending the notification by certified mail. It did not matter that the security agreement required notification by first-class mail.
- *McDonald v. Wells Fargo Bank*, 374 F. Supp. 3d 462 (W.D. Pa. 2019) – The statement in a security agreement that Ohio law “appl[ies] to this contract,” was a narrow choice-of-law clause governing interpretation issues only. Ohio law therefore

governed the debtor's breach of contract claim but, under traditional conflicts-of-law principles, Pennsylvania law governed the debtor's claims against the secured party for conversion, improper notification, and conducting a commercially unreasonable sale of the collateral. The notification of sale sent by the secured party complied with UCC §§ 9-613 and 9-614. Although the notification did not state that the debtor was entitled to "an accounting," it did state that "[i]f you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at . . . and request a written explanation." The UCC, which emphasizes substance over form, permits a secured party to use language its customers can understand. Although the notification did not indicate the charge for an accounting, the notification included a summary of the overdue charges, and that is sufficient. Moreover, there was no evidence that the secured party charged for an accounting and, if it did not, there is no need for the notification to expressly state that there is no charge. There was a jury question about whether a subsequent notification sent after the collateral was not sold as planned rendered the disposition commercially unreasonable. The initial notification stated a minimum price and the subsequent notification failed to indicate the minimum did not apply to the second attempted sale.

- *SunTrust Bank v. Howard*, 105 N.Y.S.3d 446 (App. Div. 2019) – A secured party that sent notification of a planned disposition to the debtor's home address listed on the loan application rather than to the address initially identified on the loan application as a business address but later, in a refinancing application, as the debtor's home address and used as the debtor's billing address, did not send reasonable notification. Consequently, a presumption arose that there was no deficiency and the secured party failed to rebut that presumption. The rule in UCC § 9-307 providing that an individual debtor is located the debtor's residence applies only to Part 3.

- *Crowley v. Northern Aviation, LLC*, 441 P.3d 407 (Alaska 2019) – A secured party’s failure to provide notification of the disposition of the collateral caused harm, given that the failure results in a rebuttable presumption that no deficiency is owing, the secured party was suing the guarantor for a deficiency, and the record lacking information about how the sale was conducted. The debtor or guarantors, had they received proper notification, might have redeemed the collateral prior to the disposition.
- *Meruelo v. East West Bank*, 2019 WL 1567561 (Cal. Ct. App. 2019) – A bank that, prior to conducting a public disposition of a secured promissory note, sent notification to the debtor at five different addresses, including the address provided for in the loan agreement, and to two lawyers for the debtor, satisfied its obligation to send reasonable notification. The bank had no duty to send notification to the address indicated on a change-of-address form that the debtor had previously submitted to the bank because the form concerned only billing, not all notifications, and there was no evidence that it was sent by any of the methods specified in the loan agreement for a change of address for all purposes (i.e., registered or certified mail, personal delivery, facsimile, overnight mail, or overnight courier). The bank also had no duty to send the notification to the debtor’s son, even though he was the bank’s main contact with respect to the loan and a potential bidder at the sale. The notification, which included all the information required by UCC § 9-613, was not rendered ineffective by the fact that the letter’s heading - “Notice of Continuing Default and Foreclosure” - referred first to continuing default rather than to foreclosure.
- *Toyota Motor Credit Corp. v. Kalantarov*, 2019 WL 6205455 (N.Y. Cty. Ct. 2019) – A secured party failed to establish a right to summary judgment on its action for a deficiency because the affidavit attempting to demonstrate that notification of the disposition was sent to the debtor provided no description of

the office practices and procedures relating to mailing or any indication that the affiant had personal knowledge that the notification was mailed. Moreover, the affidavit stated that a notification “dated May 27, 2016” was sent, not when it was sent.

- *Li v. Nextgear Capital, Inc.*, 136 N.E.3d 313 (Ind. Ct. App. 2019) – A guarantor of floor plan financing to a car dealership was entitled to set aside a default judgment for a deficiency in part because the secured party did not send the guarantor notification of the disposition of the collateral, and thus the guarantor had made a prima facie showing that no deficiency was owing.

4. *Commercial Reasonableness of Foreclosure Sale*

- *Deer Creek Excavating v. Hunt's Trenching*, 2013 WL 1400970 (Ohio Ct. App. 2019) – A tractor buyer that revoked acceptance and had a security interest in the tractor conducted a commercially reasonable disposition by having professional auctioneers auction the tractor after advertising the sale and making the tractor available for inspection three days prior to auction.
- *Robb v. Bond Purchase, LLC*, 580 S.W.3d 70 (Mo. Ct. App. 2019) – A secured party's public disposition of thinly traded shares of bank stock was not conducted in a commercially reasonable manner. The secured party repeatedly failed to provide a pay-off balance to the debtor, ultimately provided an inflated pay-off amount, and conducted an off-market sale. The secured party advertised the disposition in three local papers, two of which regularly published real property foreclosure notices but not notices of sales of publicly traded stock. The secured party never notified the bank or its shareholders of the sale or offered to sell them the shares. One day before the sale, the terms were modified to allow buyers to pay 10% of the price down and the balance the following day - instead of full payment at the conclusion of the sale, as had been advertised - but the modification was not announced until the day of the sale. The

shares were purchased by a newly formed company controlled by a friend of and for the benefit of the individual who owned the secured party and who was a dissident shareholder of the bank. All this indicated that the disposition was structured to allow the secured party's owner to acquire the shares both at a reduced price and without the danger of outside competition.

- *Breckenridge v. Nissan Motor Acceptance Corp.*, 2019 WL 1863792 (E.D. Mich. 2019) – A secured party that did not dispose of a vehicle until ten months after the repossession was entitled to summary judgment on the debtor's claim for failure to conduct a commercially reasonable disposition because there was an issue regarding the vehicle's mileage, which delayed for nine months the secured party's ability to get an accurate title for the vehicle and the debtor submitted no evidence to indicate that the delay resulted in a lower sales price (although it allegedly did result in increased interest and storage fees).
- *Atlas MFMezzanine Borrower, LLC v. Macquarie Texas Loan Holder LLC*, 105 N.Y.S.3d 59 (App. Div. 2019) – The court could not resolve on a motion to dismiss the debtor's claim that the secured party conducted a disposition of collateral - equity interests in a subsidiary - in a commercially unreasonable manner. The debtor claimed that the secured party: (i) gave potential bidders two weeks to learn of the sale and conduct due diligence, which was inadequate because the subsidiary indirectly owned 11 separate properties, each with its own loan and loan documents; (ii) improperly attempted to deprive the debtor of its right to bid at the sale by subjecting it to ever-changing requirements; (iii) refused to provide the final terms of the sale sufficiently in advance; and (iv) improperly rejected the debtor's high bid. This raised a factual question of whether the sale was conducted in a commercially reasonable manner.
- *Regions Bank v. Lenox*, 2019 WL 320566 (E.D. Ky. 2019) – Neither the secured party nor the debtor was entitled to summary judgment on the commercial reasonableness of the secured party's disposition of the collateral, a houseboat. Although

there was evidence that the secured party's agent obtained an appraisal valuing the houseboat at \$300,000 - \$340,000, received three bids, and sold the houseboat to the highest bidder for \$287,500, the secured party failed to provide any specific information regarding reasonable commercial practices among dealers in houseboats, and whether its conduct conformed to those practices.

- *Kerrissey v. Commercial Credit Corp.*, 359 F. Supp. 3d 151 (D. Mass. 2019) – Although a junior secured party provided evidence that the senior secured party had conducted a commercially unreasonable disposition by prohibiting several people from bidding at the auction, the junior secured party was not entitled to a preliminary injunction against consummation of the sales or otherwise voiding the sales and requiring the senior secured party to conduct a commercially reasonable sale. The junior secured party had not shown a likelihood of success on the merits because she failed to provide any case law to support her claim and had not shown that an award of monetary damages would be inadequate.
- *Figueroa Tower I, LP v. U.S. Bank*, 2019 WL 1467953 (Cal. Ct. App. 2019) – A debtor had no standing to prosecute a breach of contract claim against a lender for conduct relating to efforts to collect a \$14 million prepayment penalty allegedly before that amount was due because several months thereafter the lender foreclosed on and purchased for \$10,000 the personal property collateral listed in the deed of trust - which included general intangibles, and hence claims for breach of contract - and thus the debtor was no longer the owner of the contract claim. The general intangibles were not limited to things associated with the real property.

5. *Collection*

- *FinServ Casualty Corp. v. Symetra Life Insurance Co.*, 941 F.3d 795 (5th Cir. 2019) – Lenders with security interests in rights to payment under structured settlements were subject to the setoff

rights of the account debtor obligated under the structured settlement because the setoff rights arose before the account debtor received “notice” of the assignment.

- *Waterworks Industries, Inc. v. ASR Constructors, Inc.*, 2019 WL 181260 (Cal. Ct. App. 2019) – A general contractor’s surety, which had a security interest in the contractor’s rights to payment from a city on a public works project, was entitled to the funds the city had interpled even though the contractor was unlicensed for nine days during the project. By interpleading the funds, the city admitted the funds were owed and thus had waived the right to assert a defense based on the contractor’s failure to be properly licensed.
- *ARA Inc. v. City of Glendale*, 360 F. Supp. 3d 957 (D. Ariz. 2019) – The secured party’s instruction to the account debtor to pay the secured party was sufficient even though it did not use the word “assignment”; there is no meaningful difference between a security interest and an assignment. However, neither party was entitled to summary judgment on a secured party’s action against an account debtor because it was unclear if the corporate debtor or a related entity with a similar name had contracted with the account debtor, given that the agreement with the account debtor did not use the correct name of either entity. Whether there is or is not a separate cause of action under UCC § 9-607 is not material because the complaint included a claim for breach of contract.
- *Durham Commercial Capital Corp. v. Ocwen Loan Servicing, LLC*, 777 F. App’x 952 (11th Cir. 2019) – A secured party had no cause of action under UCC § 9-406 against an account debtor that paid the debtor after receiving an instruction to pay the secured party because UCC § 9-406 applies only to outright assignees, not to secured parties who also hold a security interest to secure a debt, and creates no private right of action for secured parties.
- *Lake City Bank v. R.T. Milord Co.*, 2019 WL 1897068 (N.D. Ill. 2019) – An account debtor that paid the debtor after receiving

an instruction to pay the secured party remained liable to the secured party. Although the account debtor alleged that the instruction to pay did not reasonably identify the rights assigned, it did list the specific invoices that the debtor had provided to the account debtor. Although the instruction identified the debtor as “K-Com Transport Services, Inc.” rather than as “K-Com Environmental,” if, as alleged by the secured party, the name used was the debtor’s trade name, the instruction was sufficient because it identified the specific invoices and, if the account debtor was confused, the account debtor could have contacted the secured party for clarification.

- *Mobilization Funding, LLC v. Halvorson Construction Group, LLC*, 2019 WL 4671009 (W.D. Wash. 2019) – A lender with a perfected security interest in a subcontractor’s accounts was not entitled to summary judgment on its claim against the contractor because the lender’s rights are subject to all of terms in the contract between the contractor and the subcontractor, and that contract provided that no assignee had a right to payment unless and until all suppliers and employees had been paid and any claims against the subcontractor were satisfied. There was evidence indicating that the contractor was entitled to a setoff for the expense it incurred in engaging a replacement to finish the work that the subcontractor failed to perform.
- *RPG Receivables Purchase Group, Inc. v. WKWErbsloeh North America, LLC*, 2019 WL 5309745 (N.D. Ala. 2019) – An account debtor instructed to pay an assignee of accounts was entitled to setoff against its \$470,000 contractual obligation to the debtor its \$1.4 million claim against the debtor for lost profits resulting from the debtor’s material breach. There was no genuine issue of fact that the debtor materially breached or that the damages exceeded the amount of the account debtor’s obligation.
- *Solar Spectrum LLC v. AEC Yield Capital LLC*, 2019 WL 5381798 (S.D.N.Y. 2019) – An account debtor that brought an interpleader action and deposited the funds owed with the court was not entitled to payment of its attorney’s fees until it

was determined whether the United States, which was one of the claimants to the funds, had a tax lien that would not be fully satisfied because the costs incurred by a stakeholder do not take priority over a federal tax lien.

- *CRG Financial LLC v. Two Diamond Capital Corp.*, 2019 WL 1490098 (D. Mass. 2019) – Two loan participants were not entitled to a preliminary injunction against the loan originator because they were unlikely to succeed on the merits of their claim for breach arising from the originator’s settlement with the debtor and release of a guarantor. Although the participation agreement required the originator to obtain the participants consent to any settlement or release, that obligation applied only before default. After default, the originator was obligated merely to notify the participants of a material modification or waiver, and the originator had done that.
 - *Meuers Law Firm, P.L. v. Reasor’s, LLC*, 2019 WL 6334273 (10th Cir. 2019) – A produce buyer was liable to the trustee of a Perishable Agricultural Commodities Act (PACA) trust for the full purchase price of produce purchased from a seller that itself was subject to PACA, and could not setoff the amount of the rebate that the seller agreed to pay the buyer. The seller’s agreement to the setoff was a “transfer” of the seller’s receivable and a breach of the PACA trust. The buyer was not a good faith purchaser for value because extinguishment of a preexisting debt is not a transfer for value.
6. *Effect of Failure to Give Notice, Conduct Commercially Reasonable Foreclosure Sale, or Otherwise Comply with Part 6 of Article 9; Deficiency Judgments*
- *BMO Harris Bank v. L & O Trucking, LLC*, 2019 WL 1557265 (D. Neb. 2019) – A bank that received an assignment of a secured loan was not entitled to a default judgment on its action for a deficiency because the complaint failed to allege that the disposition of collateral had been conducted in a commercially reasonable manner.

- *McDonald v. Wells Fargo Bank*, 374 F. Supp. 3d 462 (W.D. Pa. 2019) – A secured party’s post-sale notification of deficiency complied in both form and substance with UCC § 9-616 because it stated the aggregate amount of obligations secured, the gross proceeds from the disposition, the aggregate amount “of expenses, including expenses of retaking, holding, preparing for disposition, processing and disposing of the collateral and attorney fees secured by the collateral which are known to the secured party and relate to the current disposition,” the lack of credits for insurance and other rebates, and, in bold, the total amount of the deficiency.
- *Atlas MF Mezzanine Borrower, LLC v. Macquarie Texas Loan Holder LLC*, 105 N.Y.S.3d 59 (App. Div. 2019) – Even if the secured party conducted the disposition of collateral - equity interests in a subsidiary - in a commercially unreasonable manner, and even if the transferee did not act in good faith, the disposition transaction could not be unwound. Pursuant to UCC § 9-617, the bad-faith transferee would take subject to the debtor’s rights, which at most would mean that the debtor could still exercise its right to redeem.
- *Radish Seed Growers’ Association v. Norwest Bank*, 2019 WL 495598 (D. Or. 2019) – The absolute litigation privilege did not bar radish seed growers’ claims for conversion and trespass to chattels against a secured party that claimed in litigation to have a superior security interest in the seed. The growers claimed not merely that the secured party recorded meritless liens on the seed but also that the secured party interfered with their right to control the seed by sending threatening letters to potential buyers and by filing and maintaining a lawsuit.
- *In re Lewis*, 2019 WL 2158832 (Bankr. W.D. La. 2019) – A secured party that claimed to have sold the car the day of the repossession, when in it had not, wrongfully denied the debtor the right to redeem the car.
- *Thomson v. Eastern Bank*, 2019 WL 1429475 (Mass. Super. Ct. 2019) – An individual who redeemed his vehicle had no

standing to maintain an action against the secured party for stating in its notification of disposition, sent the day after the redemption and contrary to Massachusetts law, that the individual would be responsible for a deficiency calculated on the basis of the sales price, rather than on the fair market value of the vehicle. The individual was no longer a debtor in a secured transaction when the notification was sent.

- *Suntrust Banks, Inc. v. Be Yachts, LLC*, 2019 WL 1787226 (W.D. Wash. 2019) – A secured party was not entitled to dismissal of the debtor’s claim for statutory damages under UCC § 9-625(c) because, even though nonuniform statutory language prohibits statutory damages “to the extent that [the claimant’s] deficiency is eliminated or reduced” under UCC § 9-626, it was not yet clear whether a deficiency would be eliminated or reduced.

7. *Successor Liability*

- *Shaoxing Daqin Import & Export Co., Ltd. v. Notations, Inc.*, 2019 WL 6498397 (S.D.N.Y. 2019) – Sufficient evidence was presented to avoid summary judgment against the plaintiff on a successor liability claim against the newly formed entity that purchased the debtor’s assets at an Article 9 disposition. With respect to an implied assumption of liabilities, there was evidence that: (i) the debtor told its customers that they should turn to the buyer after the acquisition; (ii) the buyer is operating out of the same location, employs many of the same employees, and provides the same services; and (iii) the buyer expressly asked the plaintiff to fulfill pending orders placed by the debtor and made payment for those orders. With respect to fraud, there was some evidence that the debtor and the buyer worked in concert to favor one of the debtor’s unsecured creditors, which suggests that the consideration the buyer paid might have been inadequate, and that the debtor continued to build up debt very close to the time of the sale. However, summary judgment would be granted against a claim of successor liability based on a de facto merger because there was no evidence of continuity of ownership, and against successor

liability based on the buyer being a mere continuation of the seller because the debtor continued to exist and there was no identity of ownership.

- *In re O'Leary*, 599 B.R. 209 (Bankr. W.D.N.Y. 2019) – Summary judgment could not be issued on whether an entity formed to buy all the assets of a debtor at a foreclosure sale had successor liability for a particular debt of the debtor because it was unclear precisely when the buyer was formed in relation to when the debt was created and whether the creditors knew about plans to sell the debtor's assets, whether the buyer or its owner requested or encouraged the transaction giving rise to the debt, whether the purchase price for the assets was adjusted to reflect the transaction, or whether the parties intend to benefit at the expense of creditors.
- *Ronnoco Coffee, LLC v. Westfeldt Brothers, Inc.*, 939 F.3d 914 (8th Cir. 2019) – A competitor that, through a newly formed subsidiary, bought substantially all of the debtor's assets at a commercially reasonable, private foreclosure sale was not liable for the debtor's outstanding obligations arising from inventory purchases. Although the competitor continued the debtor's operations at the same location, retained most of the debtor's employees, and for a few months employed both the debtor's president and the debtor's CFO, the competitor was not a mere continuation of the debtor given the arm's-length nature of the transaction and the absence of continuity of ownership or management.
- *Potts v. Maryland Games, Inc.*, 2019 WL 4750339 (D. Md. 2019) – A buyer that purchased gaming equipment subject to a perfected security interest was liable in conversion to the secured party for the value of the collateral as of the date of the purchase but was not also liable for the revenues that the buyer generated after that date by using the collateral.

G. *Retention of collateral*

- *Eskelsen v. Theta Investment Co.*, 437 P.3d 1274 (Utah Ct. App. 2019) – Secured parties who accepted the debtors’ membership interest in a manager-managed LLC in full satisfaction of the debt did not thereby become the manager. Nor did they properly remove the manager because they did not file a certificate of amendment. Consequently, one of the debtors remained the manager. Although the manager might have lacked actual authority to bind the LLC to a sale of all its assets, the manager had apparent authority to do so because the other parties to the transaction had no notice of the restrictions in the operating agreement on the manager’s authority. The operating agreement was not filed as a public record; the articles of organization were filed, but they lacked the restriction on the manager’s authority.
- *Inselberg v. Bisignio*, 2019 WL 1125549 (N.J. Super. Ct. App. Div. 2019) – The debtor agreed to a partial strict foreclosure of patents even though the assignment agreement executed after default did not identify the amount of the secured obligation that it satisfied. As a result, the agreement transferred the debtor’s rights in the patents to the secured party and the debtor could not maintain an action for infringement against the secured party.
- *Bennet v. Bascom*, 2019 WL 4412477 (6th Cir. 2019) – A debtor that responded to a proposal to accept collateral in satisfaction of the secured obligation by sending an email message stating that the proposal was “premature and beyond [the secured party’s] abilities as a purported creditor,” and indicating that the debtor’s counsel would send a more detailed response in a few days, was a sufficient objection to prevent the acceptance even though no more detailed response was sent. The email message was authenticated because the sender typed his name at the end of the message and pressed the “send” button.
- *Kapor v. RJC Investment, Inc.*, 434 P.3d 869 (Mont. 2019) – Although the debtor voluntarily vacated the mobile home, allowed the secured party to take possession of it, and thereafter signed a document purporting to release all rights in the mobile home, she

- remained the debtor in a secured transaction and was entitled to the surplus the secured party received upon selling the mobile home. UCC § 9-602(5) prohibits the debtor from waiving the right to a surplus. The secured party had not conducted a strict foreclosure because the release did not state that the secured party accepted or consented to accept the collateral in full satisfaction of the debt; the release purported to waive the debtor's rights but included no commitment by the secured party.
- *Hutzenbiler v. RJC Investment, Inc.*, 439 P.3d 378 (Mont. 2019) – Although the debtor voluntarily vacated the mobile home, allowed the secured party to take possession of it, and signed a document purporting to release all rights in the mobile home, she remained the debtor in a secured transaction and was entitled to the surplus the secured party received upon selling the mobile home if she was in default, a factual issue which remained in dispute. The secured party had not conducted a strict foreclosure because the release did not state that the secured party accepted or consented to accept the collateral in full satisfaction of the debt; the release purported to waive the debtor's rights but included no commitment by the secured party. The protection in UCC § 9-628 for secured parties who are unaware of the debtor's rights in the collateral did not apply because the debtor was known to the secured party.
 - *Christman v. Clause*, 443 P.3d 472 (Mont. 2019) – A couple that voluntarily surrendered a mobile home to the secured parties did not thereby waive their rights under Article 9 to notification of a disposition and to any surplus because there was no authenticated writing purporting to waive such rights. However, summary judgment was properly denied on the secured parties' defense based on equitable estoppel.

II. REAL PROPERTY SECURED TRANSACTIONS

- *Wells Fargo Bank v. Pope*, 2019 WL 1274615 (Cal. Ct. App. 2019) – A bank’s claim against a guarantor for the deficiency resulting after a nonjudicial foreclosure of real property collateral was not barred by California’s one-form-of-action rule because the property secured the principal debt, not the guaranty. Neither the fact that the guaranty referred to the deed of trust nor that a default under the guaranty constituted a default under the deed of trust altered the fact that the property secured the principal debt. Moreover, a nonjudicial foreclosure is not an “action” within the meaning of the one-form-of-action rule.
- *Rockstone Capital, LLC v. Sanzo*, 210 A.3d 554 (Conn. 2019) – Judgment debtors who entered into a forbearance agreement pursuant to which they granted the judgment creditor a mortgage on their home thereby lost the ability to claim the homestead exemption. Although the homestead exemption cannot normally be waived, the mortgage was more than a mere waiver of the exemption because it subordinated the judgment creditor to two other liens that were recorded after its judgment but before the mortgage and it secured additional fees and costs stemming from the forbearance.

III. GUARANTIES

- *Capital Finance LLC v. Rosenberg*, 2019 WL 296706 (D. Md. 2019) – Scope of guaranty determined under ordinary contract interpretation principles. In appropriate circumstances, “and” can be disjunctive and “or” conjunctive.
- *In re Futterman*, 602 B.R. 465 (Bankr. S.D.N.Y. 2019) – A guarantor had no defense under UCC §§ 9-610, 9-615(f), or 9-626 even though, shortly after the collateral was sold to the secured party pursuant to a process approved by the bankruptcy court, the secured party resold it at a higher price to the only other bidder at the sale. Article 9 applies only to dispositions conducted pursuant to its terms, not to dispositions pursuant to some other law, such as the Bankruptcy Code. Moreover, Article 9 does not apply to real property transactions and while there might have been some personal property included in the sale, under UCC § 9-604 a creditor has the option to proceed under the applicable real property law if both real and personal property are involved, in which case the provisions of Article 9 do not apply. Finally, even if Article 9 did apply, because the sale procedures were approved by bankruptcy court, the sale was conclusively deemed to be conducted in a commercially reasonable manner. Nevertheless, the court retained the authority to invalidate the sale or reduce the amount of the alleged deficiency if, as the guarantor alleged, the secured party colluded with the other bidder during the sale.
- *Branch Banking and Trust Co. v. Healthgrowth Credit, LLC*, 2019 WL 3816293 (W.D. Tex. 2019) – A bank with a perfected security interest in guarantors’ accounts stated claims for conversion and unjust enrichment, among others, against a lender that subsequently purchased and collected on the accounts. The lender did not pay the bank merely because its payments to the guarantors were made directly to the guarantors’ deposit accounts at the bank.
- *Bowers v. Today’s Bank.*, 347 Ga. App. 615 (Ga. App. 2018) – A guarantor’s springing liability on a nonrecourse debt, which was

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- to ripen if the collateral became subject to a “voluntary bankruptcy or insolvency proceeding,” did not ripen when the debtor consented to the lender’s receivership proceeding. The term “voluntary” modified both “bankruptcy” and “insolvency proceeding,” and the debtor’s consent to the lender’s actions did not make the proceeding a voluntary one.
- *In re Republic Airways Holdings Inc.*, 598 B.R. 118 (Bankr. S.D.N.Y. 2019) – Because the liquidated damages provisions in aircraft leases were unenforceable penalties, they could not be enforced against the guarantors of the leases. Although guarantors are generally permitted to waive affirmative defenses, and the unenforceability of the principal obligation is an affirmative defense, the invalidity of a contract based on illegality or public policy cannot be waived.
 - *Rapid Capital Finance v. Golden Chariot Motors, LLC*, 2019 WL 315332 (Del. Super. Ct. 2019) – An individual who guaranteed his LLC’s representations, warranties, and covenants to a buyer of accounts, and who granted a security interest in his interest in the LLC to secure his obligations under the guaranty, was not personally liable for the debt even though the LLC violated a covenant by moving its deposit accounts. The individual did not give his personal guarantee against loss, merely a security interest in the business itself.
 - *U.S. Bank v. Springfield Prairie Properties, LLC*, 2019 WL 977867 (C.D. Ill. 2019) – A nonrecourse mortgage loan became recourse pursuant to its terms, and the guarantor incurred personal liability under the guaranty, when the debtor, after default, used rents to pay attorneys and make distributions to the debtor’s members, rather than to pay the mortgagee or ordinary expenses.
 - *Capital Finance LLC v. Rosenberg*, 364 F. Supp. 3d 529 (D. Md.), *appeal filed*, (4th Cir. Feb. 25, 2019) – The individuals who executed bad boy guarantees for their companies’ loans, triggered by (i) an improper involuntary bankruptcy; (ii) an improper voluntary bankruptcy; “and” (iii) fraud or other illegal actions, were

- personally liable for the debt because the borrower illegally failed to pay payroll taxes, provided false borrowing base certificates, and diverted the proceeds of accounts receivable. The triggers to liability had to be interpreted disjunctively, and thus there was no requirement that all three triggers had to occur.
- *Bank of the Ozarks v. Perfect Health Skin and Body Center PLLC*, 2019 WL 316466 (E.D. Mich. 2019) – An individual who claimed that his signature on an equipment financing agreement on behalf of a business entity and his signature on an individual guaranty were forged was nevertheless liable for the unpaid portion of the debt because he did not challenge the validity of his signature on a deferral agreement that acknowledged and reaffirmed the debt and guaranty.
 - *Apex Bank v. Thompson*, 826 S.E.2d 162 (Ga. Ct. App. 2019) – Although guarantors can waive the requirement of judicial confirmation of a nonjudicial foreclosure sale of real property that serves as collateral for the debt, none of the transaction documents in this case contained an adequate waiver. The promissory note indicated that a change in terms of the note would not release the guarantors and provided that the lender had discretion over which collateral to foreclose upon first and how to apply the proceeds, but neither of those terms evidenced a waiver of the guarantors' rights under the confirmation statute. A simultaneously executed Assignment of Deposit Account provided that one guarantor would "remain liable under the Note no matter what action Lender takes or fails to take *under this Agreement*" (emphasis added), but that language dealt with the Deposit Account Agreement, not the confirmation statute. Other language in that agreement providing that the guarantor "waives any defenses that may arise because of any action or inaction of Lender" could be interpreted to apply to the failure to seek confirmation of the foreclosure sale, but could also be interpreted to mean that the guarantors were waiving only those defenses relating to enforcement of that agreement, and thus there was no sufficiently clear waiver.

- *Wyrick v. Business Bank of Texas*, 577 S.W.3d 336 (Tex. Ct. App. 2019) – Guarantors had no fraudulent inducement or negligent misrepresentation defense based on the lender’s failure to obtain a security interest in the intended collateral because the guarantors waived suretyship defenses and the guaranty agreement expressly authorized the lender to enforce the guaranty without pursuing the collateral, and thus there could be no justifiable reliance on any statement by the lender that it would obtain a security interest. The guarantors’ mutual mistake defense based on the nonexistence of the collateral failed for a similar reason: the guarantors assume the risk of the mistake.
- *Radiance Capital Receivables Fourteen, LLC v. Foster*, 833 S.E.2d 867 (Va. 2019) – A guarantor’s waiver, in the guaranty agreement, of a statute of limitations defense was invalid under Virginia law, which invalidates most promises not to plead the statute of frauds.
- *The Bancorp Bank v. Condor Developers, LLC*, 2019 WL 1976424 (D.N.J. 2019) – A guarantor had no fraudulent inducement defense based on the alleged oral statement by the bank’s representative that the guarantor would not be held personally liable and instead the bank would, upon default, simply repossess the collateral. Even though the guaranty agreement lacked a merger clause, it was a fully integrated writing and such an alleged statement would contradict the guaranty’s terms. Hence, the parol evidence ruled prohibits admission of such alleged misrepresentations. Moreover, fraud must relate to a present or preexisting fact and cannot ordinarily be predicated on representations which involve things to be done in the future.
- *In re Serap*, 2019 WL 1976043 (9th Cir. BAP 2019) – A creditor that obtained a judgment against a guarantor before foreclosing on the real property collateral violated Nevada’s one-action rule, and thereby discharged the lien on the collateral. The rule applies to guarantors as well as borrowers and while guarantors of debts of more than \$500,000 may waive the benefit of the rule in the guaranty agreement, the debt in this case never exceeded that amount.

- *KR Enterprises, Inc. v. Zerteck, Inc.*, 2019 WL 3818786 (N.D. Ind. 2019) – Because there was a factual dispute as to whether the guarantor of a secured loan paid the debt or purchased the note, summary judgment could not be issued on whether the guarantor could enforce the security interest.
- *Johnson v. Seville Holdings, LLC*, 2019 WL 3852664 (Ill. Ct. App. 2019) – A secured creditor’s written release of his lien on the collateral, which expressly provided that it did not release the borrower of its liability on the promissory note, did not release the borrower under UCC § 3-605(f) because that provision allows only an indorser or accommodation party to assert the defense of collateral impairment. Because the guaranty of the note by the owner of the borrower was not itself a negotiable instrument, it falls outside the UCC and the impairment of collateral defense is unavailable to him. No discussion of the suretyship defense based on impairment of collateral.
- *BOKF v. RC Operator, LLC*, 2019 WL 6251452 (N.D. Okla. 2019) – By seeking the appointment of a receiver to manage the nursing home purchased by the borrower, instead of seeking to foreclose, a lender could not reasonably be said to have failed to mitigate damages, and thus summary judgment against guarantors that had issued absolute and unconditional guaranties was appropriate.
- *IMHBroadway Tower Senior Lender, LLC v. Hertz*, 2019 WL 6001605 (S.D.N.Y. 2019) – A lender that made both a loan secured by a mortgage on real property and a mezzanine loan secured by the membership interests of the LLC that owned the real property, and which purchased the membership interests at a public disposition after default, had a claim against the guarantors whose liability was limited to “any loss, damage, cost, expense, liability, claim or other obligation incurred by the Lender . . . arising out of or in connection with . . . material physical waste of the Property by Borrower, Guarantor or Manager; . . . [or] failure to pay charges for labor or materials or other charges or judgments that can create Liens on any portion of the Property.” The borrower failed to pay

various vendors and tenants, improperly deferred required maintenance of the property's elevator and HVAC system, and failed to make required payments to the building's maintenance reserve fund. Although the lender did not allege what the value of the real property was, and therefore failed to state a claim for a loss on the mortgage loan, it did allege a loss on the mezzanine loan to the extent of the deficiency remaining after the sale of the membership interests.

- *In re Blixseth*, 2019 WL 7372662 (9th Cir. BAP 2019) – A guaranty executed in connection with a settlement agreement and which promised payment “no matter what may happen” was not an unconditional promise but was instead conditioned on the creditor's performance of her material obligations under the settlement agreement. Because the creditor breached that agreement by failing to cause entities under her control to make a required payment and by breaching confidentiality and non-disparagement covenants, the guarantor's duty to perform was excused.

IV. FRAUDULENT TRANSFERS AND VOIDABLE TRANSACTIONS

- *Smith v. Marshview Fitness, LLC*, 212 A.3d 767 (Conn. Ct. App. 2019) – A landlord’s purchase of the debtor’s collateral for \$159,000 was not a fraudulent transfer because the first lien secured a debt of \$800,000, which exceeded the value of the collateral, and thus the collateral were not “assets” within the meaning of the Uniform Fraudulent Transfer Act.
- *Janvey v. GMAG, LLC*, 913 F.3d 452 (5th Cir. 2019) – The investors who purchased above-market rate certificates of deposit from a Bank that issued the CDs as part of a Ponzi scheme, and who received a substantial portion of their investments back with inquiry notice - but not actual knowledge - of the scheme did not receive the transfers in “good faith” within the meaning of the Uniform Fraudulent Transfer Act.
- *In re Philadelphia Entertainment and Development Partners, L.P.*, 2019 WL 7546049 (E.D. Pa. 2019) – The revocation of the debtor’s gaming license could not be a fraudulent transfer because, under Pennsylvania law, a gaming license is not property of the licensee.
- *Kelley v. Kanois*, 383 F. Supp. 3d 852 (D. Minn. 2019) – Although not all transfers made by a debtor engaged in a Ponzi scheme are presumptively made with fraudulent intent - fraudulent intent must instead be determined on an asset-by-asset, and transfer-by-transfer basis - the evidence nevertheless established that the debtor’s payments to the initial investors in a Ponzi scheme were made with fraudulent intent. The underling assets allegedly supporting the investments were all fake and the operators of the scheme were actively working to conceal its nature from creditors. The investors did provide reasonably equivalent value to the extent that the payments they received repaid the principal amounts they loaned, but not to the extent the payments were for interest due. Although reasonably equivalent value includes the discharge of an antecedent debt, and a contractual obligation to pay interest can be a valid debt, the obligation to pay interest in

- connection with a Ponzi scheme is void as against public policy, even as to investors who had no knowledge of the fraud.
- *Pergament v. Brooklyn Law School*, 595 B.R. 6 (E.D.N.Y. 2019) – A university was an initial transferee of funds paid by the debtor to cover the tuition obligation of his children if payment was made after the university no longer had an obligation to issue a refund if the child withdrew from classes. As to payments made before then - either before the child registered or after registration but during the period when the university would be obligated to refund the payment to the child if he or she withdrew from classes - the child was the initial transferee and the university was a subsequent transferee. Because the university unquestionably received those funds in good faith, the transfers were excepted from avoidance under Bankruptcy Code § 550(b).
 - *In re Palladino*, 942 F.3d 55 (1st Cir. 2019) – The debtors did not receive reasonably equivalent value for the \$65,000 they paid for their adult daughter's education, at a time when they were operating a Ponzi scheme through their company, even though the debtors believed that they were economically benefitted by having a financially self-sufficient daughter. The term "reasonably equivalent value" does not include intangible, emotional, and non-economic benefits, and parents have no legal obligation to pay the college tuition of their adult children.
 - *In re Connolly Geaney Ablitt & Willard, P.C.*, 597 B.R. 700 (Bankr. D. Mass. 2019) – A factor received constructively fraudulent transfers by: (i) collecting \$200,000 on accounts that had not been factored; (ii) receiving from the debtor the \$200,000 proceeds of another unfactored account; and (iii) paying only \$235,000 for accounts with a face amount of \$950,000 and on which it later collected \$895,000.
 - *Textron Financial, Inc. v. Bash*, 2019 WL 3290257 (N.D. Ohio 2019) – Even if a secured party with a security interest in all of the debtor's assets to secure a \$17.5 million revolving line of credit lacked good faith when it received intentionally fraudulent

transfers totaling \$316 million, the secured party's liability would be limited to the \$17.5 million credit limit, which the debtor never exceeded. It would be inequitable and lead to multiple recovery to impose liability for the transfers followed by a further extension of credit.

- *In re Generation Resources Holding Company, LLC*, 604 B.R. 896 (Bankr. D. Kan. 2019) – Entities that received from the initial transferee of an avoidable fraudulent transfer the proceeds of the property transferred, rather than the fraudulently transferred property itself, could have liability under Bankruptcy Code § 550(a). That provision imposes liability on an immediate or mediate transferee of “the value of [the property transferred].”
- *In re Phung Tan Huynh*, 602 B.R. 632 (Bankr. S.D. Tex. 2019) – Because, under Texas law, a transfer of homestead property for the purpose of shielding the property from creditors is void, and void transfers do not affect the termination of homestead rights, the debtor remained the owner of and could claim a homestead exemption in the real property that the debtor transferred to his brother.
- *Korth v. Luther*, 935 N.W.2d 220 (Neb. 2019) – A blanket security agreement covering all existing and after-acquired personal property that a husband signed to secure a \$450,000 loan from his wife, which he used to pay obligations to the IRS, was not an avoidable fraudulent transfer because all property that the husband had at that time was fully encumbered by the tax lien and thus was not an “asset” under the Uniform Fraudulent Transfer Act. The security agreement itself was not an asset.

V. CREDITOR AND BORROWER LIABILITY

- A. *Regulatory and Tort Claims – Good Faith, Fiduciary Duties, Interference With Prospective Economic Advantage, Libel, Invasion of Privacy*
- *First Guaranty Bank v. Republic Bank*, 2019 WL 4736916 (D. Utah 2019) – A seller of equipment leases warranted that it was the owner of the leases, not the owner of the underlying equipment, and hence was not liable to the buyer for breach of that warranty. Similarly, the seller warranted that the sale documents were enforceable, not that the leases were enforceable, and hence did not breach that warranty. However, summary judgment was denied on whether the seller breached a warranty that the transfer would not constitute a breach of an underlying document because the transfer might have breached a covenant in the contract between the seller and the originator/servicer that prohibited assignment without consent. Also, the seller might have breached its covenant to forward all correspondence relating to the leases by failing timely to forward notification of the lessee's bankruptcy filing, which caused the buyer to incur additional legal expenses to have an allowable claim in the bankruptcy case. The buyer had no claim against the seller for misrepresentation based on nondisclosure of the fact that the software supporting the leased equipment was licensed, not owned, because there was no evidence the seller knew this fact. The sale could not be rescinded for mutual mistake based on the fact that the seller did not own the software because the sales agreement allocated to the buyer the risk that the originator might own some of the property subject to the lease. However, the seller might be liable for failing to disclose that the originator still had the right to service one of the leases.
 - *Burt v. Chase Auto Finance Corp.*, 2019 WL 6219508 (E.D. Wis. 2019) – The debtor stated claims against the secured party for invasion of privacy, trespass to chattel, conversion, and civil theft for repossessing and refusing to return the collateral in the absence of default. The claims are not barred by the economic loss

- doctrine. Instead, if the allegations of the complaint are true and the secured party had no contractual right to repossess the collateral, that would not mean that the secured party breached the contract or violated the UCC. It would mean the secured party has no defense to the tort claims. Hence, if any claims should be dismissed, it is likely the debtor's UCC and breach of contract claims.
- *Robb v. Bond Purchase, LLC*, 580 S.W.3d 70 (Mo. Ct. App. 2019) – A secured party tortiously interfered with the debtor's business expectancy by disposing of the collateral - thinly traded shares of bank stock - after having prevented the debtor from selling the shares by ignoring repeated requests for pay-off balances and then providing intentionally inflated pay-off balances, all for the purpose of indirectly acquiring the shares at a commercially unreasonable disposition for a fraction of the market price.
 - *Maricultura Del Norte, S. de R.L. de C.V v. Umani Sustainable Seafood, Inc.*, 769 F. App'x 44 (2d Cir. 2019) – A lender with a security interest in fishing vessels and equipment, and the lender's assignee, breached the loan agreement by failing to provide a payoff amount when requested and by refusing to accept a payoff when offered, and were therefore liable for: (i) the interest that accrued between the time of the breach and when a foreclosure judgment was obtained against the debtor in Mexico; (ii) a customs fee incurred to the Mexican government for failing to remove the vessels during that period; (iii) attorney's fees incurred during the foreclosure proceedings; and (iv) prejudgment interest. The debtor did not have a claim under UCC § 9-210(b) for failing to provide an accounting of the secured obligation when requested because even though the loan documents selected New York law to govern, the mortgages were created under Mexican law, the debtor's principal place of business is in Mexico, the collateral was located in Mexico, and Mexico was the place where the parties envisioned enforcement of the mortgages.
 - *Funding Metrics, LLC v. Decision One Debt Relief LLC*, 2019 WL 3759111 (S.D. Fla. 2019) – A financier that made cash advances to

- merchants stated a claim for conversion against the debt relief company that advised the merchants to cease remitting payment to the financier and by debiting the merchants' bank accounts, thereby depriving the financier of its superior rights to the funds, and by directing the merchants to create new bank accounts through which payments previously scheduled to be made to the financier could be rerouted to the debt relief company. The financier also stated claims under RICO, for tortious interference with contract, and for fraudulent conveyances.
- *Funding Metrics, LLC v. Decision One Debt Relief LLC*, 2019 WL 861268 (S.D. Fla. 2019) – An accounts financier did not adequately plead claims under RICO or for conspiracy to tortiously interfere with contract, conversion, or fraudulent conveyance - but did plead a claim for tortious interference with contract - by alleging that a debt relief company, in return for payment of a percentage of the debt owed to the financier, falsely promised to reduce a debtor's payment obligation and advised the debtor to stop paying the financier.
 - *Morton v. Knox County Sheriff's Department*, 2019 WL 645042 (Tenn. Ct. App. 2019) – Neither a county nor the state Department of Safety and Homeland Security were entitled to sovereign immunity with respect to a secured party's claim that they had seized the collateral in bad faith by failing to notify him of the seizure and later asserting without basis that he had no security interest because the security agreement was not notarized.
 - *ConcealFab Corp. b. Sabre Industries, Inc.*, 2019 WL 3282966 (D. Colo. 2019) – A corporation had no cause of action for tortious interference with business relations against a competitor, with which it had contracted, due to the competitor's filing of an unauthorized financing statement because the corporation failed to prove that there was a reasonable likelihood or probability that a significant investment or large purchase orders would have resulted but for the filing.

- *Peach REO, LLC v. Blalock Investments, LLC*, 2019 WL 102142 (S.C. Ct. App. 2019) – A borrower brought a claim against its lender for the lender’s failure to respond to the borrower’s numerous requests for permission to sell or lease collateral. Although the loan agreement gave the lender discretion whether to approve of such transactions, the covenant of good faith and fair dealing obligated the lender to exercise that discretion in good faith, and the complaint sufficiently alleged a lack of good faith.
- *AME & FE Investments, Ltd. v. NEC Networks*, 2019 WL 286121 (Tex. Ct. App. 2019) – Even though a secured lender breached its contract with the borrower by failing to timely provide a payoff letter, and the borrower was therefore entitled to an order requiring the lender to release its liens and security interests, the trial court erred in failing to condition that release on the borrower’s payment of its obligations under the notes.
- *Sprint Nextel Corp. v. Wireless Buybacks Holdings, LLC*, 938 F.3d 113 (4th Cir. 2019) – A clause in a wireless service provider’s agreements with its customers providing that subsidized “customer devices . . . are not for resale and are intended for reasonable and non-continuous use” on the provider’s networks was merely a background statement of intent, not an enforceable promise not to resell subsidized phones. Accordingly, a company that bought subsidized phones from customers of the provider was not liable for tortious interference with contract.
- *Wadsworth v. Talmadge*, 450 P.3d 486 (Or. 2019) – Because a constructive trust is a form of remedy, rather than a type of trust, constructive trusts originate at the time that they are imposed by the court. However, such a trust is based on a preexisting equitable ownership interest dating from the actions giving rise to the claim for a constructive trust, and that interest is generally good against both the current holder of the property involved and third parties who are not *bona fide* purchasers. Specifically, when the defendant used fraudulently obtained funds to improve real property, the fraud victims received an interest in the property through an equitable lien, not an ownership interest. However,

- because the defendant had previously purchased the property with the funds provided by earlier victims, those victims had an equitable ownership interest in the property, and when the defendant later repaid the earlier victims with funds fraudulently obtained from the plaintiffs, the plaintiffs were subrogated to the earlier victims' equitable ownership interest.
- *CitiMortgage, Inc. v. Equity Bank*, 942 F.3d 861 (8th Cir. 2019) – Because the seller of mortgage loans had breached representations and warranties regarding some loans, the seller was contractually obligated to repurchase the loans that still existed. It did not matter that the loan buyer failed to include the repurchase amount in the repurchase request. However, the seller was not obligated to repurchase the loans which, prior to the repurchase request, had been liquidated through foreclosure, and thus no longer existed.
 - *Bank of America v. New England Quality Service, Inc.*, 2019 WL 6245756 (2d Cir. 2019) – A bank's waiver of covenant defaults in loan agreements coupled with its extension of the maturity dates did not waive the bank's right to enforce future defaults. Whenever the Bank waived a covenant default, it did so solely as to the specific loan and the particular covenant breached, and the loan agreements expressly provided that, "[i]f the Bank waives a default, it may enforce a later default." The borrowers' alternative estoppel argument fails for much the same reason; given the bank's statements and the language of the loan agreements, the borrowers could not have reasonably believed that the bank's conduct allowed them to breach covenants in the future.
- B. *Obligations Under Corporate and Securities Laws*
- *CompoSecure, L.L.C. v. Cardux, LLC*, 213 A.3d 1204 (Del. 2019) – Contract not subject to provision of LLC agreement requiring additional approvals; lack of approval under another provision to which the contract was subject made provision only "voidable" and could be ratified.

C. Borrower Liability

- *Bearoff v. Craton*, 830 S.E.2d 362 (Ga. Ct. App. 2019) – The debtor was liable for conversion for transferring social media accounts of his business to a new entity - which were general intangibles encumbered by a security interest - after the secured party foreclosed and demanded return of the intangible collateral.
- *Bank of the Ozarks v. Perfect Health Skin and Body Center PLLC*, 2019 WL 3388465 (E.D. Mich. 2019) – A debtor cannot be liable for converting its own property even if the property is subject to a security interest.
- *First National Bank of Omaha v. Madison*, 2019 WL 4014206 (Ill. Ct. App. 2019) – A debtor was liable for the unpaid portion of the secured obligation even though the secured party never exercised its rights over the collateral, an airplane that declined in value. The secured party had the right, but not duty, to pursue the collateral. Moreover, even if the secured party was in constructive possession of the plane by virtue of the restrictions on the debtor's use of the plane without the secured party's consent - which was itself a dubious proposition - the secured party never had actual possession, and thus UCC § 9-207 never imposed duties on the secured party.
- *The Western State Bank v. Cosey, L.L.C.*, 2019 WL 5694271 (D. Colo. 2019) – A bank that provided floor plan financing failed to state claims for fraud or civil theft against one of the individual borrowers based on false borrowing base certificates and sales out of trust because the bank did not allege that this individual had any role in submitting the certificates or that she had the requisite intent to deprive the bank of collateral or its proceeds.
- *Ferrari Financial Services, Inc. v. Yokoyama*, 2019 WL 1466886 (D. Haw. 2019) – Although a secured party stated a claim for conversion - and was entitled to a default judgment - against the individual and business to which the debtor had transferred possession of the collateral but which refused to relinquish possession after the debtor defaulted, the secured party was not

- entitled to damages for loss of use of the collateral, calculated based on the amount of the debtor's scheduled payments, because the secured party had repossessed the collateral and received a judgment against the debtor for the full amount of the secured obligation.
- *Agrifund, LLC v. Radar Ridge Planting Co.*, 278 So. 3d 1025 (La. Ct. App. 2019) – A secured party with a perfected security interest in the debtor's crops and the proceeds thereof stated a claim for conversion against banks that received proceeds in the form of checks and issued cashier's checks for some and deposited the remainder, all to or for the benefit of the debtor's owner. The secured party sufficiently alleged, for the purpose of a motion to dismiss, that the banks had some knowledge that the debtor's owner was not entitled to the proceeds, thereby implying that the banks were not acting in good faith and not holders in due course of the proceeds.
 - *Idaho v. Dix*, 2019 WL 946821 (Idaho Ct. App.), *petition for review granted* (June 17, 2019) – An individual who purchased goods on credit without the intent to pay the purchase price and who pawned the goods soon after receiving them was properly convicted of grand theft with respect to the purchases and burglary with respect to the pawn transactions. An individual who acquires merchandise without any intent to pay for it has no lawful ownership interest in it and thus is guilty of theft. By then pawning the goods, he then obtained money for goods he did not own, and thus was guilty of burglary.
 - *Milwaukee Center for Independence, Inc. v. Milwaukee Health Care, LLC*, 929 F.3d 489 (7th Cir. 2019) – Even though a provider of medical care had no security interest in the receivables due to a nursing facility in which the provider operated, the facility and its CEO committed conversion by using collections to fund payroll and to pay other creditors, rather than to pay the provider. The provider had sufficient property rights in the collections to support the conversion claim.

D. *Disputes Among Creditors and Intercreditor Issues*

- *Central Bank of India v. U.S. Bank*, 2019 WL 1206489 (S.D.N.Y. 2019) – An intercreditor agreement pursuant to which each creditor promised to “not challenge or question in any proceeding” the validity of any secured obligation owed to the others or the attachment, perfections, or priority of each other’s lien, but which also provided that nothing in the agreement restricts any creditor’s right “to object in any insolvency proceeding,” did not prevent one creditor from objecting to another’s claim in the debtor’s bankruptcy proceeding.
- *NextGear Capital, Inc. v. Bank of Springfield*, 2019 WL 2525753 (E.D. Mo. 2019) – A bank that contractually subordinated its security interest in inventory and its proceeds to the security interest of a floor plan financier was not liable to the financier for breach of the subordination agreement or under various tort theories for sweeping the debtor’s deposit accounts even though the bank knew the deposit accounts contained manufacturer’s rebates to the debtor, in which the financier had the senior security interest. Because the financier failed to allege that the bank acted in collusion with the debtor, the bank took free of the financier’s security interest under UCC § 9-332, and this provision displaced common-law causes of action.
- *Parkhill LLC v. Economic and Community Development Institute, Inc.*, 2019 WL 4016275 (Ohio Ct. App. 2019) – A secured party to which the debtor’s landlord had contractually agreed to subordinate its interest in the debtor’s equipment was liable under the subordination agreement for *per diem* rent only for 10 days. The agreement provided for per diem rent beginning 20 days after the secured party received notification of the debtor’s default under the lease but also provided that the secured party’s rights under the agreement - including its right of entry to take the collateral - expired 30 days after receipt of the notification. It made no sense for the secured party to be liable for rent after its right to enter expired.

- *Eurosemillas, S.A. v. PLC Diagnostics Inc.*, 2019 WL 2088479 (N.D. Cal. 2019) – Two secured parties with an intercreditor agreement between them did not breach an intercreditor agreement with a third lender because neither the debtor nor one of the secured parties signed the draft that was circulated and that secured party instead expressly indicated what terms needed to be changed to obtain its assent. Although subsequent email messages indicated that the parties thought they had a three-way intercreditor agreement, there is no evidence of such an agreement or indication of what its terms are. While the parties might have agreed that the three security interests would be of equal priority, they left unresolved all the other terms of the agreement, such as “the treatment of payments, distributions, impairment, specific performance, foreclosure, and so on,” with the result that the alleged agreement is too indefinite to be enforceable. Even though one of the secured parties and the lender signed the draft agreement, no one was bound by the agreement because the signature of all parties is a condition to the efficacy of the agreement.
- *In re Vetter Assets Service, LLC*, 609 B.R. 279 (Bankr. W.D. Okla. 2019) – Although the senior lender agreed to a forbearance with the debtor, which resulted in an increase in the unpaid debt, even though the senior lender knew of a term in the debtor’s contract with the junior lender prohibiting the debtor from modifying the terms of its loan with the senior lender without the junior lender’s consent, the senior lender’s lien would not be equitably subordinated. The senior lender was not a fiduciary of the junior lender.
- *In re Energy Future Holdings Corp.*, 773 F. App’x 89 (3d Cir. 2019) – The holders of the highest tranche of first-lien debt - the whole of which was undersecured - were not entitled to postpetition interest out of the adequate protection payments and plan distributions allocated to the lower tranches because the waterfall in the intercreditor agreement dealt only with payments out of the proceeds of collateral or the exercise of remedies by the

- collateral agent. The payments were not made from property in which the creditors had a lien or from the exercise of remedies by the collateral agent.
- *In re MPM Silicones, LLC*, 596 B.R. 416 (S.D.N.Y. 2019) – Contractually subordinated and massively undersecured junior lienors did not breach the intercreditor agreement by voting in favor of the plan of reorganization because the agreement unambiguously restricted the junior creditors only to the extent they were enforcing rights as a secured party, not to the extent they were acting as unsecured creditors. The creditors also did not breach the intercreditor agreement by receiving equity in the reorganized debtor because that equity was not proceeds of joint collateral.
 - *Secured Financings, LLC v. Bristol Holdings, LLC*, 2019 WL 3758943 (Cal. Ct. App. 2019) – Although a lender that has contractually agreed to subordinate its lien might normally have a cause of action against an entity related to the debtor for buying the senior loan and then releasing the guarantor in return for a nominal payment, thereby materially prejudicing the rights of the junior lender that also had a right to buy the senior loan, the junior lender in this case had no such claim because it had waived its rights pursuant to the clause in the subordination agreement providing that the senior lender could “release or compromise any obligation or provisions of the notes and deed of trust . . . and all documents given in connection therewith.”
 - *Wang v. Hull*, 2019 WL 5862964 (W.D. Wash. 2019) – A creditor with a contractually subordinated loan was not entitled to an order enjoining the senior lender from extending the maturity date of its loan, even though that would have the effect of delaying payment on the subordinated loan. The Subordination and Intercreditor Agreement contains no termination date; instead it terminates only upon full, indefeasible payment to the senior lender. The duty of good faith did not require the senior lender to demand payment on its loan quickly.

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

A. *Scope*

1. *General*

- *In re Miami Metals I, Inc.*, 603 B.R. 727 (Bankr. S.D.N.Y. 2019) – A transaction in which the debtor’s customers delivered precious metals to the debtor, which then became obligated to return a like amount of the same metal, was a sale, not a bailment, because the debtor was not obligated to return the same goods in their original or altered form, but instead to return goods of the same kind. This conclusion was supported by various terms in the parties’ agreements, including the customers’ warranty of title and a declaration stating that the parties were merchants within the meaning of UCC Article 2. Although the agreements did not specify a quantity, that term was provided by the later shipment of the goods. Therefore, the goods were property of the debtor’s estate and the customers had only unsecured claims.
- *Zodiac Seats US LLC v. Synergy Aerospace Corp.*, 2019 WL 1776960 (E.D. Tex. 2019) – Nothing in the United Nations Convention on Contracts for the International Sale of Goods preempts state law that authorizes an award of attorney’s fees to the prevailing party in a contract dispute.
- *MNMInvestments, LLC v. McCloud*, 2019 WL 3801672 (D. Kan. 2019) – Bills of sale by which two entities purported to “sell, transfer, and quit claim” virtually all of their assets, including “general intangibles,” were sufficient to transfer trademarks.

2. *Software and Other Intangibles*

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

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C. *Warranties and Products Liability*

- *Ochoa v. Setton Pistachio of Terra Bella, Inc.*, 2019 WL 1615371 (Cal. Ct. App. 2019) – The mere fact that a food company sold and retained a security interest in a facility that contained a wet auger was insufficient to demonstrate that the company manufactured, possessed or otherwise controlled the auger, and therefore the company was not liable to the widow of a maintenance worker who was fatally injured when a co-worker activated the auger while the maintenance worker was inside.

D. *Limitation of Liability*

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E. *‘Economic Loss’ Doctrine*

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F. *Performance, Breach and Damages*

- *Litchfield County Auctions, Inc. v. Brideau*, 2019 WL 4860644 (Conn. Super. Ct. 2019) – Buyers who purchased expensive paintings from a dealer in cash and who, at that time received no bill or sale or other paperwork, but who were later provided with the seller’s plain letterhead that could be used to fabricate a fraudulent bill of sale, were not buyers in ordinary course of business. The buyers therefore did not take free of the rights of the rightful owners, who had transferred the goods to an agent for the purpose of sale, and for whom the dealer was a sub- sub-agent.

G. *Personal Property Leasing*

- *In re Republic Airways Holdings Inc.*, 598 B.R. 118 (Bankr. S.D.N.Y. 2019) – The liquidated damages provisions in aircraft leases - which entitled the lessor to unpaid rent plus an amount that compensated the lessor for both the future rent (discounted to present value) and the diminished value of the aircraft - were unenforceable penalties. Because the lessor would bear the risk of diminished value if the lessee had fully performed, providing for recovery of that in the event of default, in addition to the other amounts, was an unenforceable penalty. For example, if the lessee

VI. U.C.C. – *Sales and Personal Property Leasing*

defaulted at the end of the lease term, the lessee would have to pay more than 50 times the total amount of unpaid rent; the total cost of performance when the debtor rejected the leases was \$12.5 million but the liquidated damages were \$52.7 million.

VII. NOTES AND ELECTRONIC FUNDS TRANSFERS

A. *Negotiable Instruments, PETE, Holder in Due Course, and Usury*

- *In re Jaghab*, 584 B.R. 472 (Bankr. E.D.N.Y. 2018) – The bankruptcy trustee, who held 50% of the stock in a corporation, could not recover under bankruptcy law a payment made to the other stockholder on a promissory note owned by the corporation. Because the corporation – not its shareholders – owned the note, the trustee had no direct action on the note or against the other shareholder for an accounting. If the other shareholder owed an accounting, it was to the corporation, not the trustee as a shareholder. The trustee could, however, pursue whatever rights the trustee might have under nonbankruptcy law.
- *Knezovic v. Urban P' ship Bank*, 589 B.R. 351 (N.D. Ill. 2018) – A court scrutinized a variable interest rate provision in a loan agreement when the bank providing the base rate failed and was taken over by another bank. The court held the rate remained available based on actions of the successor bank.
- *In re Goione*, 595 B.R. 477 (Bankr. D.N.J. 2019) – A bank that obtained a judgment of foreclosure on a mortgage loan was entitled to post-judgment interest at the legal rate, not at the contract rate, because, pursuant to New Jersey law, the mortgage debt merged into the judgment and thereafter the contract documents do not serve as a basis of the borrower's obligations unless they clearly evidence the intent to remain effective post-judgment. These documents did not.
- *Wells Fargo Bank v. Ferruccio Insurance Services of LA, Inc.*, 358 F. Supp. 3d 887 (D. Ariz. 2019) – A bank that allowed a depositor to withdraw funds one business day after depositing a \$100,000 check subject to a stop payment order was a holder in due course of the check. The bank did not fail to act in good faith because, even if it acted negligently, it acted fairly, and good faith requires reasonable commercial standards of fair dealing, not due care. The bank was therefore entitled to collect the amount by which the

depositor's account became overdrawn when the check was dishonored, reduced by subsequent credits, not the full amount of the check.

- *In re Rent-Rite Superkegs West, Ltd.*, 603 B.R. 41 (Bankr. D. Colo. 2019) – A promissory note between a Colorado borrower and a Wisconsin bank, which selected Wisconsin as the governing law and provided for interest at more than 120% per year - a rate that would be usurious under Colorado law but not under Wisconsin law - was enforceable because the federal Depository Institutions Deregulation and Monetary Control Act of 1980 (“DIDMCA”) expressly allows a state-chartered bank to charge interest at “the rate allowed by the laws of the State . . . where the bank is located.” It did not matter that the bank later assigned the note to a non-bank. Even if DIDMCA did not apply, a federal court not sitting in diversity would apply federal choice-of-law principles, and under those rules, Wisconsin law would govern because the note expressly designated Wisconsin as the place of payment. Even if Colorado choice-of-law rules applied, Wisconsin law would govern because, under UCC § 1-301, the parties are free to select any state's law to govern if the transaction bears a reasonable relation to that state, and the transaction did bear a reasonable relation to Wisconsin. Finally, even if UCC § 1-301 were inapplicable, Wisconsin law would still apply pursuant to § 187 of the *Restatement (Second) of Conflict of Laws* because Colorado did not have a materially greater interest than Wisconsin in the issue, enforcing the note would not violate a fundamental policy of Colorado, and Wisconsin law would govern in the absence of the contractual choice because the place of performance was in Wisconsin.

B. *Electronic Funds Transfer*

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

A. *Letters of Credit*

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B. *Investment Securities*

- *Triaxx Prime CDO 2006-1, Ltd. v. Ocwen Loan Servicing, LLC*, 762 F. App'x 601 (11th Cir. 2019) – An entity that owned securities representing an interest in a pool of residential mortgage loans, and which transferred the securities to an indenture trustee as part of an issuance of collateralized debt obligations, was no longer the owner of the securities and therefore could not maintain an action against the servicer for gross negligence.
- *Estate of Malkin v. Wells Fargo Bank*, 379 F. Supp. 3d 1263 (S.D. Fla. 2019) – The estate of an individual was entitled to the benefits paid under a stranger-initiated life insurance (“STOLI”) policy rather than the entity that acquired the policy from the original financier. The entity was not protected under UCC § 8-502 as a protected purchaser of a financial asset because the policy was *void ab initio* and because UCC § 8-502 does not override Delaware’s insurable interest statute, which prohibits investors from retaining the death benefits under a life insurance policy procured through a STOLI scheme.

C. *Documents of Title*

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IX. CONTRACTS

A. *Formation, Electronic Contracts, Scope and Modification*

- *Sotheby's, Inc. v. Mao*, 173 A.D.3d 72, 100 N.Y.S.3d 27 (N.Y. App. Div.), *leave to appeal denied*, 34 N.Y.3d 902, 136 N.E.3d 424 (2019) – Even though an oral waiver of contractual rights can be effective despite a term in the written agreement purporting to prohibit oral modifications and waivers, such a waiver cannot operate to extend the limitations period because state law requires a waiver of the statute of limitations to be in signed writing. Consequently, a creditor's alleged waiver of default, even if otherwise effective, did not extend the limitations period for bringing an action on the debt.
- *Kotler v. Shipman Associates, LLC*, 2019 WL 4025634 (Del.Ch. 2019) – Contract not formed by attaching signature pages where there was no meeting of the minds between parties as to which version of the contract they had agreed to enter into.
- *Labonty v. Momager, Inc.*, 2019 WL 4925642 (Cal. App. 2019) (not reported) – Employee was not party to agreement entered into by other party.
- *Velasquez-Reyes v. Samsung Electronics America, Inc.*, 777 Fed. Appx. 241 (9th Cir. 2019) – Silence or inaction can form a contract only if provisions are conspicuous and their “contractual nature” is obvious.
- *Wal-Mart Stores Texas LLC v. Shirley*, 2020 WL 548323 (Ct. App. Texas 2020) – Exchange of e-mails sufficient to form a contract because e-mails had material terms.
- *Copano Energy, LLC v. Bujoch, Life Estate*, 2020 WL 499765 (Sup.Ct. Texas 2020) – Exchange of e-mails not sufficient to form a contract because e-mails lacked material terms.
- *Gupta v Morgan Stanley Smith Barney, LLC*, 934 F.3d 705 (7th Cir. 2019) – One party to a contract can amend it by giving sufficient notice to other party who “accepts” it by silence, notwithstanding

- provision in original contract that an amendment is not effective unless signed by both parties.
- *Philadelphia Indemnity Insurance Company v. SMG Holding SMC, Inc.*, 2019 WL 7790891 (Cal.App. 2019) – Third-party beneficiary status may be inferred from terms of agreement.
 - *Piranha Partners v. Neuhoff*, 2020 WL 868120 (Tex. February 21, 2020) – Although Contract provided that it applied only “INSOFAR” as stated in an exhibit, the contract when read in a “holistic and harmonizing” manner, unambiguously did not limit the application of the contract to the matters on the exhibit.
 - *AG Oncon, LLC v. Ligand Pharmaceuticals Inc.*, 2019 WL 2245976 (Del.Ch. 2019) – As permitted by a provision in an indenture, issuer may “conform” the terms of the indenture to the description in a prospectus.
 - *In re ICPW Liquidation Corp.*, 600 B.R. 640 (Bankr. C.D. Cal. 2019) – The assignee of a corporate debtor’s rights failed to state a cause of action for economic duress against a competitor that, having been rebuffed in its efforts to buy the corporation’s assets, purchase from a bank the corporation’s secured debt, accelerated the debt, and forced the corporation into bankruptcy, where the corporation’s assets were sold for an amount allegedly less than fair market value. The complaint was deficient because there was no allegation of a threat to take an action that the competitor was unauthorized to take, but the assignee would be permitted to amend the complaint. Although the corporation had signed a prepetition release broad enough to cover such a claim, the assignee might also be able to allege sufficient facts to raise a defense of economic duress to that release.
 - *Wall v. Altium Group, LLC*, 384 F. Supp. 3d 561 (W.D. Pa. 2019) – Because the investors who purchased a fraudulent annuity had no breach of contract claim against the broker that sold it, they also had no unjust enrichment claim. The broker had no knowledge of the fraud and the only benefit it received was the one expressly permitted under the parties’ contract.

- *Katun International, Inc. v. Exworks Capital, LLC*, 2019 WL 3202233 (Cal. Ct. App. 2019) – Because the communications between a prospective borrower and a potential lender expressly disclaimed any commitment to fund the borrower’s planned acquisition, and instead stated that the lender was merely agreeing to proceed with a review of the proposal, the borrower had no breach of contract claim against the lender for failing to fund the acquisition. However, the borrower did state claims for fraud and negligent misrepresentation by claiming that the lender had falsely indicated its ability to fund the acquisition.
- *In re Louise K. Van Slooten Revocable Living Trust*, 2019 WL 5418343 (Mich. Ct. App. 2019) – An oral agreement to extend the term of a loan without a change in interest rate was supported by consideration: the additional interest during the extended period.

B. *Interpretation and Meaning of Agreement*

- *U.S. Bank N.A. v. Windstream Services*, 2019 WL 948120 (SDNY 2019) – Interpretation of prohibition of sale and leaseback under indenture. The court found by a preponderance of evidence that defendant had breached the indenture by engaging in a prohibited sale and leaseback transaction and its attempts to dilute the majority noteholder and obtain a waiver to cure the default were unsuccessful. The noteholder was therefore entitled to a money judgment for the aggregate principal amount of its notes plus interest.
- *Tavarua Restaurants, Inc. v. McDonald’s USA, LLC*, 2019 WL 3858826 (S.D. Cal. 2019) – A franchisor, which had a contractual option to purchase the franchisee’s franchises “on the same terms and conditions” that the franchisee offered to any third party, could exercise that option without also purchasing the franchisee’s office and storage facility, even though those properties were part of the franchisee’s negotiated transaction with a prospective buyer.

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

- *Lehman XS Trust v. Greenpoint Mortgage Funding, Inc.*, 916 F.3d 116 (2nd Cir. 2019) – Cannot extend New York statute of limitations.
- *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 2019 WL 406075 (Tex. 2019) – Contractual waiver of punitive damages for fraud claim is enforceable, but waiver of all claims for fraud is not.
- *Delaney v. First Financial of Charleston, Inc.*, 829 S.E.2d 249 (S.C. 2019) – The statute of limitations on a debtor’s claim against a secured party for sending improper notification of a disposition begins to run when the disposition is held, not when the notification is sent, even though the debtor could before the sale seek a court order requiring the secured party to comply with Article 9.

D. *Risk Allocation*

- *Hensel Phelps Construction Co. v. Superior Court of San Diego County*, 2020 WL 370445 (Calif. Ct. App. 2020) - When statute provides that statute of limitations begins running upon ‘substantial completion’ of project, contract’s definition of ‘substantial completion’ does not control.
- *Stephens Inc. Vv. Flexiti Financial Inc.*, 2019 WL 2725627 (SDNY 2019) – Indemnity provision interpreted narrowly.
- *Mitsuwa Corp. v. Wehba*, 2019 WL 3561928 (Cal. Ct. App. 2019) – An agreement that settled a dispute for \$15 million and called for two payments totaling \$10.5 million, with the remaining \$4.5 million forgiven if both payments were timely made, did not create an unenforceable penalty for late payment. The agreement expressly called for payment of \$15 million, with discount for timely performance, not liquidated damages or a penalty for late payment. Had the agreement not expressly created liability for \$15 million, the result might have been different.
- *Spec’s Family Partners, Ltd. v. First Data Merchant Services LLC*, 777 F. App’x 785 (6th Cir. 2019) – A liquor retailer that was the victim

of two attacks on its computer network was not liable to its data processor for the millions of dollars in fraudulent credit card charges that Visa and Mastercard passed on to the card issuers, which in turn passed them on to the data processor. Although the indemnification clause in the retailer's contract with the data processor covered all losses and liability relating to any breach of the agreement, and the retailer had breached the agreement by failing to maintain data security, the clause also excluded liability for consequential damages, and the charges were consequential damages.

- *The Ricardo S. and Ilda FG. Fernandez Revocable Living Trust v. Ripps*, 2019 WL 3934375 (Ariz. Ct. App. 2019) – A creditor with three deeds of trust on a piece of property and which, upon payment of the amounts due under two of them, signed releases stating that “the indebtedness and/or obligations secured by the Deed of Trust . . . has been fully paid, satisfied and discharged,” thereby discharged the liens. However, the releases were not determinative of whether the debt had been fully paid.
- *Langley v. MP Spring Lake, LLC*, 834 S.E.2d 800 (Ga. 2019) – A term in a residential lease agreement providing that “any legal action against [landlord] must be instituted within one year of the date any claim or cause of action arises” was, despite its broad language, limited to contract claims and did not cover the tenant's premises-liability tort claim.

E. *Personal Jurisdiction*

- *Roch v. Mollica*, 481 Mass. 164, 113 N.E.3d 820 (Mass. 2019) – Transient jurisdiction still available to obtain personal jurisdiction.
- *Jensen v. Jensen*, 31 Cal.App.5th 682, 242 Cal.Rptr.3d 832 (Cal. App. 2019) – Non-California resident did not purposefully avail himself of California law's benefits and protections by filing guardian *ad litem* application in California sufficient to allow personal jurisdiction over him.
- *Sherburne v. Ashton State Bank*, 2019 WL 6894278 (Iowa Ct. App. 2019) – An Iowa court had no personal jurisdiction over a

- Nebraska bank that claimed to have a security interest in lambs sold by a Nebraska debtor to an Iowa buyer, and hence the buyer's action against the bank had to be dismissed. The bank expected the lambs to remain with its customer in Nebraska and did nothing to purposely direct its activities at the residents of the state of Iowa.
- *MJM Holdings Inc. v. Sims*, 130 N.E.3d 1093 (Ct. App. Ohio 2019) – Opinion giver subject to personal jurisdiction by sending e-mails to opinion recipient's counsel in Ohio, negotiating agreements governed by Ohio law, and sending opinion letter to recipient in Ohio.
 - *Von Schönau-Riedweg v. Rothschild Bank AG*, 95 Mass.App.Ct. 471 (Mass. App. Ct. 2019) – Acts of agent of party to litigation can create sufficient relationship to forum to establish personal jurisdiction over the principal of the agent.
 - *Halyard Health, Inc. v. Kimberly-Clark Corp.*, 43 Cal.App.5th 1062 (Cal.App. 2020) – Personal jurisdiction depends on whether particular dispute is sufficiently related to forum state.
 - *AlixPartners, LLP v. Mori.*, 2019 WL 6327325 (Del. Ch. 2019) – Agreement to forum selection clause inherently includes consent to personal jurisdiction in the chosen forum.
 - *Aybar v. Aybar*, 169 A.D. 3d 137, 2019 NY Slip. Op. 00412 (App. Div. 2nd Dep. January 23, 2019) – State does not have general personal jurisdiction over corporation registered to do business in the state where the corporation does significant business in the state; registration to do business is not 'consent' to jurisdiction and corporation is not 'at home' in the state where it is not formed under the law of that state.

F. *Choice of Law and Forum*

- *Empire Loan of Stoughton, Inc. v Stanley Convergent Security Solutions, Inc.*, 119 N.E.3d 318 (Mass. App. Ct. 2019) – Choice-of-law provision not enforceable where parties had no substantial relationship with state whose law was chosen; choice-of-forum clause enforceable because it was not unjust or unreasonable.

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- *Royce v. Michael R. Needle, P.C.*, 381 F. Supp. 3d 968 (N.D. Ill. 2019) – Article 9 contains no choice-of-law rule for issues involving the attachment of a security interest. Accordingly, under general choice-of-law principles, attachment of a security interest was governed by the law of Illinois, where the secured party was located and the collateral was generated, not Pennsylvania where the debtor is located. A law firm that provided services to a client gave value for another firm’s grant of a security interest in its right to an award of attorney’s fees in a case involving the client. Attachment requires that value be given, not that it be given to the debtor.
 - *Hughes v. Nationwide Bank*, 387 F. Supp. 3d 612 (W.D. Pa. 2019) – A security agreement’s selection of Ohio law to govern generally, but Pennsylvania law to apply to “procedural matters related to the perfection and enforcement of Lender’s rights and remedies against the Property” meant that Pennsylvania law governed the debtor’s claims against a secured party for providing improper notification of the disposition and failure to send a post-disposition explanation of the resulting deficiency. Those were procedural matters relating to enforcement. The promissory note’s selection of Ohio law was not relevant to the complaint, which related only to the security interest.
 - *First Bank & Trust v. Complete Communications, Inc.*, 2019 WL 2582569 (D.S.D. 2019) – The assignee of a factor that purchased the debtor’s accounts was bound by the forum selection clause in the agreement between the factor and the debtor. Although the clause provided that no dispute could be litigated outside the chosen forum “except as expressly agreed in writing by [the factor],” that language did not allow the assignee to unilaterally change the forum and, in any event, the assignee had not tried to change the forum merely by commencing suit elsewhere.
 - *Gemini Technologies, Inc. v. Smith & Wesson Corp.*, 931 F.3d 911 (9th Cir. 2019) – Under *Atlantic Marine*, a court may decline to enforce choice-of-forum provision on basis of “extraordinary circumstances unrelated to the convenience of the parties”; *Bremen*

- is still good law to the extent enforcing a choice-of-forum clause would violate a “strong public policy”.
- *City of Albany v. Ch2M Hill, Inc.*, 924 F.3d 1306 (9th Cir. 2019) – Venue selection provision that requires litigation in courts in a particular county precludes litigation in federal court when there is no federal courthouse in that county.
 - *Germaninvestments AG v. Allomet Corporation*, 2020 WL 414426 (Del.Supr.) (Del.Supr. 2020) – Court interprets and applies choice-of-forum provision under chosen law in contract (Austria).
 - *AlixPartners, LLP v. Mori.*, 2019 WL 6327325 (Del. Ch. 2019) – *Forum non conveniens* not available when there is contractual forum-selection clause.
 - *Oxford Global Resources v Hernandez*, 480 Mass. 462 (Mass. 2018) – Contractual choice-of-forum provision does not prevent application of *forum non conveniens*, even if contract so provides.
 - *Li v. LoanDepot.com, LLC*, 2019 WL 1792307 (Del.Ch. April 24, 2019) – Forum selection clause in an LLC operating agreement is enforceable.
 - *NuVasive v. Miles*, 2019 WL 4010814 (Del.Ch. 2019) – Choice-of-law provision not enforced where state whose law otherwise would apply would not enforce a non-competition provision and that state has a materially greater interest in the issue.
 - *AlixPartners, LLP v. Mori.*, 2019 WL 6327325 (Del. Ch. 2019) – Foreign statute mandating that particular claims must be brought in foreign jurisdiction does not prevent another court from having subject matter jurisdiction over the case where the claims are “transitory.”
 - *Scibacucchi v. Salzberg*, 2018 WL 6719718 (Del. Sup. Ct. 2020) – Exclusive forum bylaw provision not enforced because it does not in the circumstances apply to internal-affairs or intra-corporate claims.
 - *F&MMafco, Inc. v. Ocean Marine Contractor’s, LLC*, 2019 WL 142297 (E.D. La. 2019) – A purchase agreement that included a clause

- selecting Louisiana law to govern the agreement and a clause providing that any proceeding brought to enforce an arbitration must be brought in Louisiana did not deprive Ohio courts of jurisdiction over an action for breach. The agreement contained no arbitration clause, and thus the forum-selection clause for actions to enforce an arbitration award did not apply.
- *Himelsein Mandel Fund Management, LLC v. Fortress Investment Group LLC*, 2019 WL 1395963 (Cal. Ct. App. 2019) – Trial court did not enforce a security agreement’s choice of New York law to govern the parties’ rights and a waiver of a jury trial because the waiver violated a fundamental policy of California law and California had a materially greater interest in the matter even though the debtor was organized under New York law, the secured party’s principal office is in New York, and the parties negotiated the agreement in New York.
 - *BMO Harris Bank v. Richland Express, Inc.*, 2018 WL 8299883 (E.D. Ark. 2019) – Loan agreements selecting Texas and Utah law and providing for a default rate of interest that would be usurious under Arkansas law violate a fundamental policy of Arkansas, and hence Arkansas law applies despite the contractual choice. However the default interest rate that the agreements provided for - 18% per year, or “otherwise at the highest rate [the debtor] can legally obligate itself to pay” - could be reduced to 17%, the maximum amount permitted under Arkansas law, even though the penalty for usury in the state is that the agreement is void as to both principal and interest.
 - *Maslowski v. Prospect Funding Partners, LLC*, 2019 WL 3000747 (Minn. Ct. App. 2019) – Neither the clause in a litigation funding agreement choosing New York law to govern nor the clause choosing New York courts as the forum to resolve disputes was enforceable. They both violated Minnesota’s public policy against champerty and maintenance.
 - *Handoush v. Lease Finance Group, LLC*, 254 Cal. Rptr. 3d 461 (Cal. App. 2019) (hearing granted by California Supreme

Court) – Enforcement of a New York choice-of-forum clause in an equipment lease, which also selected New York as the governing law and waived the right to a jury trial, would diminish the plaintiff's substantive rights and violate fundamental policy of the State of California - which prohibits pre-dispute, contractual waivers of the right to a jury trial - and was therefore unenforceable. It did not matter that the plaintiff's claims were not based on a statute with an anti-waiver provision.

- *In re Mayacamas Holdings LLC*, 608 B.R. 522 (Bankr. N.D. Cal. 2019) – The court would respect the parties' contractual choice to have a deed of trust governed by California law, which is where the property is located, but have the promissory note governed by Oregon law. As a result, the increase in the contractual interest rate from 6% to 18% after default, along with a monthly late charge of 4% and a \$75,000 exit fee were enforceable. The lender's security interest in the real property did not extend to the insurance proceeds received after damage caused by fire because the lender neither was named as an insured nor provided the insurer with written notification that it should be added as a loss payee to the policy.

G. *Damages and Remedies*

- *In re 1141 Realty Owner LLC*, 2019 WL 1270818 (Bankr. W.D.N.Y. 2019) – Discussion of whether liquidated damages applies to make-whole payment. The court concluded that make-whole premiums may be enforceable in bankruptcy post-default and post-acceleration if there is clear and unambiguous language to that effect in the loan documents.
- *In re Emerald Grande, LLC*, 2019 WL 1421429 (Bankr. N.D.W. Va. 2019) – Loan documents that made the debtor responsible for the legal expenses incurred by the lender "in connection with the enforcement of this Agreement," including: (i) expenses incurred "for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction)"; (ii) "costs and expenses of preserving and protecting [the collateral]"; and (iii) any "expenses

- paid or incurred to . . . enforce [its] security interests and liens . . . or to defend any claims made or threatened against [it] arising out of the transactions contemplated hereby,” did not encompass fees incurred in opposition to an administrative expense claim, monitoring the bankruptcy case, seeking the conversion or dismissal of the debtor’s case, or for other clerical work incidental to its participation in the debtor’s bankruptcy case.
- *In re 1111 Myrtle Avenue Group, LLC*, 598 B.R. 729 (Bankr. S.D.N.Y. 2019) – A default rate of interest 7% above the non-default rate is an enforceable term, not a penalty, under New York law.
 - *In re 3MB, LLC*, 2019 WL 6701420 (Bankr. E.D. Cal. 2019) – A promissory note calling for interest after maturity at 4% more than the base rate of 6.27% was enforceable. An agreement for a higher interest rate after maturity is not, under California law, a liquidated damages clause that might be an unenforceable penalty. Instead, it provides for an alternative performance and compensates the bank for the lower value of the loan, since it no longer conforms to its expected duration. Even if the clause did provide for liquidated damages, it would still be enforceable because the increase in the interest rate is consistent with similar commercial loans, compensates for the increased risk of nonrecovery, and determining actual damages would be difficult.
 - *In re Davis*, 595 B.R. 818 (Bankr. C.D. Cal. 2019) – An individual debtor who had been determined to be the *alter ego* of a corporation, and hence liable for the corporation’s debts, was entitled to recover attorney’s fees incurred in successfully defending against a creditor’s challenge to the individual’s bankruptcy discharge and the dischargeability of his obligations to the creditor. Although all contract issues had previously been litigated, and therefore the action was not “on the contract” and Cal. Civil Code § 1717 did not apply, the individual was entitled to attorney’s fees pursuant to the attorney’s fees clause in the contract because it covered “any . . . proceeding or court action arising out of this Agreement or the enforcement or breach thereof.”

- *Menco Pacific, Inc. v. International Fidelity Insurance Co.*, 2019 WL 653086 (C.D. Cal.), *appeal filed*, (9th Cir. March 19, 2019) – A bankruptcy debtor who successfully defended against a motion for relief from the automatic stay was not entitled to an award of attorney’s fees under Cal. Civil Code § 1717 because the motion was not an “action on a contract.”
- *Strategic Capital Inv., LLC v. Bill Miller Equipment Sales, Inc.*, 2019 WL 331046 (E.D. Pa. 2019) – Neither party was entitled to summary judgment on a financial consultant’s action for a success fee because the consultant did not perform all the services mentioned in the parties’ agreement, was not clear whether doing so was a condition to the success fee, and the investor introduced to the client by the consultant did not provide any funds at closing but instead purchased the loan shortly thereafter.
- *Red & White Distribution, LLC v. Osteroid Enterprises, LLC*, 251 Cal. Rptr. 3d 400 (Ct. App. 2019) – An agreement that settled a dispute between a lender and a borrower and provided for payment by the borrower of \$2.1 million through installments over a one-year period, but also included a stipulation for entry of a \$2.8 million judgment in the event of default, created an unenforceable penalty. Nothing in the settlement agreement indicated that the borrower owed \$2.8 million; rather it stated that the borrower was liable for \$2.1 million. Had the parties intended to settle for \$2.8 million, but apply a discount for timely payments, they could have done so expressly.
- *In re Family Pharmacy, Inc.*, 605 B.R. 900 (W.D. Mo. 2019) – A bank’s right to default rate interest of 18% - which was more between 10% and 14.35% higher than the pre-default rate on the various loans - was an unenforceable penalty under Missouri law.
- *Rosemont Properties, LLC v. IP Realty, LLC*, 2019 WL 2912855 (N.J. Super. Ct. 2019) – A promissory note that provided for the interest rate to rise from 11.5% to 24% after default was enforceable because the maker provided no industry information or other

competent evidence suggesting that the rate increase was unreasonable.

- *Magic Carpet Ride LLC v. Rugger Investment Group, L.L.C.*, 254 Cal. Rptr. 3d 213 (Ct. App. 2019) – Even though an aircraft purchase agreement stated that “time shall be of the essence,” that clause will not be enforced if doing so will result in a forfeiture. Hence, the seller’s eight-day delay in providing a lien release statement would not warrant the buyer’s refusal to release the remaining \$90,000 of the purchase price, which had been held in escrow, absent proof that the seller failed to substantially perform.

H. Arbitration

- *Loyola v. American Credit Acceptance, LLC*, 2019 WL 1601362 (E.D. Wash. 2019) – The arbitration clause in the security agreement required the debtor to arbitrate its claims against the secured party, the company that the secured party hired to repossess the debtor’s car, and the repossession agency that the company subcontracted with for the actual repossession. The arbitration clause was not unconscionable even though it relegated the debtor’s likely claims to arbitration while excluding self-help and provisional remedies, the claims most likely to be raised by the secured party. Although none of the defendants was a signatory to the security agreement, the secured party was an assignee of the contract and could enforce the arbitration clause, and the other defendants could do so under agency principles.
- *Wells Fargo Bank v. Suburu 46, LLC*, 2019 WL 2592566 (N.J. Super. Ct. App. Div. 2019) – The clause in the credit agreement between a floor plan financier and several car dealerships, which provided for arbitration of “any claim or controversy arising out of or relating to the Loan Documents” other than “disputes under or related to swap agreements” and actions to foreclose, included the financier’s action on the debt. Even though computation of damages required using the rates and formula incorporated into the parties’ swap agreement, the swap agreement itself was not the subject of a dispute.

- *Gillette v. Service Intelligence LLC*, 2019 WL 5268570 (E.D. Wis. 2019) – An arbitration clause in a car financing contract that covered “any controversy or claim” between the parties, but which expressly excepted any repossession of the vehicle or exercise of any power of sale over the vehicle as long as such action does not involve a request for monetary relief, covered the debtor’s claims arising from the secured party’s repossession of her car because the claims sought monetary relief.
- *Laurie v. Collateral Recovery Team LLC*, 2019 WL 5538423 (S.D. Tex. 2019) – An arbitration clause in a car financing contract that covered any dispute between the parties, and defined “dispute” to include contract, tort, and statutory claims other than any repossession of the vehicle or any action by the debtor to prevent such a remedy, provided such claim does not involve a request for monetary relief, covered the debtor’s claims arising from the secured party’s repossession of her car because the claims sought monetary relief. Therefore, the debtor would be compelled to arbitrate her claims against the secured party and the repossession agents.
- *Smith v. Credit Acceptance Corp.*, 207 A.3d 722 (Md. Ct. Spec. App. 2019) – A secured party had not, by bringing and then voluntarily dismissing its claim for nonpayment, waived its right to arbitrate the debtor’s claim for charging unauthorized fees and failing to provide required notification of the repossession and sale of the collateral. None of the debtor’s claims were raised or decided by the action initially brought by the secured party and the arbitration clause in the parties’ agreement expressly stated that either party “may require any Dispute to be arbitrated and may do so before or after a lawsuit has been started over the Dispute.”
- *Valentine v. Plum Healthcare Group, LLC*, 37 Cal. App. 5th 1076 (Cal. App. 2019) – Children of person who had agreed to arbitrate were not bound by arbitration agreement signed by agent of parent.
- *Abernathy v. Doordash, Inc.*, (N.D.Calif. February 10, 2020) – Arbitration agreement enforced against (alleged) “employer.”

- *Gannett Fleming, Inc. v. Corman Construction, Inc.*, 2019 WL 6207616 (Md. Ct. App. 2019) – The trial court did not err in enforcing an arbitration clause in the parties’ agreement even though the claim was barred by the applicable statute of limitations because the contract clause did not expressly state that claims outside the limitations period were not subject to arbitration. Of course, the arbitrator remains free to decide that the claim is not arbitrable or that the claim is untimely even if the demand for arbitration was not.

X. OTHER LAWS AFFECTING COMMERCIAL TRANSACTIONS

A. *Bankruptcy*

1. *Bankruptcy Estate*

- *In re Jackson*, 2019 WL 329424 (Bankr. M.D. La. 2019) – Because the debtors’ vehicle was destroyed prepetition, a secured party was listed as loss payee on the insurance contract, and the insurance proceeds were less than the amount of the secured claim, the insurance proceeds were not property of the estate.
- *In re Woodfield*, 602 B.R. 747 (Bankr. D. Or. 2019) – The dissociation provision in an LLC operating agreement, which provided that upon filing a bankruptcy petition a member would no longer have the right to receive regular distributions, and would instead be entitled to payment of the member’s capital-account balance over four years, was preempted by Bankruptcy Code § 541(c)(1). Section 541(c)(1) also preempted the portion of the state LLC Act that provided for members to lose their membership status and voting rights upon filing for bankruptcy. However, even though the operating agreement was an executory contract, the debtor could not assign his interest without the consent of the other members, because state law made such consent necessary for any assignment to be effective, not merely for an assignment by a debtor in bankruptcy.
- *In re Brown*, 601 B.R. 514 (Bankr. C.D. Ill. 2019) – No portion of a debtor’s annual bonus from her employer - which on the petition date she expected but had no contractual right to receive - was property of the estate. Even though the debtor and trustee stipulated that “62.7% of the bonus is rooted in the pre-bankruptcy past,” the “sufficiently rooted” test has been displaced by Bankruptcy Code § 541, and absent a right to the bonus on the petition date, no part of the bonus is property of the estate.

- *In re Insight Terminal Solutions*, 2019 WL 4640773 (Bankr. W.D. Ky. 2019) – A term in the operating agreements of both a borrower and its guarantor, added pursuant to a requirement in a commercial Loan and Security Agreement, which prohibited each of them from filing for bankruptcy protection unless they first obtained the prior written consent of everyone with a membership interest in or warrant to acquire a membership interest in the guarantor did not render the bankruptcy petition of either entity unauthorized. Contractual restrictions on filing for bankruptcy are unenforceable as against public policy and, at the time the petition was filed, the secured lender had not become an equity holder because it had not completed the strict foreclosure process.
- *In re Anderson*, 2019 WL 2527210 (Bankr. N.D. Ga. 2019) – An individual whose vehicle was repossessed prepetition following his default in a title pawn transaction, and who then failed to redeem the vehicle within the redemption period, as extended by § 108(b), had no interest in the vehicle and neither did the estate.

2. Automatic Stay

- *In re Denby-Peterson*, 941 F.3d 115 (3d Cir. 2019) – A secured party that repossessed collateral prepetition does not violate the stay by failing to return the property to the debtor postpetition despite a demand therefor. Instead, it is incumbent on the debtor to bring a turnover action under Bankruptcy Code § 542.
- *In re Fulton*, 926 F.3d 916 (7th Cir.), *petition for cert. filed* (Sept. 18, 2019) – A city that prepetition had impounded the debtor's vehicle due to unpaid parking tickets exercised control over the vehicle and therefore violated the automatic stay by refusing to release the vehicle postpetition until the tickets were paid. The city did not need to retain possession to maintain its statutory lien on the vehicle; the city could instead file a notice of its interest in the vehicle with the Secretary of State or the Recorder of Deeds and, in any event, the city's possessory lien

is not destroyed by the city's involuntary loss of possession due to forced compliance with the automatic stay.

- *In re Chambers*, 605 B.R. 720 (Bankr. D.S.C. 2019) – A secured party that, with knowledge of the debtor's bankruptcy case, repossessed the debtor's truck while the debtor was inside and over his objection, thereby forcing the debtor to walk two miles in the cold, and which then refused to return the truck, willfully violated the automatic stay and was liable for \$1,000 in actual damages and \$10,000 in punitive damages.
- *In re Deemer*, 602 B.R. 770 (Bankr. M.D. Ala. 2019) – A secured party that declined to repossess the inoperable car that the debtor had surrendered violated the discharge injunction by refusing to release the title certificate without payment because this prevented the debtor from disposing of the car.
- *In re Angus*, 2019 WL 325807 (Bankr. W.D. Mich. 2019) – A vehicle lessor was entitled to relief from the automatic stay given that the debtor indicated an intention to reject the lease but was not entitled to an order requiring the debtor to surrender possession of the vehicle to the lessor. The lessor would have to use its non-bankruptcy rights in a non-bankruptcy forum to obtain possession.
- *In re Valez*, 601 B.R. 351 (Bankr. M.D. Pa. 2019) – A vehicle lessor violated the automatic stay when it remotely disabled and later repossessed the vehicle. The lessor did not violate the stay by debiting a co-debtor's bank account because there is no stay of acts upon a co-debtor in a Chapter 7 case.
- *First State Bank of Roscoe v. Stabler*, 914 F.3d 1129 (8th Cir. 2019) – The bankruptcy court did not abuse its discretion in sanctioning a secured creditor for violating the discharge injunction by convincing the debtors to sign new post-discharge promissory notes, totaling an amount substantially greater than the value of the collateral, in exchange for forbearing from foreclosing its liens.

- *In re Lewis*, 2019 WL 2158832 (Bankr. W.D. La. 2019) – A secured party that repossessed the debtor’s car and then wrongfully refused to return it after being informed of the bankruptcy filing, and then claimed to have sold the car the day of the repossession when in it had not, was liable for: (i) \$2,050 in damages for the loss of property; (ii) \$312 in damages for lost wages; (iii) \$698 in damages for transportation costs the debtor incurred; (iv) emotional distress damages of \$3,000; (v) \$5,835.00 for attorney’s fees and expenses; and (vi) \$10,000 in punitive damages.
- *In re Garza*, 605 B.R. 817 (Bankr. S.D. Tex. 2019) – A secured party that repossessed the debtor’s car postpetition and then refused repeated demands by her lawyers to turn the car over was liable for \$1,000 in actual damages for the debtor’s cost of obtaining alternative transportation and punitive damages in the amount of \$6,000, which represented value of the car, plus an additional \$100 per day until the award was paid. The secured party was not liable for emotional distress damages.
- *In re Edwards*, 601 B.R. 660 (8th Cir. BAP 2019) – A city did not violate the stay by failing to recall a warrant issued prepetition for the debtor’s arrest for failing to pay a fine for speeding in a school zone. Unlike a garnishment, which does result in wages being withheld unless withdrawn, nothing will happen as a result of an arrest warrant until it is actually enforced.
- *In re Newberry*, 604 B.R. 37 (Bankr. E.D. Mich. 2019) – A creditor’s postpetition receipt of funds pursuant to a prepetition garnishment violated the automatic stay.

3. *Substantive Consolidation and True Sale*

- *In re Cornerstone Tower Services, Inc.*, 2019 WL 127359 (Bankr. D. Neb. 2019) – A transaction structured as a sale of a specified percentage of all future receivables for \$75,000 “until” \$105,000 was paid was a true sale because the transaction documents described it as such, there was no obligation to repurchase the accounts, the buyer acquired the right to enter into

compromises with the account debtors, and the buyer could take no more than a specified amount each day. However, because the buyer did not file a financing statement to perfect its interest until after the debtor filed for bankruptcy protection, the accounts became property of the seller's bankruptcy estate.

- *In re Hawaii Island Air, Inc.*, 2019 WL 2041705 (Bankr. D. Haw. 2019) – An airline sold spare parts to the lessor of its aircraft, but retained possession of the spare parts. The court considered whether the transaction was a true sale or a secured loan. Several facts suggest that the transaction was a loan: (i) the transaction occurred only because the airline needed an immediate cash infusion; (ii) the lessor had no need for the spare parts, would not have bought them if the airline had not needed cash, had no interest in them other than liquidating them as rapidly as possible, and apparently was not in the business of dealing in such items; (iii) neither party seemed concerned about whether the parts were worth the purchase price; and (iv) the lessor apparently did not expect or demand payment contemporaneously with the sale. However, some facts suggest that the transaction was a true sale: (i) the airline also had no use for the parts and apparently never intended to regain full control of them; and (ii) the lessor had no contractual guarantee of repayment. The court denied summary judgement on the issue of whether the payment for the spare parts was a preferential transfer under Section 547 of the Bankruptcy Code because there were genuine issues of material fact.

4. Secured Parties, Set Off, Leases

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5. Avoidance Actions

- *In re Hackler*, 938 F.3d 473 (3d Cir. 2019) – A strict foreclosure of a New Jersey tax lien on real property two months before the taxpayers' bankruptcy, pursuant to which the lien holder received property worth far more than the amount of the debt, was an avoidable preference. The transfer enabled the lien

holder to receive more than it would have had the transfer not been made and the taxpayers' assets liquidated under Chapter 7.

- *In re A Goodnight Sleepstore, Inc.*, 2019 WL 342577 (E.D.N.C. 2019) – Regardless of whether a factor's purported purchase of future receivables from the debtor was a true sale or a secured loan, the debtor was obligated to make payments and hence the pre-petition payments that the factor received were on account of a debt. The payments were preferential because a secured party had priority in the debtor's receivables, there are insufficient assets to pay the secured party's claim, and thus unsecured claimants, including the factor, will receive no bankruptcy distribution. The payments were not protected from avoidance under Bankruptcy Code § 547(c)(2) because even if the factoring transactions were made in the ordinary course of business, it was not clear that the payments were made in the ordinary course of business or financial affairs of the debtor and the factor.
- *In re Wagenknecht*, 2019 WL 2353534 (10th Cir. BAP), *appeal filed*, (10th Cir. June 11, 2019) – A creditor that received payment during the preference period from the debtor's mother, who in return received a promissory note from the debtor, did receive an interest of the debtor in property. Even though the mother signed an affidavit stating that she advanced the funds exclusively for the purpose of paying the creditor, and that the debtor could not have used the funds for any other purpose, the debtor had the ability to control the loan proceeds because he could have refused to accept a loan from his mother.
- *In re Motors Liquidation Co.*, 596 B.R. 774 (Bankr. S.D.N.Y. 2019) – The earmarking doctrine does not insulate from avoidance the payments made from the proceeds of DIP financing to prepetition lenders who had terminated their financing statements. The DIP financing order authorized but did not expressly require that the funds be used to pay the prepetition lenders and the order was expressly subject to

challenge and recovery based on the extent, validity and priority of the liens securing the lenders' security interest.

- *In re Robert L. Dawson Farms, LLC*, 2019 WL 2366418 (Bankr. E.D.N.C. 2019) – A debtor in possession, which was the surviving entity in a merger of limited liability companies that occurred the day before the bankruptcy petition was filed, cannot avoid as a preference a transfer deemed made when a secured party perfected the security interest granted by the non-surviving company. Even if the property transferred was property of the debtor, the property was not transferred on account of the antecedent debt of the debtor. The debtor could not have become liable for the debt until the merger occurred.
- *In re Iley*, 606 B.R. 871 (Bankr. D. Colo. 2019) – Prepetition payments that the debtor - a payroll processor - made from non-segregated funds to the IRS on behalf of a client were transfers of an interest of the debtor in property, and thus were potentially avoidable preferences, but not to the extent the funds represented trust fund taxes withheld from wages of the client's employees and thus impressed with a statutory trust for the benefit of the IRS.
- *Trinity 83 Development, LLC v. ColFin Midwest Funding, LLC*, 917 F.3d 599 (7th Cir. 2019) – A mortgagee's recordation of a cancellation of its erroneously recorded satisfaction of mortgage was not avoidable. The erroneous satisfaction of mortgage did not alter the rights between the mortgagor and mortgagee and while it could affect the rights of a third party, there was no third party. The trustee's strong-arm powers were irrelevant because the cancellation was recorded prepetition.
- *In re Oakes*, 917 F.3d 523 (6th Cir. 2019) – Although recent Ohio legislation provides that recordation of a defectively executed mortgage nevertheless provides constructive notice of the property interest created therein, and thus the trustee could not, as a *bona fide* purchaser of real property, avoid such a

mortgage, the trustee could avoid the mortgage using the trustee's status as a judicial lien creditor because notice is not relevant to the rights of a judicial lien creditor.

6. *Executory Contract*

- *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019) – A debtor-in-possession's rejection of a trademark license constituted a breach but did not terminate the licensee's rights.
- *In re Orama Hospitality Group, Ltd.*, 601 B.R. 340 (Bankr. D.N.J. 2019) – A landlord that had sold a liquor license to the debtor on credit and had an option to repurchase the license by setting off amounts due from the debtor, but which had not exercised the repurchase option prepetition, could not exercise the option postpetition for three reasons: (i) the landlord did not have a security interest in the liquor license because applicable state law does not permit one; (ii) the repurchase option was an executory contract that had been rejected; and (iii) the repurchase option, coupled with the right to pay by setting off the debtor's obligation, was effectively an effort to create a prohibited security interest, and hence was unenforceable under state law.

7. *Claims*

- *SummitBridge National Investments III, LLC v. Faison*, 915 F.3d 288 (4th Cir. 2019) – An unsecured creditor did have an allowable claim for postpetition attorney's fees the creditor incurred because the debtor had covenanted in a prepetition contract to reimburse the creditor for such fees.
- *In re Ultra Petroleum Corp.*, 943 F.3d 758 (5th Cir. 2019) – A creditor is not impaired if the creditor's entire allowed claim is paid, even if other portions of its claim are disallowed. The creditor's right to a make-whole payment upon early repayment is in the nature of unmatured interest - even though it might also be viewed as liquidated damages - and hence is disallowed to the extent it arises postpetition. However,

because the debtor is now solvent, the Bankruptcy Court must determine whether the solvent-debtor exception, which existed under pre-Code law, survives the enactment of Bankruptcy Code § 502(b)(2).

- *In re Family Pharmacy, Inc.*, 605 B.R. 900 (W.D. Mo. 2019) – Even if a bank’s right to interest at the default rate was enforceable under state law, equities required that the claim for postpetition interest at the default rate be disallowed. Allowing interest at the default rate would increase the bank’s claim by \$443,000, yet it was through the efforts of a junior, undersecured creditor - by providing DIP financing and serving as a stalking horse bidder at a § 363 sale - that the bank went from being undersecured to oversecured. Moreover, the bank did not assert that its loans were in default or that it was entitled to default interest until just before the § 363 sale occurred.

8. *Plan*

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9. *Other*

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B. *Consumer Law*

- *Wyche v. Tsarouhis*, 385 F. Supp. 3d 392 (E.D. Pa. 2019) – A debtor stated a claim under the Fair Debt Collection Practices Act against both the assignee of the deficiency judgment and its attorneys for seeking to collect the deficiency without a license.
- *Stein v. Titlemax of Georgia, Inc.*, 2019 WL 5549265 (N.D. Ga. 2019) – A borrower under a title pawn transaction for an automobile failed to state a claim that the lender violated the Truth in Lending Act by providing a disclosure of the charges that included an \$18 fee for registering the lien on the vehicle even though the debtor paid off the debt before the lender paid the fee. TILA disclosures are based on events at the time the loan is made, and the disclosure was accurate at that time. Accurate and candid initial

- disclosures cannot retroactively be rendered inaccurate by subsequent events, such as deviation from the terms of a contract.
- *Carlson v. Patrick K. Willis Co.*, 2019 WL 6118902 (W.D. Wis. 2019) – The debtor had no cause of action under the Fair Debt Collection Practices Act against a repossession company for phone calls that the company made to the debtor and the debtor’s son in an effort to locate the collateral. Pursuant to the Supreme Court’s decision in *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029 (2019), entities engaged in no more than the enforcement of security interests are not “debt collectors” within the meaning of the act, and because the phone calls did not seek to collect the debt, merely to locate the collateral, the repossession company was not a debt collector.
 - *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029 (2019) – A law firm is not a “debt collector” within the meaning of the Fair Debt Collection Practices Act - other than § 1692f(6) of the Act - merely because the firm regularly conducts nonjudicial foreclosures of real property on behalf of mortgagee clients.
 - *Eckhardt v. State Farm Bank*, 2019 WL 1177954 (C.D. Ill. 2019) – A bank did not violate the Truth in Lending Act or Regulation Z by failing to provide advance notification of its decision to treat credit card purchases of crypto currencies as a cash advance, which is subject to higher fees than is a credit card purchase of goods or services, because the practice did not amend the credit card contract. However, the cardholder might have a claim against the bank for providing unclear disclosures or for breach of contract.
 - *Jordan v. Tucker Albin and Associates, Inc.*, 2019 WL 4647339 (E.D.N.Y. 2019) – A law firm hired to file a mechanic’s lien was not a “debt collector” within the meaning of the Fair Debt Collection Practices Act because the firm was not to enforce the lien.

C. *Professional Liability*

- *Gansett One, LLC v. Husch Blackwell, LLP*, 93 N.Y.S.3d 276 (NY Sup Ct App Div 2019) – No reliance clause in opinion letter given

- effect; no claim for misrepresentation against law firm, but claim stated for aiding and abetting fraud of another.
- *Bloostein v. Morrison Cohen LLP*, 62 Misc.3d 1221(A) (Sup. Ct. NY 2019) – Enforcing limitation of scope of tax opinion.
 - *A & L Village Market, Inc. v. 344 Village, Inc.*, 96 N.Y.S.3d 668 (Sup. Ct. App. Div. 2019) – The trial court properly denied a law firm’s motion for summary judgment in a malpractice action against the firm for failure to perfect a client’s security interest in equipment.
 - *Gemcap Lending I, LLC v. Pertle*, 2019 WL 6840052 (D. Kan. 2019) – A secured party stated claims against the debtor’s lawyer and the lawyer’s law firm for fraud and professional negligence based on allegations that the lawyer: (i) misrepresented to the debtor’s receiver - who, at the behest of the secured party, acted as the debtor’s chief restructuring officer - the legitimacy of a sale of the debtor’s cattle; (ii) confirmed the accuracy of a memorandum that falsely included the fictitious cattle sale; and (iii) advised the debtor to falsify cash flow reports so to conceal the existence of a default. However, the secured party did not state claims for violating RICO, negligence, and unfair business practices.
 - *Gator Frac Heating and Rentals, LLC v. Dustin Brooks and the Brooks Firm, LLC*, 581 S.W.3d 460 (Tex. Ct. App. 2019) – The statute of limitations on an equipment lessor’s malpractice action against its lawyer for failing to perfect the lessor’s interest, which resulted in a loss of the equipment to the Canadian lessee’s secured lender, expired because the lessor had notice of the secured lender’s competing claim more than two years before suit was brought.
 - *Windsor Securities, LLC v. Arent Fox LLP*, 2019 WL 1510895 (S.D.N.Y. 2019) – Summary judgment could not be awarded for either side in a secured party’s malpractice claim against its legal counsel for allegedly giving incorrect advice with respect to the application of California law to an acceptance of financed insurance policies in satisfaction of the secured obligation. There was conflicting evidence as to what advice was given and

conflicting expert testimony as to whether counsel had satisfied the applicable standard of care.

- *Affiniti Colorado, LLC v. Kissinger & Feldman, PC*, 2019 WL 4309532 (Colo. Ct. App. 2019) – Under Colorado law, although the attorney-client privilege survives the death of an individual client, the privilege does not survive a corporate client’s dissolution if no one remains to act on the corporation’s behalf. As a result, a law firm being sued for negligent misrepresentation based on a corporate client’s failure to obtain necessary governmental approval to grant the plaintiff a security interest had to disclose its communications with the now-dissolved client.