2018-2019 COMMERCIAL LAW DEVELOPMENTS

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- *Colorado v. Madison*, 2018 WL 2054605 (Colo. Ct. App. 2018) – A thief of wine who was ordered to pay restitution to the victims but who was entitled to get the wine back from the sheriff upon such payment did not thereby have a security interest or other ownership rights in the wine and was therefore not entitled to sell the wine and apply the proceeds to the restitution obligation.

2. *Insurance*

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- *In re TSAWD Holdings, Inc.*, 2018 WL 6839743 (Bankr. D. Del. 2018) – Because the debtor's principal lender with a perfected security interest in the debtor's inventory had actual knowledge that the debtor was selling the consignor's goods on consignment, the consignor's interest was not – vis-à-vis the lender – subject to Article 9 and thus was not rendered subordinate by the consignor's failure to file a continuation statement and maintain perfection.

* We remember our good friend Jeff Turner.

- *In re TSAWD Holdings, Inc.*, 2018 WL 6885922 (Bankr. D. Del. 2018) – Because the debtor's principal lender with a perfected security interest in the debtor's inventory did not have actual knowledge that the debtor was selling the consignor's goods on consignment until the consignor filed a financing statement, the consignor's interest in goods sold before that time was subject to Article 9 and subordinate to the lender's security interest.
- *In re Pettit Oil Co.*, 2019 WL 1104662 (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.

4. *Real Property*
   - *In re Smith*, 2018 WL 1466080 (Bankr. W.D. Ky. 2018) – A bank with a security interest in the debtors' farm equipment and business machinery did not have a security interest in the insurance proceeds for two tobacco pole barns destroyed in a wind storm because they were permanent fixtures that became part of the realty.
   - *Bob Bay and Son, Co. v. Circle Investment Corp.*, 2018 WL 3239909 (Ohio Ct. App. 2018) – There is no longer under the common law of Ohio a landlord's distress lien on a defaulting tenant's personal property; to have a lien on such property, the landlord must obtain a security interest under Article 9. The lease agreement, by expressly providing the landlord a right of re-entry upon default, did not grant a security interest in the tenant's personal property. The re-entry clause did not mention personal property, and the lease otherwise stated that such property remained the tenant's.
   - *In re Pacific Imperial Railroad, Inc.*, 2018 WL 3689552 (Bankr. S.D. Cal. 2018) – Although the debtor obtained its right to a railroad line through a document entitled a lease and operating agreement, because it was not clear that the owner of the line

owned all the real property on which the line sits or that it is possible to lease an easement, the debtor's rights were a license, not a lease, and were personal property, not real property. This conclusion is supported by the fact that the grantor reserved extensive rights of possession. Accordingly, a creditor with a security interest in the debtor's rights had perfected that interest by filing a financing statement; it was not necessary to record deeds of trust.

5. *Personal Property Leasing*

   - *In re Clinton Nurseries of Maryland, Inc.*, 2018 WL 2293554 (Bankr. D. Conn. 2018) – Equipment leases pursuant to which the lessee had the option to purchase the equipment for $1 were sales and secured transactions, not leases. It did not matter that the purchase was contingent on the lessee not being in default or that the lessee had defaulted. The characterization of the transaction is to be determined at its inception.

   - *In re Johnson*, 2018 WL 3005811 (Bankr. M.D. Ga. 2018) – A renewable one-month lease of a portable storage shed with an option to purchase after 48 months was a true lease, not a sale and a secured transaction, because the Tennessee Rental-Purchase Agreement Act expressly provides that an agreement for the use of personal property for personal, family, or household purposes, for an initial term of four months or less, even if automatically renewable and containing a term that allows the consumer to become the owner of the property, "shall not be construed to [create a] 'security interest' " under UCC § 1-203. Even if the Act did not apply, the transaction would still be a true lease under § 1-203 because the initial lease term was shorter than the remaining economic life of the goods and the lessee had no obligation to renew or purchase.

   - *Nostrum Laboratories, Inc. v. Balboa Capital Corp.*, 2018 WL 2470734 (W.D. Mo. 2018) – A master lease agreement that contained no purchase option but which referred in one place to "any purchase option relating to any lease" and in another place to "any purchase option with respect to such lease" was

ambiguous, and thus the parol evidence rule did not prevent admission of evidence of the parties' intent regarding a purchase option.

- *Pipkin v. Sun State Oil, Inc.*, 2018 WL 4871132 (Ala. 2018) – An oil company that leased gasoline pumps to a customer could not rely on rules relating to trade fixtures to claim continued ownership of the pumps because those rules apply only in the context of a landlord-tenant relationship, and the oil company had no such relationship with the customer. Instead, it was necessary to determine whether the lease was a true lease or a sale with a retained security interest. Because the customer did not have a right to terminate the lease – that is, the customer did not have the right to discontinue paying the consideration owed under the agreement – and did have the right to become the owner of the pumps at the end of the lease term for no additional consideration, the lease was a sale with a retained security interest.

6. *Sales*

- *In re Pioneer Health Services, Inc.*, 2018 WL 3747537 (1st Cir. 2018) – A conditional sales agreement by which a healthcare provider acquired a nonexclusive, perpetual license to an information system used for billing, scheduling, and record retention was not a lease but a sale with a retained security interest because the agreement provided for title to pass to the healthcare provider upon full payment.
- *In re Brainard*, 2018 WL 341730 (Bankr. D.N.M. 2018) – The court could not determine on a motion for summary judgment whether an agreement to buy and sell 50% of the "shares" of two limited liability companies, which provided for payment over a two-year period and for the seller to retain ownership until payment was made in full, created a security interest. Many facts remained unclear, including whether the buyer acquired or exercised the rights of ownership during the payment period so that the only thing he lacked was title.

- *Restaurant Supply, LLC v. Pride Marketing and Procurement, Inc.*, 2018 WL 4038090 (E.D. La. 2018) – A purchasing cooperative did not have a security interest in rebates received from sellers and attributable to purchases the cooperative made on behalf of its members and instead owned the rebates because the cooperative's shareholder agreement had been modified to make its ownership clear. Although the shareholder agreement apparently retained some provisions referring to a security interest, the resulting ambiguity was resolved with parol evidence that showed that the intent was for the cooperative to own the rebates. 2018 WL 5024072 (E.D. La. 2018) (on reconsideration) Because the court overlooked evidence that the cooperative did not pay taxes on the rebates, and thus did not treat itself as the owner of them, reconsideration would be granted; a material fact remained in dispute prohibiting summary judgment.

7. *Intellectual Property and Licenses*

   - *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018) – There is no scienter requirement for copyright infringement. The alleged infringer will not be liable for alleged infringement unless it had access to the copyrighted work.

8. *Torts*

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9. *Government Debtors*

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B. *Security Agreement and Attachment of Security Interest*

1. *Security Agreement*

   - *Jipping v. First National Bank Alaska*, 2018 WL 4001719 (9th Cir. 2018) – Although the debtor's first security agreement with a bank granted the bank a security interest in the debtor's deposit accounts and expressly stated that the security interest would "continue in effect even though all or any part of the Indebtedness is paid in full," because that secured obligation

was paid off and the debtor's subsequent security agreement with the bank did not list deposit accounts as collateral and contained a merger clause stating that the subsequent agreement, "together with Related Documents, constitutes the entire understanding and agreement" of the parties, the bank's later loan was not secured by deposit accounts. The original security agreement was not a Related Document because it was not executed in connection with the subsequent loan.

- *Zweizig v. Rote*, 2018 WL 3572524 (D. Or. 2018) – A judgment creditor could not avoid as a fraudulent transfer the filing of a financing statement against a judgment debtor by a related entity because, even if the complaint was brought within the limitations period, there was no evidence that a security interest was transferred. A financing statement not signed by the debtor does not create a security interest.
- *McPherson v. Western Tap Manufacturing Co.*, 2018 WL 1409375 (C.D. Ca. 2018) – There was sufficient evidence to raise a jury question about whether a security interest was granted in all its shares of a corporation (some of which the corporation did not own) to secure a debt to one shareholder for the purchase of her shares. Even though there was no written security agreement, the minutes of a board meeting stated that "[a]ll the stock of the corporation would be held as collateral for the note" and an action list prepared by the corporation's accountant stated that "[s]ecurity agreements to be issued by shareholders . . [shareholders] to place their stock as security for the above."
- *Malek v. Gold Coast Exotic Imports, LLC*, 2018 WL 3405238 (Ill. Ct. App. 2018) – An automobile dealer had a security interest in a vehicle despite the absence of an authenticated security agreement because the dealer had given value, the debtor had rights in the vehicle, and the dealer had possession of the vehicle.

2. *Value and Obligation Secured*
    - *In re Factory Sales & Engineering, Inc.*, 2018 WL 3013352 (Bankr. E.D. La. 2018) – Collateral that the debtor provided to sureties that issued performance bonds remained encumbered after some of the bonds were released when the projects related to the bonds were completed because the indemnity agreement provided that the collateral security lasts until the debtor furnishes written evidence of the termination of past, present, and future liability under "any Bond," not "the Bond."
3. *Rights in the Collateral*
    - *In re Blake*, 2018 WL 1182178 (Bankr. S.D. Ill. 2018) – A bank's security interest in the debtors' crops, farm equipment, and general intangibles, attached to the debtor's rights under the Agricultural Risk Coverage Program once the debtor signed contracts to participate in the program, not later when payments were made under the program. Consequently, the bank's interest arose before the preference period and was not avoidable.
    - *In re B & M Hospitality, LLC*, 2018 WL 1635228 (Bankr. E.D. Pa. 2018) – A liquor license is property under Pennsylvania law, and a creditor's security interest did attach to it.
    - *Northwest Bank v. McKee Family Farms, Inc.*, 2018 WL 3598828 (9th Cir. 2018) – A bank that had a security interest in a seed licensee's existing and after-acquired crops did not have a security interest in seed crops grown by independent growers. Even though the license agreement expressly stated that, as between the owner of the variety and the licensee, the licensee was the owner, the growers were not a party to that agreement. Although some of the agreement with the growers specified that ownership of the seed remained with the licensee, those agreements were not signed until after the crop was harvested, and the crop was never delivered to the licensee or its agent.
    - *In re Flechas & Associates, P.A.*, 2018 WL 4162195 (Bankr. S.D. Miss. 2018) – The individuals that purported to purchase a

fraction of an individual lawyer's right to a contingency fee did not have a lien or other interest in the right to the fee because the lawyer's law firm, not the lawyer himself, was the entity that contracted with the clients and had the right to the fees.

- *West Linn Paper Co. v. Columbia River Logistics, Inc.*, 2018 WL 5116062 (D. Or. 2018) – Factual issues prevented summary judgment on whether goods shipped to and stored by an entity related to the debtor remained part of the seller's inventory pursuant to the seller's warehouse agreement with that entity or whether the debtor had acquired ownership or control of the goods sufficient for security interests granted by the debtor to attach to the goods.
- *Cordes v. United States*, 2018 WL 496839 (D. Colo. 2018) – A secured party that was aware that the two original borrowers and guarantor conducted their business with numerous related entities without regard to corporate separateness, and therefore insisted that many of those other entities grant a security interest in their assets, was not entitled to the portion of a tax refund owed to one entity but which the IRS sought to apply to the tax liability of another entity.

4. *Restrictions on Transfer*

- *In re Woodbridge Group of Companies, LLC*, 2018 WL 3131127 (Bankr. D. Del. 2018) – The assignee (buyer) of a note that had an anti-assignment provision could not file a claim in bankruptcy notwithstanding UCC § 9-408, which overrides the anti-assignment provision for purposes of making the sale effective as between the seller and the buyer.*
- *Consumer Financial Protection Bureau v. RD Legal Funding, LLC*, 2018 WL 3094916 (S.D.N.Y. 2018) – The assignment by individuals of their rights to payment under a settlement agreement with the NFL were void because the settlement agreements expressly prohibited assignment and stated that any attempted assignment was void. Although the New York version of § 9-408(d) overrides many restrictions on the

assignment of general intangibles, it expressly excludes "the right to receive compensation for injuries or sickness as described in 26 U.S.C. § 104(a)(1) – And (2)," and the settlement agreement, which was rooted in the physical injuries resulting from repeated brain injuries that retired NFL players experienced while active in professional football, involved such a right.

- *In re Mason*, 2019 WL 1472947 (Bankr. E.D.N.C. 2019) – 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.
- *In re Woodbridge Group of Companies, LLC*, 2018 WL 3131127 (Bankr. D. Del. 2018) – A promissory note that prohibited assignment without consent and stated that any attempted assignment without the required consent was void could not be assigned. Section 9-408 did not override the restriction on assignment because § 9-406 endorses the enforceability of anti-assignment provisions in the sale of promissory notes, whereas § 9-408 applies only to the grant of a security interest to secure a debt.

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

- *Vermeer Manufacturing Co. v. RDO Equipment Co.*, 2018 WL 1062684 (Cal. Ct. App. 2018) – The modified agreement between a law firm and its client that provided that the client would pay the firm half "of any settlement amount or amount decided by arbitrators or

mediators or of any settlement amount agreed upon between the parties or obtained by judgment during or after the re-trial at any time from the start of this Engagement to the end of time" was sufficient to give the firm a lien on the client's recovery on a judgment after the first and only trial because other language in the agreement made it clear that the firm has "a lien on any and all recovery" and "a lien on any recovery of any kind," and the parties' email correspondence confirmed the breadth of the lien.

- *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 Cocoa Services, LLC*, 2018 WL 180124 (Bankr. S.D.N.Y. 2018) – A security agreement that described the collateral as "[a]ll of the Debtor's equipment . . . whether now owned or hereafter acquired and wherever located . . . [i]ncluding but not limited to the equipment listed below" followed by a long list of specified items was sufficient to cover all equipment, not merely the items specifically listed. Moreover, it did not matter that the list of specified items indicated an incorrect address for those items.
- *Green Automotive, LP v. ATN Management Co.*, 2018 WL 4374204 (W.D. Okla. 2018) – A letter memorializing a consulting agreement and which provided that "[i]n the event the Customer fails to pay. . . Consultant will retain the rights to file a UCC claim on the Customer's assets related to the businesses" was ineffective to create a security interest because it did not contain an acceptable description of the collateral.
- *McPherson v. Western Tap Manufacturing Co.*, 2018 WL 1409375 (C.D. Ca. 2018) – A description of collateral as all the shares of stock in a specified corporation reasonably identifies the collateral.

- *In re Connolly Geaney Ablitt & Willard P.C.*, 2018 WL 1664636 (Bankr. D. Mass. 2018) – A secured party's security interest in the debtor's "General intangibles, . . . including choses in action [and] causes of action," did not attach to a fraud claim because the claim was not described with the specificity required by § 9-108(e)(1).
- *Mac Naughten v. Harmelech*, 2018 WL 3763879 (N.J. Super. Ct. 2018) – A lawyer who acquired no security interest in his clients' assets because the security agreement described the collateral as "all real or personal property wherever located," which was not a reasonable description, could not unilaterally amend the security agreement and sign the clients' names even though the original agreement contained language granting the lawyer permission "to sign [the clients' names] to any UCC-1 or other documents reasonably necessary to perfect the security interest in the Property." That language deals with perfecting the security interest, but there was no security interest to perfect.
- *Gill v. Board of the National Credit Union Administration*, 2018 WL 5045755 (E.D.N.Y. 2018) – Although the written security agreement that was to collateralize a limousine lacked a description of the collateral when the debtor signed the agreement, it was nevertheless effective because a description consistent with both parties' intent and the loan application – and which identified the limousine by year, make, color, and VIN – was later added by the secured party.
- *In re Somerset Regional Water Resources, LLC*, 2018 WL 4587868 (Bankr. W.D. Pa. 2018) – A debtor-in-possession financing order that provided for the sole member of the debtor to "assign to Lender any rights or interest in the 2015 Federal tax refund due to him individually, but attributable to the operating losses of the Debtor" was ambiguous as to whether it covered a refund of 2014 attributable to a carryback of 2015 losses. After considering parol evidence, it was apparent that the parties understood that the entirety of any refund generated on account of the 2015 operating losses was to be the collateral.

- *In re The Financial Oversight and Management Board for Puerto Rico*, 872 F.3d 57 (1st Cir. 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 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 because, by the time they were filed, the English translation of the Debtor name used on the filings was not seriously misleading.
- *In re 8760 Service Group, LLC*, 2018 WL 2138282 (Bankr. W.D. Mo. 2018) – An amended financing statement describing the collateral as "[a]ll Accounts Receivable, Inventory, equipment and all business assets, located at 1803 W. Main Street," was effective even though the debtor's goods were located at a different address because the description was ambiguous – the address could restrict all the described collateral or merely the phrase "all business assets" – and thus a reasonably prudent searcher should inquire further.
- *In re I80 Equipment, LLC*, 2018 WL 4006294 (Bankr. C.D. Ill. 2018) – 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 was ineffective to perfect. While § 9-108(b)(6) provides that any method of identifying the collateral is sufficient "if the identity of the collateral is objectively determinable," the collateral description in the financing statement was effectively blank, and that is not objectively determinable even though it might have put searchers on notice that the secured party claimed a security interest in some assets of the debtor.

- *Knoxville TVA Employees Credit Union v. Houghton*, 2018 WL 3381506 (E.D. Tenn. 2018) – An error of one digit in a filed financing statement's description of a boat's identification number did not render the financing statement ineffective to perfect (possibly dicta).
- *Winfield Solutions, LLC v. Success Grain, Inc.*, 2018 WL 1595871 (E.D. Ark. 2018) – A financing statement covering equipment, among other things, was not seriously misleading because it incorrectly included in the collateral description the statement "this filing filed as ag lien." A searcher would find the financing statement because the debtor's name was listed correctly, and the erroneous language would not mislead the searcher as to the collateral the financing statement covers.
- *In re B & M Hospitality, LLC*, 2018 WL 1635228 (Bankr. E.D. Pa. 2018) – A filed financing statement that properly identified the debtor and which described the collateral as "[a]ll assets of the debtor" was sufficient to perfect a security interest in the debtor's liquor license.
- *In re Hill*, 2018 WL 1916172 (Bankr. D. Neb. 2018) – Because the financing statement filed by the party with an agricultural lien on crops lacked the dates of the transactions giving rise to the lien, a signature of the person to whom the pesticides and fertilizer were furnished, and the lienholder's tax identification number, the agricultural lien was unperfected.

D. Perfection

1. *Automatic*
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2. *Certificates of Title*
   - *Malek v. Gold Coast Exotic Imports, LLC*, 2018 WL 3405238 (Ill. Ct. App. 2018) – An automobile dealer perfected its security interest in a vehicle by possession because the Illinois certificate of title statute does not apply to a security interest in a vehicle "created by a . . . dealer who holds the vehicle for sale."

- *In re Abell*, 2018 WL 1787357 (Bankr. W.D. Ky. 2018) – A creditor's purchase-money security interest in a vehicle was not perfected because the interest was not stated on the first certificate of title issued due, apparently, to the creditor's failure to pay the filing fee. Under Kentucky law, perfection of a security interest in a motor vehicle is not accomplished when the fee and paperwork are submitted to the county clerk; perfection occurs when the notation is made on the certificate of title.
- *In re Thompson*, 2018 WL 2717044 (Bankr. W.D. Va. 2018) – Because a security interest in a motor vehicle is perfected pursuant to Virginia law when the application to note the lien on the certificate of title is delivered to the Department of Motor Vehicles, the lender's security interest was perfected before the debtor's bankruptcy petition was filed, even though the certificate noting the lien was issued post-petition.
- *In re Riffe*, 2018 WL 3788973 (Bankr. S.D.W. Va. 2018) – A security interest in a manufactured home, which was perfected through compliance with the state certificate of title statute, did not become invalid or unperfected when the manufactured home became affixed to real property.

3. *Control*

- *In re Raymond Renaissance Theater, LLC*, 2018 WL 1320140 (Bankr. C.D. Cal. 2018) – Even if the owner of the debtor retained a security interest in funds that he provided to the debtor for deposit with a superior court in a interpleader action, and regardless of whether the debtor's interest in the deposited funds was money, an account, or a general intangible, the security interest was unperfected. The owner did not file a financing statement, did not take possession, and did not obtain the acknowledgment of the court that it held the funds for the owner's benefit.
- *In re Jaghab*, 2018 WL 1831775 (Bankr. E.D.N.Y. 2018) – A creditor's security interest in the debtor's uncertificated shares

of the stock in a corporation was unperfected because no financing statement had been filed, the security had not been delivered to the creditor, and the issuer had not agreed to comply with the instructions of the creditor.

- *In re Rivera*, 2018 WL 3702481 (Bankr. D.P.R. 2018) – A bank's security interest in its customer's deposit account was perfected by control even though the document granting the security interest was not notarized pursuant to the Puerto Rico Civil Code. The transaction was governed by Puerto Rico's version of Article 9, not by the Civil Code.
- *In re Charleston Associates, LLC*, 2018 WL 4566674 (D. Nev. 2018) – A bank with a security interest in a deposit account failed to include a copy of its security agreement in the record on appeal, and thus the district court had no basis to conduct a de novo review of – and hence affirmed – the bankruptcy court order that a garnishor took funds free of the security interest under § 9-332.

4. *Possession*

- *In re Chamberlayne Auto Sales & Repair, Inc.*, 2018 WL 1054698 (Bankr. E.D. Va. 2018) – A lender's security interest in a used car dealer's inventory of vehicles, which was perfected by the filing of a financing statement, was not rendered invalid because the lender took physical possession of the certificates of title for the vehicles. Although Virginia law makes it a class 1 misdemeanor for any person other than the holder to possess a certificate of title, that statute addresses circumstances other than those involving dealer transactions, as is demonstrated by language exempting secured lenders from its application. Moreover, taking possession of the certificates is a sound practice, as evidenced by the OCC's Handbook for examiners, which in discussing the risks associated with floor plan financing, offers a comprehensive list of steps a lender should take to protect itself from a loss, including taking control of title documents.

- *In re Woodbridge Group of Companies, LLC*, 2018 WL 4878830 (Bankr. D. Del. 2018) – Lenders who provided indirect financing for a real property transaction – they received a note from the borrower that was secured by the note and mortgage that the borrower received from the purchaser of the real property – did not have any interest in the real property or in proceeds of the real property. The lenders also had no right to enforce the note serving as collateral. Their security interest was unperfected because they did not file a financing statement or possession of the note serving as collateral. And, although the lenders relied on California law which provides delivery, transfer, and perfection of a promissory note shall be complete even if a licensed broker who has arranged a loan continues to service and retains possession of a promissory note, it was not clear that California law applies and, in any event, the borrower was not a licensed broker.
- *In re Community Home Financial Services, Inc.*, 2018 WL 1146271 (Bankr. S.D. Miss. 2018) – A secured party that obtained an assignment of mortgage loans represented by instruments that were in the possession of a law firm acting as custodian for the assignor was not perfected by possession because the Custodial Agreement identified the law firm as the agent of only the assignor, not the assignee/secured party. The secured party was not perfected through possession of a bailee because the law firm never acknowledged that it held the instruments for the secured party. Although a perfected security interest that is assigned normally remains perfected under § 9-310(c), that rule can be and was varied by agreement because the secured party's principal stated the name on the lockbox, custodial agreement, and all other documents should be amended, but he not follow through.

5. *Authority to File Financing Statement*
   - *JP Morgan Chase Bank v. Carraker*, 2018 WL 1959471 (Ariz. Ct. App. 2018) – An individual who, without authorization, filed a financing statement against a bank and asserted a baseless

claim for $3 trillion was liable for $500 under a nonuniform provision of the Arizona Commercial Code and the bank was entitled to an order declaring the financing statement void ab initio.

- *Bank of New York Mellon v. Perry*, 2018 WL 4345253 (D. Haw. 2018) – The bank against which an initial financing statement and amendments were fraudulently filed was entitled to a declaration that the documents were invalid nunc pro tunc and an order enjoining the filer from filing further fraudulent instruments.
- *First Bancorp v. Christopher*, 2018 WL 3715711 (D.V.I. 2018) – A bank that had foreclosed on a mortgage and against which the former mortgagors had filed an unauthorized financing statement and documents creating a cloud on the bank's title to the real property was entitled to a preliminary injunction preventing the former mortgagors from filing further liens and requiring them to disclose all the documents they had filed.

6. *Financing Statements: Debtor and Secured Party Name; Other Contents*
   - *In re Pierce*, 2018 WL 679677 (Bankr. S.D. Ga. 2018) – Because the debtor's correct name is "Kenneth Ray Pierce," the name printed on his driver's license, not "Kenneth Pierce," the signature used on his driver's license, a filed financing statement that identified the debtor as "Kenneth Pierce," and which would not be disclosed in response to a search using the debtor's correct name, was ineffective.
7. *Filing of Financing Statement — Manner and Location*
   - *In re Cocoa Services, LLC*, 2018 WL 180124 (Bankr. S.D.N.Y. 2018) – Even if a secured party's fixture filing was ineffective to perfect a security interest in fixtures because it did not correctly identify the record owner of the real property and gave an incorrect address for the real property, the secured party's security interest was perfected by the financing statement it filed where the debtor is located.

- *In re The Feed Store, LLC*, 2018 WL 1320168 (Bankr. N.D.W. Va. 2018) – A secured party whose filed financing statement was erroneously assigned the same instrument number as another filing, and hence was not properly indexed, was nevertheless perfected. The rule treating a mis-indexed financing statement as effective to perfect does not deprive searchers of constitutionally required notice.

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

   - *In re Strickland*, 2018 WL 4620643 (Bankr. S.D. Ala. 2018) – A lender with a perfected security interest in the debtors' motor vehicle did not become unsecured when the lender mistakenly executed a lien release section on the certificate of title and mailed it to the Debtors. The state certificate of title statute provides that a lien release is effective "upon satisfaction of a security interest," once the lienholder executes a release on the certificate, delivers the certificate to the next lienholder or owner, and that person then delivers the certificate to the department. In this case, there was no satisfaction of the security interest, evidenced by the fact that the debtors continued to make payment and the debtors never delivered the certificate to the department.

   - *In re Essex Construction, LLC*, 2018 WL 4656206 (Bankr. D. Md. 2018) – Because priorities in bankruptcy are fixed as of the filing of the petition, a creditor with a first-priority security interest at that time retained priority over another perfected security interest even though the senior creditor's financing statement lapsed and the security interest became unperfected post-petition.

E. Priority

1. *Lien Creditors*

   - *S & H Packing & Sales Co. v. Tanimura Distributing, Inc.*, 883 F.3d 797 (9th Cir. 2018) (en banc) – Contrary to a prior ruling of a panel, a commercially reasonable factoring agreement by a

buyer of produce removes accounts receivable from the PACA trust without breaching the trust only if the factoring transaction is a true sale. A security interest in the accounts that was granted to secure a loan is, even if perfected, inferior to the rights of the PACA trust beneficiary. In distinguishing a true sale of accounts from a loan secured by accounts, the threshold question is whether the seller retained the risk of loss: if so, the transaction is not a sale.

- *Malek v. Gold Coast Exotic Imports, LLC*, 2018 WL 3405238 (Ill. Ct. App. 2018) – Because an automobile dealer's security interest in a vehicle was perfected by possession, the wife of the debtor, who was in the midst of a divorce proceeding, was not entitled to a writ of replevin.
- *The Eclipse Group, LLP v. Target Corp.*, 2018 WL 4680006 (S.D. Cal. 2018) – A law firm's contractual lien on a client's right to payment under an agreement settling a case handled by the law firm had priority over the rights of a judgment creditor that filed its notice of judgment lien ten months after the law firm acquired its contractual lien. It did not matter that the law firm was owned by a lawyer who had previously been the managing partner of the client because the judgment creditor presented no evidence of collusion.
- *Legacy Bank v. Fab Tech Drilling Equipment, Inc.*, 2018 WL 6928971 (Tex. Ct. App. 2018) – The holder of a prior perfected security interest in the debtor's accounts did not waive its interest in the collateral by not taking action to foreclose, despite the debtor's default for several years, before a judgment lien creditor sought to garnish the accounts or by continuing to lend to the debtor after the garnishment action was filed. The security agreement expressly provided that the secured party would not be deemed to have waived any rights in the absence of a writing signed by the secured party and that no delay in exercising rights would operate as a waiver, and under § 9-201 the terms of the security agreement are binding on creditors of the debtor.

- *Fishback Nursery, Inc. v. PNC Bank*, 920 F.3d 932 (5th Cir. 2019) – Because under § 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 on the farm products shipped to those states, even though the debtor's contracts with the agricultural lienholders purported to select only Oregon law. The result would be the same if the court applied federal choice-of-law rules to determine which state's law controlled. The lien notice filed in Oregon 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.

2. *Statutory Liens; Forfeiture*

   - *Nissan Motor Acceptance Corp. v. All County Towing*, 2018 WL 2246517 (N.Y. Sup. Ct. 2018) – The statutory lien of a company that, at the request of police, towed and stored a vehicle, had priority with respect to the towing charges over the creditor with a perfected security interest in the vehicle. The company did not, however, have a lien for the storage charges because its notification to the secured creditor stated that the vehicle would be released upon full payment of all accrued charges but failed to state, as required by the lien statute, that the company "claim[ed] a lien" on the vehicle.

   - *Santander Consumer USA, Inc. v. A-1 Towing, Inc.*, 2018 WL 3463124 (N.Y. App. Div. 2018) – A towing company that towed and made some repairs to a vehicle failed to establish that it had a garagekeeper's lien with priority over an earlier perfected security interest because the towing company did not establish

that it was a registered motor vehicle repair shop at the time it towed and repaired the vehicle.

- *Bennett v. Bascom*, 2018 WL 1473798 (E.D. Ky. 2018) – The IRS, which filed a notice of federal tax lien against the debtor, had priority in the proceeds of the debtor's partnership interest over a creditor with an unperfected security interest in the partnership interest, even though the partnership interest is not an asset on which a judgment creditor could acquire a judgment lien under state law.
- *Premo Autobody, Inc. v. Parker*, 2018 WL 4625626 (W.D. Va. 2018) – Both a perfected federal tax lien and an earlier perfected – and hence higher priority – security interest survived a judicial sale of the collateral by a judgment creditor of the taxpayer/debtor. Consequently, collateral could be sold and the proceeds distributed to pay, in order, the costs of the sale, the secured obligation owed to the senior secured party, and the federal tax liabilities included in the notice of federal tax lien, with any remainder disbursed to the buyers at the prior judicial sale.
- *In re Farmers Grain, LLC*, 2018 WL 2223071 (Bankr. D. Id. 2018) – A lender's perfected security interest in the debtor's grain was subordinate to the Oregon producer lien of a corn supplier because, even though the corn supplier failed to send notice of its lien to the lender within 20 days after filing, as required for priority under the statute, the lender had actual knowledge of the lien.
- *DeCastro v. Kavadia*, 2018 WL 4771528 (S.D.N.Y. 2018) – A lawyer's charging lien on the diamonds that the lawyer helped recover for a client had priority over the rights of a judgment creditor who had filed a financing statement against the client and who claimed to have a perfected security interest. Even if the judgment creditor did have a security interest, the lawyer's charging lien would have priority because it secured the efforts that enabled the client to acquire rights in the diamonds.

- *SE Property Holdings, LLC v. Unified Recovery Group*, 2018 WL 6267183 (E.D. La. 2018) – 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 was choate before the tax lien notice was filed. The fact that the debtor had assigned the account to a related party before it granted the security interest did not matter because the related party never perfected its interest, and thus the debtor was deemed to remain the owner of the account. The fact that the security agreement encumbered all accounts "subject only to Permitted Liens," did not subordinate the security interest to permitted liens (including the tax lien); it meant only that the security interest might be subordinated to permitted liens if such liens otherwise have priority. However, 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.

3. *Buyers and Other Transferees*

   - *In re SemCrude,LP*, 2018 WL 481862 (Bankr. B. Del. 2018) – An unpaid supplier that sold oil to the now bankruptcy buyer, which in the ordinary course of business had resold the oil to customers, had no security interest in or statutory lien on the oil because the supplier warranted that it sold the oil free and clear of security interests. It made no difference that the supplier claimed that its lien arose after the sale to the now bankrupt buyer.

   - *In re First River Energy, LLC*, 2019 WL 1103294 (Bankr. W.D. Tex. 2019) – 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.

- *In re WB Services, LLC*, 2018 WL 4006934 (Bankr. D. Kan. 2018) – An unpaid seller of heaters did not have a security interest in the heaters pursuant to § 2-401 even though the sales agreement provided that the seller retained title until the buyer made payment because the seller still had possession of the heaters. Thus, the seller was not entitled to summary judgment on the preference claim brought by the buyer's bankruptcy trustee to recover prepetition payments on the basis that § 547(b)(5) was not satisfied.
- *Kourt Security Partners, LLC v. United Bank*, 2018 WL 1225516 (W. Va. 2018) – A buyer that purchased the assets of a business at a private sale conducted by the owner took the assets subject to a perfected security interest. The secured party never authorized the sale free and clear of its security interest.
- *H&H Contracting, Inc. v. Kinetic Leasing, Inc.*, 2018 WL 3340372 (D. Minn. 2018) – A secured party with a security interest in equipment had priority in the cash proceeds of the equipment that a buyer received when it resold the equipment less than one year after purchasing it from the original debtor. Although the original debtor was located in South Dakota and the buyer in Minnesota, and thus the secured party had one year to re-perfect as to the equipment or be deemed never to have been perfected as against a buyer, that rule did not apply to the cash proceeds that were received while the security interest was perfected. However, the secured party had no claim in conversion as to an item of equipment that the buyer resold less than one year after purchasing it because the secured party's security interest in that item became unperfected one year after

the sale, and the buyer therefore took free of the security interest.

- *Takuanyi v. Center National Bank*, 2018 WL 1462330 (Minn. Ct. App. 2018) – The buyer of an automobile that never received a title certificate for the vehicle never acquired ownership of the vehicle and thus took subject to an existing security interest perfected by notation on the certificate. The buyer therefore had no conversion action against the secured party for repossessing the vehicle.
- *Inland Bank and Trust v. ARG International AG*, 2018 WL 3543905 (S.D.N.Y. 2018) – A bank's security interest in a corporation's inventory attached to the 300 tons of aluminum bars that the corporation purchased; even though the corporation never paid for the bars and the bars remained in the possession of a third-party warehouser, the corporation acquired ownership rights in the bars when the seller instructed the warehouser to release the bars to the corporation. When the corporation then resold the goods back to the original seller, with the resale price to be offset against the original sale price, the original seller did not qualify as a buyer in ordinary course of business because it acquired the bars in partial satisfaction of a money debt. However, a factual issue remained about whether the bank authorized the resale free and clear of its security interest because it never objected to the corporation's sales of its inventory and parties in the metal trading industry frequently buy and sell raw materials from the same counter-parties and "net out" the purchase prices of the open contracts.
- *Pipkin v. Sun State Oil, Inc.*, 2018 WL 4871132 (Ala. 2018) – An oil company's unperfected security interest in the gasoline pumps that it provided to a customer did not have priority over the rights of an individual who bought the real property and the pumps.

4. *Subordination and Subrogation*
    - *Franklin State Bank & Trust Co. v. Crop Production Services, Inc.*, 2018 WL 3244105 (W.D. La. 2018) – Disputed issues of material fact prevented summary judgment on whether a secured party with priority in the proceeds of the debtor's 2015 crop but who endorsed the check over to a junior secured party under the mistaken belief that the check represented proceeds of 2014 crops was entitled to recover the proceeds.
    - *In re Lister-Petter Americas, Inc.*, 2018 WL 4623338 (Bankr. D. Kan. 2018) – The remote parent company of the debtor, which shortly before bankruptcy purchased at a substantial discount the main secured claim against the debtor, was not entitled to summary judgment on the trustee's effort to equitably subordinate the claim. The remote parent and the debtor were controlled by the same individuals, one of whom was also a guarantor of the debt, and a reasonable fact finder could conclude that the individuals violated their fiduciary duties as directors of the debtor when they caused the remote parent to acquire the secured claim because doing so deprived the debtor of the opportunity to satisfy the debt at a substantial discount and thereby salvage its reorganization efforts.
5. *Set Off*
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6. *Competing Security Interests*
    - *In re Energy Future Holdings Corp.*, 2018 WL 3752231 (3d Cir. 2018) – The first-lien lenders who funded the debtor's Deposit L/C Loan Collateral Account did not have priority over the other first-lien lenders in the remaining balance of that account when the credit facility ended because the intercreditor agreement gives all the first-lien lenders pari passu priority in all the collateral. While the credit agreement gives priority in the Deposit L/C/ Loan Collateral Account to pay "Deposit L/C Obligations," the first-lien lenders who funded that account are not owed such obligations.

- *In re Essex Construction, LLC*, 2018 WL 4656206 (Bankr. D. Md. 2018) – Because priorities in bankruptcy are fixed as of the filing of the petition, a creditor with a first-priority security interest at that time retained priority over another perfected security interest even though the senior creditor's financing statement lapsed and the security interest became unperfected postpetition.
- *In re Novak*, 2018 WL 4177831 (Bankr. D. Kan. 2018) – A bank with a perfected security interest in the debtor's assets was entitled to the insurance proceeds for a destroyed item of equipment because the trust that initially perfected a security interest in equipment had allowed its financing statement to lapse, and thus its security interest had become unperfected. Although the trust claimed that, when its security interest was perfected, it repossessed the collateral and then leased it back to the debtor, nothing in the record supported that allegation. Although the trust's contract with the debtor provided for title to revert back to the trust upon default, that language did nothing more than create a security interest. Although the trust was a loss payee on the insurance policy, that did not give the trust any greater rights to the proceeds.
- *Bayer Cropscience, LP v. Texana Rice Mill, Ltd.*, 2018 WL 1378641 (E.D. Mo. 2018) – Because the bank with a perfected security interest in the debtor's commercial tort claim had priority in the debtor's rights under an agreement settling that claim over another lender with an earlier security interest in the debtor's existing and after-acquired general intangibles, except to the extent that payment was for damage to equipment in which the earlier lender had a perfected security interest, the proceeds from the settlement agreement had to be apportioned. The bank was entitled to $212,000 and the earlier lender was entitled to $765,000.
- *In re Tuscany Energy, LLC*, 2018 WL 549642 (Bankr. S.D. Fla. 2018) – The bankruptcy debtor's law firm, to which the debtor had provided funds prepetition as a retainer, had a security

interest in the funds perfected by possession. The debtor's secured lender lacked a security interest in the funds because the law firm took the funds free of the lender's security interest under § 9-332(b). Even if the law firm was aware of the lender's security interest in the debtor's bank account, that was insufficient to show that the firm colluded with the debtor to violate the lender's rights. Even if the lender had a security interest in the funds constituting the retainer, the security interest was unperfected because the funds came from a deposit account over which the lender did not have control, and hence the lender's security interest would be junior to the law firm's security interest.

- *Peoples Bank v. Reliable Fast Case, LLC*, 2018 WL 3633961 (N.D. Ind. 2018) – A bank with a perfected, first-priority security interest in the debtor's accounts, the proceeds of which were deposited into a checking account at the bank, stated claims for conversion and unjust enrichment against a buyer of accounts by alleging that the buyer knew of the bank's security interest but nevertheless regularly debited the checking account. The allegations were sufficient to constitute "collusion" within the meaning of § 9-332(b) because from them it could be inferred that the buyer knew that the debtor's conduct constituted a breach of a duty and that the buyer gave substantial assistance or encouragement to the debtor to so conduct itself.
- *Liberty Bell Bank v. Rogers*, 2018 WL 4110923 (D.N.J. 2018) – A bank with a perfected, first-priority security interest in four copiers that the debtor leased to the customer, along with other property, was entitled to only that portion of the proceeds of the lease attributable to the copiers. Although the secured party receiving the remaining $50,000 in proceeds made only an $18,000 loan to finance the debtor's acquisition on the other leased item, that secured party had a security interest in all of the debtor's lease proceeds to secure additional obligations.
- *In re Flechas & Associates, P.A.*, 2018 WL 4162195 (Bankr. S.D. Miss. 2018) – A lender that had a perfected security interest in a

law firm's right to a contingency fee had priority over a subsequent purchaser. Although the lender's was expressly limited to "fees remaining after [another party] has been paid," that other party was no longer claiming any portion of the fees.

7. *Purchase-Money Security Interests*

   - *In re Jones*, 2018 WL 1898140 (Bankr. W.D. Wash. 2018) – Credit extended to a car buyer for optional gap insurance and maintenance contracts are not part of the price of the car or value given to enable the debtor to acquire the car and are thus not included in the purchase-money obligation. The debtor's prepetition payments were to be allocated to the purchase-money obligation and the non-purchase-money obligation on a pro rata basis.

8. *Proceeds*

   - *Wheeling & Lake Erie Railway Co. v Keach*, 2018 WL 4696457 (D. Me. 2018) – A creditor with a security interest in the debtor railroad's contractual, statutory, and regulatory claims – arising from an explosive rail accident – against a shipper of crude oil did not show that it was reasonably likely to succeed on the merits with respect to its claim that a $110 million settlement with the shipper was proceeds of the creditor's collateral. The parties had stipulated to the amount of the debtor's damages, not to the value of its claims, and thus there was no evidence as to the value of the claims. Consequently, the creditor was not entitled to a stay of the bankruptcy court's order ruling that the creditor was not entitled to any of the proceeds of the settlement.

   - *In re National Truck Funding, LLC*, 2018 WL 543005 (Bankr. S.D. Miss. 2018) – Assuming the secured parties that had not filed a financing statement nevertheless had a perfected security interest in the debtor's trucks through compliance with the applicable certificate of title statute, the secured parties also had a perfected security interest in the rental payments received from the independent drivers to which the debtor had leased

the trucks, as long as those payments were identifiable. The rental payments were cash proceeds not merely of the leases but also of the trucks, and thus perfection could continue under § 9-315(d)(2).

- *In re Hill*, 2018 WL 1916172 (Bankr. D. Neb. 2018) – A bank's perfected security interest in the debtor's crops had priority in the proceeds of the crops over an unperfected agricultural lien.

F. Default and Foreclosure

1. *Default*

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2. *Repossession of Collateral*

   - *Gawron v. Citadel Federal Credit Union*, 2018 WL 3737892 (Pa. Super. Ct. 2018) – A debtor had no cause of action against a secured party that repossessed her car because even though she had paid the arrearage prior to repossession, she had not paid the fee the secured party incurred in the first repossession attempt, which had failed because the debtor had not informed the secured party of her new address. Thus, the debtor was in default.

   - *Signature Financial, LLC v. Auto Trans Group, Inc.*, 2018 WL 1914557 (N.D. Ill. 2018) – Because the debtor had denied the secured party's claim of entitlement to possession of the collateral, an order of replevin would not be granted until a hearing was held and evidence could be offered. However, the debtor would be ordered to provide a report indicating: the current or last known location of each item of collateral; the condition of the collateral; and the name and contact person of each person in possession of the collateral.

3. *Notice of Foreclosure Sale*

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4. *Commercial Reasonableness of Foreclosure Sale*

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5. *Collection*

   - *Durham Commercial Capital Corp. v. Select Portfolio Servicing, Inc.*, 2018 WL 2017531 (M.D. Fla. 2018) – Even though a purchaser of accounts has no private right of action under § 9-406 if the account debtor pays the debtor after being instructed to pay the purchaser, the purchaser does have a claim based on the purchased account.
   - *FPP Sandbox, LLC v. Redstone Communications Group, Inc.*, 2018 WL 4259841 (D. Neb. 2018) – An accounts financier that purchased some of the debtor's accounts and had a backup security interest in all of them stated a cause of action against an account debtor for breach of contract based on the account debtor's failure to pay the financier after receiving instruction to do so. The financier did not have a claim under § 9-406 because that provision does not create an independent cause of action.

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

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7. *Successor Liability*

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G. *Retention of Collateral*

   - *Bennett v. Bascom*, 2018 WL 1473798 (E.D. Ky. 2018) – The debtor's attorney's email response to the secured party's proposal to accept the collateral in full satisfaction of the secured obligation, which stated "[y]our statement . . . that [the secured party] is accepting the collateral (rather than proposing to accept the collateral) is premature and beyond its abilities as a purported creditor," was an effective objection to the proposal. Because the attorney typed his name on the e-mail response and then hit the send button, the response was authenticated.

II. REAL PROPERTY SECURED TRANSACTIONS

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III. GUARANTIES

- *Jenzack Partners, LLC v. Stoneridge Associates, LLC*, 2018 WL 3213715 (Conn. Ct. App. 2018) – The assignee of a loan had standing to enforce the limited guarantee of the loan and the mortgage securing the guaranty because, under the common law, assignment of a loan carries with it the assignment of any secondary obligations related thereto (no discussion of § 9-203(f)). However, the assignee was not entitled to summary judgment on the amount due; even though the assignee's business records were admissible to show the payments received and interest that accrued after the assignment, only inadmissible hearsay evidence, created by the assignor, was offered to show the balance due at the time of the assignment.
- *Succession of Shaw*, 2018 WL 4000485 (La. Ct. App. 2018) – Because a deceased guarantor of an LLC's debts had promised, in the guaranty agreement, to refrain from attempting to collect or enforce the guarantor's own claims against the LLC until the debt to the lender was paid in full, the lender was entitled to prevent the estate of the decedent from seeking to enforce obligation of the LLC under the membership agreement to repurchase the decedent's membership interest.
- *Colonial Oil Industries, Inc. v. Lynchar, Inc.*, 2018 WL 3014466 (Ga. 2018) – A guaranty that identified the principal obligor only by its trade name nevertheless satisfied the statute of frauds and was enforceable.
- *ACP GP, LLC v. United Home Care, Inc.*, 2018 WL 4693969 (D.N.J. 2018) – Two lenders sufficiently alleged breach of a validity guaranty by claiming that the guarantor personally compromised the validity of the security interest in the collateral by misappropriating the borrowers' funds and continuing to seek advances on behalf of borrowers despite knowledge of their inability to repay and by failing to indemnify the creditor for losses caused by the guarantor's own fraud and deceit as an officer, employee, or agent of the borrowers. The fact that the

guaranty was in the form of a letter did not make it unenforceable. The lenders alleged that they manifested acceptance of the guaranty by executing the loan and security agreement and making advances to the borrowers. The guaranty was supported by consideration. The guaranty itself acknowledged that the promises and representations it contained were made to "induce [the lenders] to make financial accommodations available to" the borrowers.

- *BMO Harris Bank v. Smith*, 2018 WL 4691212 (D. Kan. 2018) – A bank that received an assignment of eight secured loans guaranteed by a single guaranty could enforce the guaranty with respect to those loans even though the guaranty also covered an additional loan that the original creditor had previously assigned to a different party. The notification of the first assignment was expressly "to the extent any such Guaranty relates to the Assigned Account and the transaction contemplated thereby," and thus the original creditor retained an interest in the guaranty that it could and did later assign to the bank.
- *United States v. Bursch*, 2018 U.S. Dist. LEXIS 51502 (N.D. Ill. 2018) – Even though a signed guaranty existed for an SBA loan, the guarantor asserted he did not recall signing it. The document was notarized, but the notary acknowledged his process was shaky. Court holds guarantee enforceable.
- *Wyrick v. Business Bank of Texas*, 2019 WL 1941839 (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.

- *In re MPM Silicones, LLC*, 596 B.R. 416 596 B.R. 416 (S.D.N.Y. 2019) – On appeal from the Bankruptcy Court, the District Court held that second lien creditors did not breach an intercreditor agreement by approving a Bankruptcy Plan unfavorable to the senior creditors and were not required to hand over reorganized common stock or professional fees under the theory they were proceeds of common collateral.
- *Lindsay International Sales & Service, LLC v. Wegener*, 917 N.W.2d 133 (Neb. 2018) – Two guarantors of a limited liability company's debts had no defense based on the creditor's impairment of the collateral because the obligation of the LLC was unsecured.
- *Bowers v. Today's Bank*, 2018 WL 4998236 (Ga. Ct. App. 2018) – A guarantor's springing liability on a nonrecourse debt, which was 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.
- *Harltey v. Hynes*, 2018 WL 5093975 (Pa. Super. Ct. 2018) – Guarantors who had waived any requirement that the creditor proceed first against the collateral and "any and all rights or defenses based on suretyship or impairment of collateral" could not assert a defense based on impairment of the collateral in the creditor's possession. The duties imposed by § 9-207(a) on a secured party in possession of collateral are not included in the list of nonwaivable obligations in § 9-602, and thus the guarantors did waive their rights under § 9-207. This conclusion is supported by § 3-605(f), which expressly allows secondary obligors to waive an impairment of collateral defense.

- *In re Montreal, Maine & Atlantic Railway, Ltd.*, 2018 WL 1835827 (1st Cir. 2018) – The debtor's prepetition payment to an insider creditor from escrowed funds derived from the sale of collateral was not a transfer of property of the debtor – and hence not an avoidable fraudulent transfer – because the proceeds were less than the total debt to the senior lienor, which had waived its lien on the condition that the proceeds be distributed to a specified waterfall. The debtor could not have put the funds to any other use.
- *In re Mongelluzzi*, 2018 WL 3105066 (Bankr. M.D. Fla. 2018) – A bank that applied deposits to outstanding loans made to related entities was not entitled to the § 550(b)(1) good-faith defense to fraudulent transfer liability because the bank's internal communications reveal that the bank knew of the debtors' check-kiting scheme and was on inquiry notice of debtors' possible insolvency as it applied the deposits.
- *In re Evergreen International Aviation, Inc.*, 2018 WL 4042662 (Bankr. D. Del. 2018) – Although a corporate parent might not, if its subsidiaries are all insolvent, indirectly benefit from credit extended to its subsidiaries and thus not receive reasonably equivalent value in exchange for its downstream guaranty of the subsidiaries' obligations, the trustee submitted evidence that only some of the subsidiaries were insolvent. Consequently, the trustee was not entitled to summary judgment.
- *Bash v. Textron Financial Corp.*, 2018 WL 4625565 (N.D. Ohio 2018) – Material facts remained in dispute about whether the debtor and secured party structured their refinancing agreement so that it was a novation despite testimony from the debtor's counsel that the purpose of the opinion he gave at the time of the refinancing was to confirm that the security interest related back to the original financing and testimony from others that everyone understood that the refinancing was an amendment to the existing credit facility. Because a novation would have extinguished the existing

security interest and created a new one and the creation of the new security interest would have related to unencumbered assets and thus constituted a "transfer" under the Uniform Fraudulent Transfer Act, the secured party was not entitled to summary judgment on the trustee's avoidance action.

- *In re Taylor*, 2018 WL 3849032 (10th Cir. 2018) – In determining whether a judicial lien impairs the debtor's exemption under § 522(f), the calculation must, when deducting other liens, use an amount that corresponds to the debtor's percentage of ownership (i.e., the total lien amount times the fraction equal to the debtor's percentage of ownership of the property).
- *United States v. Copley*, 2018 WL 4326810 (E.D. Va. 2018) – A couple's exemption of their right to a federal tax refund takes priority over the setoff rights of the IRS.
- *Merit Management Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018) – The protection from avoidance for settlement payments by or to a financial institution does not protect a transfer that is conducted through a financial institution that is neither the debtor nor the transferee but merely a conduit. Thus, when determining whether the protection for settlement payments saves from avoidance a transfer conducted in several stages, courts must look at the transfer that the trustee seeks to avoid – the whole transfer, not at each of its stages. Accordingly, a settlement payment the debtor made for the purchase of securities, which was handled by a bank as an escrow agent, was not protected and could be avoided as a fraudulent transfer to the seller of the securities.
- *In re Sterman*, 2018 WL 6333588 (Bankr. S.D.N.Y. 2018) – While the debtors did receive reasonably equivalent value for the tuition and other education-related payments they made so that their daughter could attend a private liberal arts college while the daughter was a minor, they did not receive reasonably equivalent value for similar payments made after the daughter became an adult. It did not matter that the payments allegedly benefitted the debtors by increasing the likelihood that the daughter would

become self-sufficient or by providing assurance that the daughter would have a roof over her head and food to eat while in college.

- *Radio One, Inc. v. Direct Media*, 2018 U.S. Dist. LEXIS 168234 (N.D. Ill. 2018) – Court evaluates Illinois legal requirements for an actual fraudulent transfer and a constructive fraudulent transfer, but concludes case is not ripe for a determination.

V. CREDITOR AND BORROWER LIABILITY

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

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B. Obligations Under Corporate and Securities Laws

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C. Borrower Liability

- *Clay Fin. LLC v. Mandell*, 2018 U.S. Dist. LEXIS 183584 (N.D. Ill. 2018) – Obligors on a series of investment loans represented by promissory notes pleaded a treatise-worth of reasons they should be absolved of repayment. Court rejected arguments of accord and satisfaction, novation, setoff, and lack of consideration. Court also rejected lender's claim that obligors engaged in fraudulent or deceptive conduct but found support for a claim of conspiracy to defraud.
- *U.S. Bank. Equip. Fin. v. J.W. Jones Co.*, LLC, 2018 U.S. Dist. LEXIS 167993 (S.D. Ill. 2018) – Provision in loan agreement requiring Borrower to hold equipment collateral proceeds "in trust" for Lender was sufficient to create an actual trust relationship and meant Borrower had fiduciary duties to Lender.

D. Disputes Among Creditors and Intercreditor Issues

- *Community & Southern Bank v. First Bank of Dalton*, 2018 WL 1080457 (Ga. Ct. App. 2018) – The proceeds of a foreclosure on real property that secured multiple loans was to be distributed pro rata among the entities that acquired participation interests in the loans.
- *In re Energy Future Holdings Corp.*, 2018 WL 1560081 (D. Del. 2018) – The holders of the highest tranche of first-lien debt – the whole of which was undersecured – were not entitled to post-petition interest out of the adequate protection payments and plan distributions allocated to the lower tranches because the waterfall in the intercreditor agreement dealt only with payments out of the

proceeds of collateral. The plan distributions of stock in a spin-off do not constitute proceeds of collateral because no sale or disposition occurred. The adequate protection payments were not distributions of cash collateral because the cash was generated post-petition and no effort was made to trace the cash to a sale of pre- petition collateral. Moreover, neither amount resulted from the exercise of remedies under the loan documents.

- *Viridis Corp. v. TCA Global Credit Master Funds, LP*, 2018 WL 272009 (11th Cir. 2018) – A term in each of several amendments to a credit agreement by which the debtor and guarantors released the lender from "any and all . . . claims . . . of any kind whatsoever" was effective to waive claims for usury and for breach or tortious interference with contract arising from conduct occurring before the date of the last amendment. However, the language was not effective to release claims arising from conduct occurring after the date of the last amendment. Nor was it effective to release claims based on fraudulent misrepresentations because it did not expressly indicate that it was incontestable on the ground of fraud.
- *Sierra Equipment, Inc. v. Lexington Insurance Co.*, 2018 WL 2222695 (5th Cir. 2018) – A lessor of equipment was not entitled under Texas law to an equitable lien on the proceeds of insurance payable to the lessee and arising from damage to and destruction of the equipment because, even though the lease required the lessee to insure the equipment, it did not require that the policy list the lessor as an additional insured or as a loss payee.
- *Lucas v. Deutsche Bank*, 2018 WL 300393 (Cal. Ct. App. 2018) – The terms in a note and deed of trust that provided for attorney's fees incurred by the mortgagee in defending its rights to the property or in connection with default to become part of the secured obligation did not authorize a court award of attorney's fees to the mortgagee in connection with its successful defense against the mortgagor's various claims. A term providing for attorney's fees to become part of the debt is not the same as a term authorizing a court award of fees. *In re Formosa*, 2018 WL 494416 (Bankr. E.D. Mich. 2018) – A mortgagee was not entitled to an award of

attorney's fees incurred in reversing a foreclosure sale conducted without knowledge of the automatic stay because the mortgage provided for recovery of attorney's fees incurred "to protect Lender's interest in the Property," and reversing the foreclosure was not to protect the mortgagee's interest in the property.

- *Helena Chemical Co. v. Torian*, 2018 WL 1972703 (E.D. Ark. 2018) – A clause in a settlement agreement providing for a security interest and for the secured party's expenses and reasonable attorney's fees in "retaking, holding, preparing for sale, selling and the like" did not cover attorney's fees incurred in seeking payment of the debt.
- *In re England*, 2018 WL 1614166 (Bankr. M.D. Ala. 2018) – A clause in mortgage providing for the mortgagor to pay the attorney's fees incurred by the mortgagee in a foreclosure proceeding initiated under the power of sale did not cover fees incurred in connection with the mortgagor's bankruptcy proceeding.

VI. UCC – SALES AND PERSONAL PROPERTY LEASING

A. Scope

1. General

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2. Software and Other Intangibles

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

-

C. Warranties and Products Liability

-

D. Limitation of Liability

-

E. 'Economic Loss' Doctrine

-

F. Performance, Breach and Damages

-

G. Personal Property Leasing

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VII. NOTES AND ELECTRONIC FUNDS TRANSFERS

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

- *Dugan v. Vlcko*, 2018 WL 1535398 (E.D. Mich. 2018) – A negotiable promissory note sent by email was issued and delivered to the payee, who was therefore a holder. Because the note was usurious, no interest on the note was owing and the holder had no equitable estoppel claim for the interest based on the fact that the maker drafted the note. However, the holder might have a claim for fraud based on the maker's representation that the note was not usurious.
- *David H. Russell Family, LP v. Dernick*, 2018 WL 1604989 (S.D. Tex. 2018) – Promissory notes that: (i) required the creditor to look first to the debtor's interest in a limited liability company; (ii) stated that, upon maturity, "any outstanding principal and accrued interest shall be automatically converted into additional member interests" in the LLC; and (iii) provided a mechanism for appraising the LLC for the purpose of this conversion, did not mean that the obligations were fully discharged by conversion even though the LLC was valueless at the time the notes matured. The parties had expressly recognized that the membership interests might not be sufficient to satisfy all remaining amounts due and included a sentence providing that insufficient payment would not limit other remedies.

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

- *Estate of Malkin v. Wells Fargo Bank*, 2019 WL 1429660 (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 § 8-502 as a bona fide purchaser of a financial asset because the policy was void ab initio and because § 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

- *Kolchins v. Evolution Markets, Inc.*, 28 N.Y.3d 1177 (N.Y. Ct. App. 2018) – Does "mazel" mean "luck" or "congratulations" sufficient to indicate assent to enter into a contract?
- *CSH Theatres, LLC. v. Nederlander of San Francisco Associates*, 2018 WL 3646817 (Del. Ch. July 31, 2018) – Oral statements will not form an agreement unless there was a "promise." Disclaimer of fiduciary duties must be "plain and unambiguous." The court may consider extrinsic evidence if the contract is ambiguous, which means that the contract is "reasonably or fairly susceptible" of different interpretations.
- *Cullinane v. Uber*, 893 F.3d 53 (1st Cir. 2018) (applying Massachusetts law) – As a general matter, the rules of contract enforcement that apply to written contracts apply to online contracts ("no reason to apply different legal principles [of contract enforcement] simply because a forum selection clause . . . is contained in an online contract"). The touchstone is that the terms have been "reasonably communicated and accepted", which in turn means there is "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility" (emphasis in original). The court used the UCC's definition of "conspicuous" for this purpose. The court then engaged in "contextualized" discussion of whether the particular notice was conspicuous, taking into account the kinds of factors (location and content of notice, etc.). On the facts, the court concluded that the consumers "were not reasonably notified of the terms of the Agreement." As a result, the consumers "did not provide their unambiguous assent to those terms."
- *Armiros v. Rohr,* 243 Ariz. 600 (Ct. App. Ariz. 2018) – A buyer who clicked the "Buy It Now" button on eBay formed a contract

binding the seller and was entitled to benefit-of-the-bargain damages, even though the buyer had not yet paid for the ring subject to the contract before the seller breached the contract.

B. Interpretation and Meaning of Agreement

- *Plaze v. Callas*, 2018 WL 1560057 (Del. Ch. 2018) – "In giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract."
- *Knezovic v. Urban Partnership Bank*, 2018 WL 3022680 (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.

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

- *De La Torre v. Cashcall*, 5 Cal.5th 966 (Cal. Sup. Ct. 2018) – The interest rate on a loan was the equivalent of the "price" of the loan and could be unconscionable under the "sliding scale" analyst. A particular statute did not displace unconscionability.
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D. Risk Allocation

- *Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC*, 25 Cal.App.5th 344 (Cal. Ct. App. 2018) – A release of a duty of care is effective with respect to activities within the scope of the release. The release is not effective with respect to gross negligence.
- *MHS Capital, LLC v. Goggin*, 2018 WL 2149718 (Del. Ch. Ct. 2018) – An exculpatory provision in the membership agreement for an LLC, which provides that the manager "shall not be liable . . . for breach of such person's duty as Manager" but which also requires the manager to "discharge his . . . duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner [he] reasonably believes to be in the best interests of the Company," did not

prevent a contract claim against the manager for diverting LLC assets to himself and his friends.

- *Lynch v. North American Company for Life and Health Insurance*, 2018 WL 356161 (D. Idaho 2018) – An insurer was not entitled to summary judgment on whether it properly terminated a life insurance policy. Although the policy required merely that advance notification of termination be sent, not that it be received, the insurer's evidence of its customary practices was insufficient to remove a factual issue about whether notification was properly sent to the policy owner in this case, who submitted evidence that no notification was received. There were no computer logs or other records to confirm that the insurer's customary practices were actually followed in this case, and the notification was not sent by certified mail.
- *In re Lyondell Chemical Co.*, 2018 WL 565272 (S.D.N.Y. 2018) – Although a lender breached a $750 million revolving credit facility by failing to lend, the lender was insulated from liability by a term in the credit facility disclaiming consequential damages. Such clauses are enforceable under New York law except to the extent that they cover claims for gross negligence or intentional wrongdoing or are unconscionable, and there was no claim that any of those exceptions applies. However, the clause did not bar restitutionary damages, and thus the lender had to return the $12 million commitment fee paid by the borrower. While the lender would be entitled to deduct from that amount the value of its partial performance, arising from an earlier loan it made under the credit facility, the lender failed to prove the value of that performance.
- *Firestone Financial, LLC v. Meyer*, 2018 WL 651186 (7th Cir. 2017) – A guarantor had no promissory estoppel defense based on the lender's failure to fulfill its alleged promise to finance all equipment that the debtor needed on the "same" and "identical terms" to the first two loans. Such an alleged promise did not make sense given that the first two loans had different principal amounts and interest rates, and the third had a different principal

amount and term. Moreover, the guarantor could not have relied on the alleged promise when guarantying the first loans because they preceded the alleged promise, and he guarantied the fourth after the lender's CEO told the guarantor that it would make no more loans to the debtor.

- *Melrose Credit Union v. Ulysses*, 2018 WL 3118644 (N.Y. Sup. Ct. 2018) – A credit union was entitled to summary judgment on its action on a balloon note despite the debtor's assertion that the loan had regularly been renewed for over 25 years. The note expressly provides that the credit union has no obligation to refinance the loan, and thus the debtor could not have reasonably relied on any alleged oral promise to renew. Similarly, the debtor had no defense based on the credit union's refusal to renew the loan unless the debtor provided a home mortgage to secure the debt because the note expressly provided that the credit union could demand additional collateral even during the term of the loan.
- *Blok Builders, LLC v. Katryniok*, 2018 WL 637399 (Fla. Dist. Ct. App. 2018) – A subcontractor on an excavation project that agreed to indemnify the contractor and its agents for any loss or damage resulting from the subcontractor's work was not obligated to indemnify the owner even though: (i) the contractor's agreement with the owner required the contractor to indemnify the owner; and (ii) that agreement was incorporated by reference into the subcontract.
- *Travelers Casualty and Surety Co. of America v. Paderta*, 2018 WL 1535117 (N.D. Ill. 2018) – A surety company that had issued performance bonds for a general contractor, in connection with which the contractor promise to indemnify the surety and hold funds received on bonded projects in trust, was entitled to funds from bonded projects that had been deposited into the contractor's deposit account and then swept by the depository bank in the exercise of setoff rights. The bank had constructive knowledge that the funds were held in trust and thus had no setoff rights in such funds.

- *In re Rychman Creek Resources, LLC*, 2018 WL 4178692 (Bankr. D. Del. 2018) – The owner of 80% of the equity in a reorganized LLC, which sent notification that it was exercising its call option with respect to the remaining 20%, could not withdraw that "offer" merely because it mistakenly thought the purchase price was $1.5 million rather than $11 million. The option itself was an offer and the owner's notification was an acceptance.
- *HSBC Bank USA v. Buset*, 2018 WL 735265 (Fla. Dist. Ct. App. 2018) – The fact that a promissory note was secured by and referenced a mortgage that purportedly limited transferability did not prevent the note from being negotiable because the note did not incorporate the terms of the mortgage.
- *OneWest Bank v. FMCDH Realty, Inc.*, 2018 WL 4472948 (N.Y. App. Div. 2018) – A Cash Account Agreement that created an open-end (i.e., revolving) line of credit for up to $806,152 was not a negotiable instrument because it did not state a sum certain. Therefore, the entity that had possession of the agreement, and which had received an assignment of the mortgage securing the debt, could not establish its standing to foreclose the mortgage merely by showing that it possessed the original Cash Account Agreement, indorsed in blank, on the date this action was commenced.
- *U.S. Bank Trust for LSF9 Master Participation Trust v. Spurgeon*, 2018 WL 1660122 (Ind. Ct. App. 2018) – A mortgage executed by a trust and covering real property owned by the trust that was intended to secure a debt of an individual but which erroneously defined the "Borrower" as the trust was nevertheless enforceable because it described the secured note with the correct dollar amount and date.
- *Baynes v. Santander Consumer USA*, 2018 WL 623582 (W.D. Pa. 2018) – The debtor in a secured transaction was required to arbitrate claims against the repossession company that allegedly breached the peace during repossession and the law enforcement personnel who assisted because the security agreement included

an arbitration clause covering "all claims arising out of, in connection with, or relating to the Contract" against all persons "who may be jointly or severally liable."

- *Helena Chemical Co. v. Holthaus*, 2018 WL 623593 (D. Kan. 2018) – A secured party that brought an action against the debtor and guarantors on the secured obligation and for replevin was not required to arbitrate the claim. Although the security agreement contained a clause requiring arbitration of any dispute "arising out of or relating to this Agreement," there was no dispute about the extent or scope of the Security Agreement. Instead, the claim related solely to the debt but the loan agreement did not contain an arbitration clause.
- *Hewitt v. Auto Showcase of Bel Air*, 2018 WL 2437240 (Md. Ct. Spec. App. 2018) – An arbitration clause in a retail installment contract for a motor vehicle – and another separately signed agreement to arbitrate – survived cancellation of the contract when third party financing fell through. The mutual promises to arbitrate provide consideration for each other. Accordingly, the buyer had to arbitrate his class action alleging violation of the state Spot Delivery Law.
- *Unison Co. v. Jul Energy Development, Inc.*, 2018 WL 4426204 (D. Minn. 2018) – An arbitration panel that ordered rescission of the parties' contract and restitution in excess of $400,000 did not exceed its authority. Even though the parties' contract provided that "in no event shall [the aggrieved party] . . . be liable . . . for damages . . . in excess of ten percent (10%) of the Contract Price, regardless of whether such liability arises out of breach of contract, guarantee or warranty, tort, product liability, indemnity, contribution, strict liability, or any other legal theory," because rescission is the complete undoing of the contract, the Panel's determination on how to restore the parties to their pre-contractual positions was not constrained by any contractual provision.

- *Ronnoco Coffee, LLC v. Westfeldt Brothers, Inc.*, 2018 WL 902202 (E.D. Mo. 2018) – The newly formed entity that was about to purchase substantially all of the debtor's assets at a private disposition conducted by the secured party and that shortly before the purchase instructed the debtor to stop payment on a check to a supplier, with the result that the supplier shipped goods under the mistaken belief it would receive payment, had no liability to the supplier for fraud, unfair trade practices, conversion, or unjust enrichment because it was the debtor, not the buyer, that stopped payment and received the goods.
- *In re Rienzi & Sons, Inc.*, 2018 WL 1157821 (E.D.N.Y. 2018) – A bankruptcy debtor's court-approved stipulation that modified a confirmed plan to resolve a dispute about a secured creditor's entitlement to attorney's fees, and which provided that if the debtor failed to make specified other payments by February 28, 2017, then the debtor would "owe" $186,000, did not mean that the debtor had to pay that amount on March 1. There is a difference between "owing" and "paying," and the debtor was instead obligated merely to pay the amount over the life of the loan.
- *NY Capital Asset Corp. v. F & B Fuel Oil Co.*, 2018 WL 1310218 (N.Y. Sup. Ct. 2018) – A transaction purporting to be a sale of $87,000 of future receipts for $60,000 was a true sale, not a loan, and thus not subject to state usury law, because the buyer took the risk that future receipts would be less than $87,000, the agreement did not have a finite term, and the agreement contained a reconciliation provisions that allowed the seller to seek an adjustment to the amounts paid daily based on its actual cash flow.
- *Foursome Properties, LLC v. Rite Aid of Kentucky, Inc.*, 2018 WL 1439830 (Ky. Ct. App. 2018) – The trial court did not err in ruling that a lease that provided that "the Landlord shall not, either directly or indirectly, . . . authorize or permit the operation of any other . . . pharmacy" should be interpreted to restrict not only the landlord, but also the landlord's owners and their other entities, in part because the clause included an express exception for a tenant of one of those other entities.

- *Guterman Partners Energy, LLC v. Bridgeview Bank Group*, 2018 WL 1556229 (Ill. Ct. App. 2018) – A financier that contracted to purchase mortgage loans from a bank was not entitled to return of its deposit after the transaction never closed. The conditions to closing were satisfied and the bank had not breached its representations and warranties because the bank had promised merely to sell its rights in the loans "as is," and thus it did not matter whether the bank had full ownership of the loans. The bank had possession of the loan documents – including the promissory notes – and was ready, willing, and able to deliver them to the financier.
- *Cain v. Price*, 2018 WL 1755396 (Nev. Sup. Ct. 2018) – A term in a settlement agreement between two parties in which one of them "hereby fully and forever releases" a third party from liability was rendered unenforceable when the other party to the agreement materially breached by not paying the agreed-upon amount.
- *Nist v. Hall*, 2018 WL 2440514 (Cal. Ct. App. 2018) – The owner of goods in a storage unit had no cause of action for conversion against the good faith purchaser who acquired the goods when the owner of the storage facility conducted a lien sale of them. It did not matter that the storage agreement was oral and therefore in violation of state law. The buyer did not get void title under UCC § 2-403 because that provision applies only to voluntary transactions, not to an involuntary lien foreclosure.
- *Mellen, Inc. v. Biltmore Loan and Jewelry-Scottsdale, LLC*, 2018 WL 2978532 (9th Cir. 2018) – The buyer of a four-carat diamond did not take free under the entrustment rule of § 2-403(2) because: (i) the seller's agent, with whom the buyer contracted, was not a dealer in diamonds; and (ii) the buyer did not purchase in the ordinary course of business because it first acquired only a security interest in the diamond and later when it purchased the diamond at a foreclosure sale it did so in satisfaction of a money debt.

- *AltEnergy Cyber, LLC v. Blackridge Tech. Holdings, Inc.*, 2018 WL 1954963 (Conn. Super. Ct. 2018) – A senior lender that signed an intercreditor agreement contemporaneously with making the loan and receiving a promissory note and security agreement was bound by the terms of the intercreditor agreement that allowed the agent for the lenders to extend the time for payment with approval of lenders holding at least 75% of the senior debt. It did not matter that the promissory note did not expressly reference the intercreditor agreement.
- *In re Phoenix Heliparts, Inc.*, 2018 WL 2107796 (9th Cir. BAP 2018) – A helicopter for which the buyer had partially paid, which was not airworthy and little more than a shell at the time the sales agreement was executed, but which the sales agreement referred to by make, model, serial number, and airframe hours, was an existing good identified to the contract. Consequently, the buyer acquired a special property in the helicopter. Whether the buyer's rights were superior to other interests in the helicopter had to be determined on remand.
- *South Pointe Wholesale, Inc. v. Vilordi*, 2018 WL 2770438 (W.D. Ky. 2018) – Even though the merger clause in a loan agreement stated that all the related "Loan Documents" comprised the entire agreement of the parties, it did not absorb all the other documents into the loan agreement so as to make them interdependent, particularly given the existence of a severability clause. Therefore, a subordination agreement, by which an insider promised not to accept payment until the senior loan was fully paid, was not rendered unenforceable by the expiration of the loan agreement and the maturity of the loan.
- *Sotheby's, Inc. v. Mao*, 2019 WL 1938506 (N.Y. App. Div. 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 a 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.

- *Foundation Capital Resources, Inc. v. Prayer Tabernacle Church of Love, Inc.*, 2018 WL 4697281 (D. Conn. 2018) – Under Delaware law, while a standard merger clause will not bar parol evidence of a fraudulent inducement claim, a clear anti-reliance clause – one that expressly states that no oral representations have been relied upon – will. However, under Connecticut law, evidence of fraud is not made inadmissible by the parol evidence rule even if the parties' agreement contains an express disclaimer of oral representations.
- *Rivers v. Revington Glen Investments, LLC*, 816 S.E.2d 406 (Ga. Ct. App. 2018) – A seller of real property who warranted he had complied with all applicable environmental laws and who represented that, to his knowledge, no hazardous substance was stored on the property did not have liability under either term even though, unbeknownst to him, a prior owner had buried old tires and other debris on the property.
- *Pluciennik v. Vandenberg*, 2018 WL 3045661 (Ill. Ct. App. 2018) – The trial court erred in dismissing a fraudulent transfer complaint merely because the properties were each sold for less than the amount of the outstanding debt they secured because the plaintiff claimed that the properties had a fair market value in excess of the amount of the secured obligations, which would make each property an "asset" within the meaning of the Uniform Fraudulent Transfer Act.
- *In re Western Slopes Farms Partnership*, 2018 WL 4348048 (Bankr. N.D. Iowa 2018) – An undersecured creditor had no fraudulent transfer claim against the buyer of the collateral because fully encumbered property is not an "asset" within the meaning of the Uniform Voidable Transactions Act.
- *United States v. Allahyari*, 2018 WL 4357487 (W.D. Wash. 2018) – The interest of a taxpayer's father, who obtained and recorded a deed of trust on real property of the taxpayer after the IRS

obtained a tax lien, was junior to the IRS's lien because the father knew that the taxpayer owed substantial sums to the IRS and because the deed of trust secured a pre-existing debt rather than a contemporaneous loan. Moreover, the grant of the deed of trust was avoidable as an intentionally fraudulent transfer.

- *Englander Capital Corp. v. Zises*, 2018 WL 3038172 (N.Y. Sup. Ct. 2018) – An unsecured creditor had no cause of action against the insiders who made a secured loan to the debtor and who later conducted an acceptance of the collateral. Although an insolvent debtor's transfer of property to an insider to satisfy an antecedent debt is presumed to lack good faith and thus be constructively fraudulent, there is an exception if the insider is a secured creditor. The transfer was not actually fraudulent despite the relationship between the insiders and the debtors because the insiders had loaned funds to the debtor and contemporaneously taken a valid security interest, the debtor had consistently made payments to the insiders even before the unsecured creditor's action was commenced, and the consideration was adequate.
- *Dunkel v. Signal Medical Corp.*, 2018 WL 3039916 (Mich. Ct. App. 2018) – A note holder's agreement to extend the maturity date was supported by consideration because the note holder received the benefit of collecting further interest on the loan. Consequently, the extension was enforceable and the note holder's action was brought within the applicable limitations period.
- *Whitney Bank v. SMI Companies Global, Inc.*, 2018 WL 3027021 (W.D. La. 2018) – A bank was not entitled to summary judgment on its action to collect on two promissory notes because the debtor alleged facts sufficient to make out a defense based on the bank's breach of its commitment to make advances under a line of credit.
- *Fannie Mae v. Las Colinas Apartments, LLC*, 2018 WL 3135095 (Ga. Ct. App. 2018) – A term in a nonrecourse promissory note that provided for the obligation to become recourse if the mortgaged property becomes encumbered by a mechanic's lien that is not discharged within 30 days after its creation was enforceable. The

term was not ambiguous and despite the trial court's statement that this would create a windfall for the lender, parties are free to choose the terms they desire in a contract unless prohibited by statute or public policy. The guaranty of the note maker's liability similarly became enforceable when the lender acquired recourse against the maker of the note.

- *In re WM Distribution, Inc.*, 2018 WL 3218106 (Bankr. D.N.M. 2018) – A term in a $1.3 million promissory note, issued in connection with a settlement agreement, which provided that an additional $600,000 would become due upon default, was not enforceable. Although the payee argued that she was poised to recover $1.9 million on her claim if the litigation had not been settled and that the $600,000 was a discount for timely performance, the settlement agreement contained no such term. It called for payment of only $1.3 million. The $600,000 term was therefore a liquidated damages clause and was invalid as a penalty. It did not provide compensation for anticipated attorney's fees and costs of collection because those damages were covered by other provisions of the note.
- *Bank of the West v. Prince*, 2018 WL 3868796 (W.D. La. 2018) – Although a lessor of goods that repossessed and sold the goods could not recover (in addition to the back-due rent) the full amount of future rent even if the lease provides for that as liquidated damages, the lessor was entitled (in addition to back rent due) to an amount equal to the future rent, discounted to present value, minus the proceeds received from the sale of the goods.
- *In re Altadena Lincoln Crossing, LLC*, 2018 WL 3244502 (Bankr. C.D. Cal. 2018) – A term in the agreements for two loans totaling $26 million, which provided for a 5% increase in the interest rate after default, was an unenforceable penalty even though there was evidence that a 5% increase was customary in the industry and even though the debtor acknowledged in several forbearance agreements the amount due, including interest calculated using the default rate. The increase could not be liquidated damages

designed to compensate for the cost of collection because other provisions in the agreements obligated the borrower to pay such costs, along with a fee for any late or missed payments. Although there was testimony that the increase was designed to compensate the lender for the increased risk of nonpayment, increased loan loss reserves, staff and senior management time devoted to managing and reporting on the loan and dealing with increased regulatory oversight, there was no evidence that the lender considered these things when making the loan and many of these expenses have little or no relationship to the size of the loan.

- *ING Bank v. M/V TEMARA*, 892 F.3d 511 (2d Cir. 2018) – The assignee of the entity that contracted to supply fuel bunkers to a ship was entitled to a maritime lien on the ship supplied, even though the entity subcontracted with an intermediary that further subcontracted with a fuel company to provide the bunkers. The fuel company was not entitled to a maritime lien because it did not act on the order of the ship owner or a person authorized by the owner. See also ING Bank v. M/V Voge Fiesta, 2018 WL 3359610 (2d Cir. 2018); ING Bank v. JAWOR M/V, 2018 WL 3359673 (2d Cir. 2018) (each ruling similarly).
- *Schoonover v. Hallwood Financial, Ltd.*, 2018 WL 3545320 (W.D. La. 2018) – A businessman that, after obtaining the agreement of an existing secured party to subordinate its interest in $1 million of accounts, continued to make further loans to the debtor, had no promissory estoppel claim against the existing secured party because the businessman could not have reasonably relied on any promise of additional subordination given that all the parties to the discussions agreed that any binding agreement had to be formalized in writing, the parties had not resolved several material details of any alleged deal, and the businessman inexplicably failed to draft an agreement for more than five months, despite repeated requests therefor, and yet during that period his lawyers delivered term sheets that expressly stated that they were non-binding.

- *Can Financial, LLC v. Krazmien*, 2018 WL 3654832 (Fla. Ct. App. 2018) – The statute of limitations on a mortgagee's foreclosure action began to run with each missed payment, not earlier when the mortgagor's personal liability was discharged in bankruptcy.
- *PNC Bank v. MB Wholesale, Inc.*, 2018 WL 3708076 (E.D. Mich. 2018) – A transaction consisting of a $1.1 million line of credit for a business, a security interest in the assets of the business, and a guaranty by the owner of the business, was not unconscionable even though the terms were harsh.
- *Tepper v. Amos Financial, LLC*, 2018 WL 3733862 (3d Cir. 2018) – Although a debt buyer, whose sole business is purchasing and collecting defaulted debts, does not qualify as a "debt collector" under the Fair Debt Collection Practices Act as someone who regularly collects or attempts to collect debts owed or due another, it is a "debt collector" as someone whose "principal purpose . . . is the collection of any debts."
- *Fuller Landau Advisory Services, Inc. v. Gerber Finance, Inc.*, 2018 WL 3768035 (S.D.N.Y. 2018) – An investment banking advisory service that found a buyer for a client and was therefore entitled to a success fee based on the purchase price and the amount of any debt "assumed" by the buyer was not entitled to have the amount of debt that the buyer guaranteed included in the calculation. To "assume" a debt is to take on primary liability for it, not to guarantee it.
- *Park Bank v. U.S. Bank Trust*, 2018 WL 3954162 (W.D. Wis. 2018) – A mortgagee that recorded first but had knowledge of a prior mortgage, and therefore took subject to the prior mortgage under the state's race-notice recording statute, also took subject to the later mortgage to the extent that it refinanced the prior mortgage. The refinancing lender was subrogated to the prior mortgage.
- *Murphy v. Stupar, Schuster & Bartell, SC*, 2018 WL 3978108 (W.D. Wis. 2018) – A debtor whose debt was discharged in bankruptcy because the reaffirmation agreement lacked the required Part D disclosure had a cause of action under the Fair Debt Collection

Practices Act against the law firm that filed a complaint to collect the debt. There is no defense for good faith legal error and, even if there were, the state court of appeals had already ruled in a similar case that a reaffirmation agreement lacking the disclosure was not enforceable.

- *Colon v. Porsche of Roslyn*, 2018 WL 3999864 (N.Y. Sup. Ct. App. Div. 2018) – A automobile lessor that repossessed the vehicle after the lessee's second default did not violate the state Personal Property Law even though the notification the lessor sent to the lessee after the first default incorrectly stated that the lessee had 12 days to cure the default instead of the statutorily mandated 25. The lessor had permitted the lessee to cure the first default 34 days after default, and the statute does not give a right to cure after a later default.
- *Bryner v. Cardon Outreach, LLC*, 2018 WL 4573303 (Utah 2018) – Under Utah's Hospital Lien Statute, a hospital that provides treatment to an individual injured in an accident is entitled to a lien on the full amount of a patient's settlement of a claim relating to the accident, less the attorney's fees incurred to obtain the settlement. The hospital's lien is not limited by a proportionate share of other attorney's fees.
- *HV & Canal, LLC v. Upper Iowa University*, 2018 WL 4500942 (Ariz. Ct. App. 2018) – A tenant that was contractually required to provide – and had provided – the landlord with a letter of credit to secure the tenant's obligation to pay rent had no right to substitute an LOC issued by a different bank. Therefore, the landlord did not breach by refusing the substitution due to stated concerns about the creditworthiness of the proposed substitute issuer and, instead, the tenant breached when it vacated the leasehold and stopped paying rent.
- *Moore v. Fischer*, 2018 WL 4868289 (N.J. Super. Ct. 2018) – The trial court erred in dismissing the class action for usury and other violations of New Jersey law filed by a resident of New Jersey who entered into a car title loan transaction with a Delaware lender.

Although the plaintiff signed the agreement in Delaware and the agreement purports to choose Delaware law as the law to govern the transaction, the plaintiff saw an on-line advertisement for the loan, applied for the loan, and made an appointment with lender, all from her New Jersey home. In addition, the lender called her in New Jersey to advise her that the loan had been approved. Because the 180% interest violates fundamental policy of New Jersey, the trial court should have considered whether these facts are sufficient to show that New Jersey has a materially greater interest than Delaware in the litigation and that New Jersey law would apply but for the choice-of-law clause.

- *FTC v. MOBE, Ltd*, 2018 WL 4960232 (M.D. Fla. 2018) – A merchant for which a credit card processor maintained a reserve account for potential chargebacks was the owner of the funds credited to the account, not the processor or the bank where the account was maintained. This was evidenced in part by the fact that the contracts among the parties purported to have the merchant grant the bank a security interest in the account and to authorize setoff against the account. Accordingly, a receiver for the merchant was entitled to the funds.

E. Personal Jurisdiction

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F. Choice of Law and Forum

- *Himelsein Mandel Fund Mgmt., LLC v. Fortress Inv. Group LLC*, 2019 WL 1395963 (Cal. Ct. App. 2019) – The trial court erred in enforcing 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 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. *Orgone Capital III, LLC v. Daubenspecks*, 2018 WL 1378182 (N.D. Ill. 2018) – Forum's statute of

limitations applies to claims governed by the law of another state under choice-of-law provision.

- *Cita Trust Co. AG v. Fifth Third Bank*, 879 F.3d 1151 (11th Cir. 2018) – Applies statute of limitations of state whose law governs the relevant substantive claim; provision shortening statute of limitations must be "reasonable," "clear," and "unambiguous"; one year is reasonable; provision that referred to when claim "arose" means when it "accrued."
- *Aranda v. Philip Morris USA, Inc.*, 2018 WL 1415215 (Del. Sup. 2018) – existence of an "available alternative forum" is a factor, but not a threshold question, in forum non conveniens analysis.
- *Quanta Computer, Inc. v. Japan Communications, Inc.,* 2018 WL 1357461 (Cal. Ct. App. 2018) – Inbound, mandatory choice-of-forum provision based on statute still subject to forum non conveniens analysis.

G. Damages and Remedies

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H. Arbitration

- *Benaroya v. Willis*, 23 Cal.App.5th 462 (Cal. Ct. App. 2018) – An arbitration agreement does not bind a non-party, except in limited circumstances. Only a judge (and not an arbitrator) can make the determination of whether those circumstances exist.
- *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018) – An arbitration provision can be defeated by the exclusion for revocation under other law only if the right to revocation would apply to "any" contract. This cannot be done by provisions that by "subtle" means undermine the arbitration provision.

X. OTHER LAWS AFFECTING COMMERCIAL TRANSACTIONS

A. Bankruptcy

1. Bankruptcy Estate

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2. Automatic Stay

- *In re Adams*, 2018 WL 4377165 (Bankr. M.D. Ga. 2018) – A bank's retention of a voluntary post-petition payment by the debtor or non-estate assets, despite demand for return thereof, did not violate the automatic stay.
- *In re Chamberlayne Auto Sales & Repair, Inc.*, 2018 WL 1054698 (Bankr. E.D. Va. 2018) – The bankruptcy trustee stated a claim for violation of the automatic stay against the debtor's floor plan financier by alleging that the financier refused to release possession of title certificates to coerce the debtor into making payments.
- *In re Brodgen*, 2018 WL 4183196 (Bankr. M.D. Ala. 2018) – A car dealership that had a "lease" with the debtor that purported to prohibit the debtor from listing the vehicle on the debtor's bankruptcy schedules, called the debtor over 100 times postpetition to demand payment, and extracted a $703 payment postpetition after blocking the debtor's exit from the dealership, willfully violated the automatic stay and was liable for $11,600 in compensatory damages, $23,000 in punitive damages, and attorney's fees.
- *In re Peake*, 2018 WL 3946169 (Bankr. N.D. Ill. 2018) – A city that prepetition had impounded a vehicle for unpaid tickets and postpetition refused to release the vehicle to the Chapter 13 debtor until confirmation of a plan treating the city as a fully secured claimant violated the automatic stay. Although the city did have an interest in the vehicle and that interest would become unperfected if the city relinquished possession, the city's conduct was not excepted from the stay by § 362(b)(3).

Retention of the vehicle is not an act to continue or maintain the perfection of its interest in the vehicle because section 362(b)(3) contemplates a definite, positive act to continue or maintain perfection, such as filing a continuation statement under the Uniform Commercial Code.

- *In re Madden*, 2018 WL 1229692 (Bank. M.D. Ga. 2018) – A secured party that prompted a repossession company to repossess the debtor's car prepetition did not violate the stay by refusing to return the car because the secured party did not have possession and had promptly instructed the repossession company to release the car to the debtor. There was no evidence that the secured party had caused the repossession company to insist that the debtor sign a waiver of liability before it would release the car.
- *In re Smiley*, 2018 WL 385374 (Bankr. N.D. Ill. 2018) – A judgment creditor that obtained a prepetition freeze on the judgment debtor's bank accounts pursuant to a citation lien did not violate the stay by refusing to release the freeze after the judgment debtor filed under Chapter 13 because that would require the creditor to release its lien.
- *In re Kunkel*, 2018 WL 735929 (Bankr. W.D. Mich. 2018) – A credit union was entitled to relief from the stay to exercise whatever setoff rights it might have against the Chapter 13 debtor's certificates of deposit, which were jointly titled in her and her minor children's names. If, as the debtor alleged, the CDs belonged to the children, then the CDs could not possibly be necessary to a successful reorganization. Although the co-debtor stay of § 1301 would apply even if the children were not personally liable for the debtor's debts, due to the fact that their property secures such a debt, because the debtor's plan did not treat the credit union as secured claimant and provided for only a minimal distribution on its claim, relief from stay was appropriate.

- *In re Kalabat*, 2018 WL 5226431 (Bankr. E.D. Mich. 2018) – Even though a security agreement was defective by purporting to grant a security agreement to "Jimmy Aouri," rather than to Mr. Akouri as Trustee of the James A. Akouri Living Trust, it would not violate the debtor's discharge injunction to seek reformation of the security agreement. Reformation does not create a new contract; it reforms the writing to reflect the parties' intentions and relates back to the when the contract was originally executed. Moreover, the debtor lacks the trustee's avoiding power and cannot use them to prevent reformation.

3. *Substantive Consolidation and True Sale*

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4. *Secured Parties, Set Off, Leases*

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5. *Avoidance Actions*

   - *In re Price*, 2018 WL 3213603 (D. Haw. 2018), appeal filed (Aug. 9. 2018) – A transfer of $123,000 of the proceeds from the sale of the debtor's real property to an individual with a contingent right to a portion of the profits occurred when the payment was made to the individual, which was inside the preference period, not earlier when the proceeds were placed in escrow. The escrow instructions preserved the status quo. Accordingly, placing the funds in escrow did not so diminish the debtor's rights in the proceeds so as to make the later payment to the individual an act that did not deprive the estate of an asset of value.

   - *In re Dependable Auto Shippers, Inc.*, 2018 WL 4348049 (Bankr. N.D. Tex. 2018) – An accounts financier that, one day before the debtor filed for bankruptcy, was paid off with funds loaned to the debtor by another lender two days earlier did not receive an avoidable preference because the funds were earmarked for payment to the accounts financier and thus were not property of the debtor. Although the loan documents lacked a provision

expressly stating that the loaned funds were to be used to pay the accounts financier, contained a merger clause, and declared that there were no third-party beneficiaries, extrinsic evidence – including the need for the accounts financier to be paid off so that it would release its existing security interest, thereby allowing the new lender to have a first-priority security interest – demonstrated that the debtor was obligated to use the loaned funds to pay the accounts financier.

- *In re The Truland Group, Inc.*, 2018 WL 333865 (Bankr. E.D. Va. 2018) – A supplier that delivered goods worth $2.2 million to the debtor-subcontractor shortly before and after entering into an agreement with the general contractor for future payments to be made jointly to the supplier and debtor, and that later, within the preference period, received a jointly-payable check that had been endorsed by the debtor, was liable for the amount received. The check was not property held in trust for the supplier because the subcontract did not require that the debtor segregated property, and even if the joint-check agreement caused the check not to be property of the debtor, the agreement itself was entered into within the preference period, thereby ensuring that payment was preferential. The supplier had no preference defense under § 547(c)(1) because the delivery of the equipment – 44 days and 23 days before payment was made – was not substantially contemporaneous with the payment.
- *In re Hill*, 2018 WL 3954200 (Bankr. N.D. Ill. 2018) – A transaction in which a financier "bought" a merchant's accounts receivable for a discounted amount, with the expectation of taking a pre-determined percentage of the merchant's future receipts until the MCA company is paid in full, was a sale, not a secured loan, for the purposes of the New York usury statute. The payments to the merchant within the preference period were protected from avoidance by § 547(c)(2) because the obligation was incurred in the ordinary course of the business of both the merchant and the financier, and the

payments were made in the ordinary course of the merchant's business even though some of the amounts paid came from loans made by others to the merchant, rather than from proceeds of accounts receivable.

- *In re Price*, 2018 WL 3213603 (Bankr. D. Haw. 2018) – An individual who terminated his right to purchase real property in exchange for a right to half the net profit if the property were resold under specified circumstances, who later recorded with the Bureau of Conveyances an Affidavit of Adverse Claim to the property, then released the Affidavit to facilitate a sale of the property and placement of the net proceeds in escrow, and finally received payment of a portion of the escrowed proceeds during the preference period, was liable for the preferential transfer. The transfer occurred when the payment was made, not earlier. The agreement creating the right to proceeds did not create a security interest in the property because the creation of a security interest requires the intent to transfer a lien, and the agreement did not exhibit such an intent. The filing of the affidavit (the equivalent of a lis pendens) did not create a lien because a lis pendens is effective only to give notice of a claim to real property; it is ineffective to secure a claim against the owner of the property. Finally, placing the proceeds in escrow did not terminate the debtor's rights to the funds or create a security interest in favor of the individual because nothing in the escrow instructions purported to do either of those things.
- *In re Power*, 2018 WL 1887318 (Bankr. D. Idaho 2018) – Because a lender that refinanced the debtors' existing car loan did not perfect its security interest until at least 40 days after the loan was made, due in part to the debtors' error in completing the original title application and in part to the lender's own dilatory actions, the grant of the security interest was not substantially contemporaneous with the loan and was avoidable as a preference.

- *In re BFW Liquidation, LLC*, 2018 WL 3850101 (11th Cir. 2018) – The court's statement in 1988 that the § 547(c)(4) defense requires the new value to remain unpaid was dictum and is incorrect.
- *In re Dearborn Bancorp, Inc.*, 2018 WL 1913768 (Bankr. E.D. Mich. 2018) – Although periodic payments made under consulting agreements might, for the purposes of the § 547(c)(1) – And (c)(4) defenses, normally be presumed to be equal to the value of the services provided, no such presumption is appropriate when the payments are made to insiders, as they were in this case. Consequently, the preference defendants had the burden of proving the value of the services they provided, which they failed to do.
- *In re Davis*, 584 B.R. 230 (Bankr. E.D. Tenn. 2018) – The debtor's freedom – that is, avoidance of incarceration – was not "new value" and thus could not support a contemporaneous exchange for new value defense under § 547(c)(1) with respect to a preference claim regarding a restitutionary payment that the debtor made to former employer from whom the debtor had embezzled funds.
- *In re Jaghab*, 2018 WL 1831775 (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.
- *USAA Federal Savings Bank v. Hope*, 589 B.R. 914 (M.D. Ga.), appeal filed, (11th Cir. July 24, 2018) – A security deed granted as part of a loan refinancing was deemed to be transferred

when recorded, not when the original security deed was cancelled. Because this was 52 days after the debtors executed the security deed in return for the refinancing loan, it was not substantially contemporaneous with the loan even though the delay in recording was not intended.

6. *Executory Contract*

   - *In re Tempnology, LLC*, 879 F.3d 389 (1st Cir. 2018) – The debtor's rejection of an executory contract under which the debtor granted a nonexclusive patent license, an exclusive license to distribute products manufactured under the patent, and a nonexclusive license of its trademarks terminated the licensee's exclusive distribution rights despite the licensee's election under § 365(n). Because trademarks are not within the Bankruptcy Code's definition of "intellectual property," rejection of the contract also terminated the trademark license.

7. *Claims*

   - *In re Caesars Entertainment Operating Co.*, 2018 WL 3629899 (Bankr. N.D. Ill. 2018) – Because the purchase agreement pursuant to which a university acquired real property subject to a use restriction was non-assignable, the university's claim for breach for failing to get the restriction removed was not assignable. Thus, the claim filed by the entity that subsequently purchased the real property from the university and purported to receive an assignment of the breach of contract claim was disallowed.

   - *In re McCormick*, 894 F.3d 953 (8th Cir. 2018) – A creditor that was contractually entitled to recover attorney's fees was entitled to include postpetition attorney's fees in its oversecured claim even though the bulk of the security arose from a judgment lien, rather than from the contract that provided for recovery of attorney's fees.

   - *In re Pioneer Carriers, LLC*, 2018 WL 798876 (Bankr. S.D. Tex. 2018) – An undersecured creditor has an allowed claim for post-petition attorney's fees, as provided for under its

agreement with the debtor, and because the creditor made the § 1111(b) election, that claim is treated as a secured claim.

- *In re Amko Fishing Co.*, 2018 WL 3748820 (9th Cir. BAP 2018) – Even if suppliers had a maritime lien on a vessel owned by the debtor when the bankruptcy case commenced, and on the fishing license associated with the vessel, they did not have a lien on the proceeds of the trustee's fraudulent transfer case against the transferee of the debtor's fishing license. A maritime lien does necessarily attach to proceeds and, in any event, the trustee did not sell the fishing license, the trustee merely settled the fraudulent transfer action. If the suppliers had a lien on the fishing license, it remains in place.
- *In re EPD Investment Co., LLC*, 2018 WL 947636 (Bankr. C.D. Cal. 2018) – Even if a creditor had a prepetition security interest in the debtor's assets, that security interest did not encumber the trustee's recoveries pursuant to settlements of preference and fraudulent transfer claims.
- *In re Connolly Geaney Ablitt & Willard P.C.*, 2018 WL 1664636 (Bankr. D. Mass. 2018) – A secured party's prepetition security interest in the debtor's general intangibles does not attach to the trustee's avoidance actions or the proceeds thereof.
- *Whirlpool Corp. v. Wells Fargo Bank*, 2018 WL 4853568 (S.D. Ind. 2018) – An unpaid supplier's reclamation rights were cut off by the rights of the debtor's pre-petition and post-petition lenders, each of which had a perfected security interest, by § 546(c). It did not matter that under non-bankruptcy law a supplier's reclamation rights under § 2-702 are subject to the rights of the buyer's secured party only if the secured party acted in good faith; § 546(c) has no such qualification.
- *In re Kuper*, 2018 WL 1568928 (Bankr. N.D. Iowa 2018) – An agricultural cooperative that owed the debtor $60,700 in dividends but which the debtor owed $72,800 was entitled to a secured claim based on its setoff rights even though the dividends were not yet due. The cooperative's bylaws give it

broad discretion and a right of setoff for all indebtedness, "whether then due or to become due," and this language essentially allows the Coop to deem the debts that it owes to Debtor "due" for setoff purposes.

- *In re Washington*, 587 B.R. 349 (Bankr. C.D. Cal. 2018) – A mortgagee with a completely underwater mortgage was entitled to an unsecured claim in the debtor's Chapter 13 bankruptcy, even though the debtor's personal liability for the debt was discharged in a previous Chapter 7 case, because the debtor had elected to use § 1322(b)(2) to avoid the lien.
- *In re Singh*, 588 B.R. 136 (Bankr. E.D. N.Y. 2018) – The obligation of an individual who guarantied a corporate debt was not contingent when the individual filed for bankruptcy protection because the guaranty provided that the commencement of any bankruptcy proceeding by or against the guarantor was an event of default. Consequently, the obligation had to be considered when applying the debt limits for Chapter 13 eligibility.
- *In re Spiech Farms, LLC*, 2018 WL 5255296 (Bankr. W.D. Mich. 2018) – Transactions through which a financier purported to buy produce from the debtor and consign the produce back to the debtor for sales to the debtor's existing customers did not give rise to a PACA claim by the financier because the goods were identified to the contract with the financier after they were already delivered to the debtor's customers. Accordingly, title to the goods passed to the debtor's customers, leaving no rights in the goods to pass to the financier. The financier was therefore not a seller or supplier of produce to the debtor. To the extent that the transaction between the debtor and the financier was a transaction in receivables, it was not a true sale because the debtor retained all the risks associated with the receivables.
- *In re Shaffer*, 585 B.R. 224 (Bankr. W.D. Va. 2018) – The debtors' contingent liability on their prepetition, continuing guaranty of an LLC's obligations to its supplier did not arise when debtors

signed the continuing guaranty but only when each credit purchase was made. Consequently, their guaranty liability with respect to postpetition purchases was not discharged in bankruptcy.

- *In re Tegeler*, 2018 WL 2972360 (Bankr. S.D. Tex. 2018) – The guaranty obligations of the debtors were nondischargeable under § 523(a)(2)(A) – And (6) because the debtors made numerous misrepresentations in the loan application, loan documents, and borrowing base certificate, including that the borrower owned the collateral when in fact all of the borrower's assets had been transferred to one of the debtors.
- *Knoxville TVA Employees Credit Union v. Houghton*, 2018 WL 3381506 (E.D. Tenn. 2018) – The debtor's obligation to a bank was nondischargeable under § 523(a)(2) because he misrepresented that his company owned the boat that was to serve as collateral and that he would be using the loaned funds to buy the boat. Although the company did, several months later, purchase the boat, it never transferred the boat to the debtor and he never intended that it would.
- *In re Harris*, 898 F.3d 834 (8th Cir. 2018) – The personal obligation of the CEO of an employer, who had authorized the use for other purposes of funds withheld from employees paychecks for their health insurance plan, was nondischargeable under § 523(a)(4) as a defalcation.
- *In re French*, 2018 WL 1413758 (Bankr. S.D.W. Va. 2018) – A secured party sufficiently alleged facts to make a guarantor's obligation nondischargeable under § 523(a)(6) by claiming that the guarantor: (1) knew of the security interest and that the secured party had demanded the turnover of the collateral; (2) knew the members of the debtor were diverting and converting the collateral for their own and the guarantor's benefit in violation of a court order; (3) knowingly did nothing to prevent the conversion; and (4) converted some collateral for her own benefit, thereby causing injury to the secured party.

- *In re Nix*, 2018 WL 3339620 (Bankr. N.D. Ala. 2018) – A physician's debt incurred to purchase membership units in a limited partnership was nondischargeable under § 523(a)(6) because the physician sold the units without informing the lender or remitting any of the proceeds to the lender but did repeatedly misrepresent to the buyer that the units were unencumbered. It did not matter that the lender's security interest in the units was unperfected or that the physician continued to make interest payments on the debt for four years.
- *In re Williams*, 2018 WL 1684306 (Bankr. W.D. Ky. 2018) – The obligation of an individual farmer who knew he was contractually obligated to protect a secured party's interest in collateralized farm equipment but who nevertheless sold the equipment and used the proceeds to buy feed for the farmer's his cattle was nondischargeable under § 523(a)(6). Although the farmer hoped to pay the secured party, he nevertheless acted maliciously and in conscious disregard of the secured party's interest in the collateral.
- *In re Robertus*, 2018 WL 3067730 (Bankr. D. Mont. 2018) – The debt of farmers who sold collateralized crop and did not remit the proceeds to the secured party, but instead used them to fund further farming operations, was not nondischargeable under § 523(a)(6) because the farmers lacked a subjective motive to inflict injury on the secured party or the belief that injury was substantially certain to occur. At that time, the debtors were still expecting that the proceeds of other crops would be available to pay the secured party, and they did not anticipate the complete loss of their corn crop or that their crop insurance claim would be denied.
- *Westlake Flooring Co. v. Staggs*, 2018 WL 3752383 (N.D. Ala. 2018) – The debt of the owner of a car dealership who had guaranteed the dealership's obligations to its floor plan lender was not excepted from discharge under § 523(a)(6) due to the dealership's sale of vehicles out of trust because, even though the owner worked in the dealership as a bookkeeper, her

husband ran the business and was responsible for decision not to remit car sales proceeds to the lender; the owner did not actively participate in the actions that caused the lender harm.

- *In re Simons*, 2018 WL 4362193 (Bankr. E.D. Cal. 2018) – The debtor's obligation to a lender with a security interest in the debtor's car was nondischargeable under § 523(a)(6) because the debtor sold the car after fraudulently getting the DMV to reissue the certificate of title without the security interest noted thereon.
- *Bobka v. Toyota Motor Credit Corp.*, 2018 WL 2382766 (S.D. Cal. 2018) – A lease of personal property that an individual Chapter 7 assumes under § 365(p) remains enforceable against the debtor even if the obligations are not reaffirmed under § 524(c).
- *Cheniere Energy, Inc. v. Parallax Enterprises, LLC*, 2018 WL 6836924 (Tex. Ct. App. 2018) – A debtor that claimed that an obligation it promised to repay was really an equity contribution, not debt, was not entitled to a preliminary injunction prohibiting a putative secured party from foreclosing on the putative collateral: the debtor's ownership interest in a subsidiary. Although the trial court concluded that the debtor had demonstrated a likelihood of success on the merits, the debtor had not shown that it would suffer irreparable injury if the injunction were not issued. The subsidiary's only assets were claims against the secured party, which the secured party planned to nonsuit after taking control of the subsidiary, but those claims could be valued and the debtor also had and could pursue such claims.

8. *Plan*

- *Illinois Department of Revenue v. Hanmi Bank*, 2018 WL 3340935 (7th Cir. 2018) – A taxing authority, which under nonbankruptcy law is entitled to collect taxes due from a buyer in bulk of the taxpayers assets, was not entitled to any portion of the proceeds of a § 363 sale of the debtor's assets, which were otherwise fully encumbered. Even assuming that the

authority's right against a bulk purchaser was an "interest" in the debtor's assets and that the sale proceeds were enhanced by the bankruptcy court order insulating the buyer from liability, there is no reason to believe that the authority necessarily would have recovered 100 percent of the tax delinquency from an informed purchaser, especially since the secured parties could have resisted any significant reduction by conducting a foreclosure sale, which would not trigger successor liability. Because the authority offered no evidence to establish what its potential recovery might have been, the lower courts properly awarded nothing.

- *In re Transwest Resort Properties*, 881 F.3d 724 (9th Cir. 2018) – The requirement for cramdown that at least one impaired creditor class accept the plan applies in jointly administered Chapter 11 cases on a per-plan basis, not a per-debtor basis.
- *In re Fagerdala USA – Lompoc, Inc.*, 891 F.3d 848 (9th Cir. 2018) – A bankruptcy court erred in designating the vote of a secured creditor that purchased enough unsecured claims to block confirmation. While a court may designate the vote of a creditor that acts in bad faith, purchasing claims for the purpose of blocking confirmation is not bad faith unless the creditor has an ulterior motive unrelated to protecting its rights as a creditor. It did not matter that the creditor did not offer to purchase all the claims in the class and instead selectively purchased a majority in number but only about 10% of the total amount of the claims so as to acquire a blocking position for the lowest possible purchase price. Good faith was not to be determined by the effect on the claim holders of the remaining claims but on whether the creditor had an ulterior motive.
- *In re National Truck Funding, LLC*, 2018 WL 2670498 (Bankr. S.D. Miss. 2018) – A Chapter 11 debtor can satisfy § 1129(b)(2)(A) by surrendering some collateral and providing for deferred cash payments with a present value equal to the value of the remaining collateral, even though the secured claimant's claim was cross-collateralized.

- *In re Brown*, 2018 WL 739414 (Bankr. N.D. Ohio 2018) – A Chapter 13 debtor's plan could modify a claim secured by a mechanic's lien on the debtor's principal residence because the anti-modification rule of § 1322(b)(2) applies only to a claim secured by a security interest in the debtor's principal residence, and a mechanic's lien is not a security interest.
- *In re Singh*, 2018 WL 3135990 (Bankr. E.D.N.Y. 2018) – Although the debtor's liability on a $1.6 million guaranty was contingent on the date of the petition because at that time there was no default, and thus the liability did not make the debtor ineligible for Chapter 13 relief, the debt became contingent on filing due to a default- on-filing clause. Thus, the debtor's proposed Chapter 13 plan, which provided for full payment on other unsecured claims but no payment on the guaranty, could not be confirmed even though the borrower was current in making payment.
- *In re Thompson*, 2018 WL 904004 (Bankr. D. Mass. 2018) – Although a Chapter 13 debtor need not physically deliver the collateral to the secured claimant and may continue to use or occupy the collateral until the secured claimant seeks to exercise its rights to the collateral, a debtor cannot, under the guise of surrendering the collateral, retain the collateral for a substantial period of time against the wishes of the secured claimant, even if the debtor makes periodic payments on the secured claim.
- *In re Barragan-Flores*, 2018 WL 2798411 (W.D. Tex. 2018) – Even though a lender that made two secured, cross-collateralized vehicle loans to the debtor might have two claims in bankruptcy, the debtor could not, under Chapter 13, choose to surrender one vehicle while paying over time the incurred to acquire the other. The debtor must either surrender all the collateral or cram down the entire debt.
- *In re Helmeid*, 2018 WL 2324203 (Bankr. E.D.N.C. 2018) – Although the debtors could amend their confirmed Chapter 13

plan to surrender a vehicle that had become unreliable and to alter the schedule of payments to the creditor whose claim was secured by the vehicle, the debtors could not reclassify the creditor's deficiency claim as an unsecured claim because the debtors purchased the vehicle within 910 days before they filed the petition, and thus the entire amount of the creditor's claim had to be treated as a secured claim.

- *In re Wagabaza*, 2018 WL 812926 (Bankr. C.D. Cal. 2018) – Although the California statute codifying the principle of estoppel by deed apparently means that a junior lien, which was wiped out when a senior lienor foreclosed after receiving relief from the stay, reattaches if the debtor reacquires the property, the junior lien could not reattach because the debtor had already received a discharge of the obligation owed to the junior lienor and because § 552 prevents a lien from attaching to post-petition property.
- *In re Williams*, 2018 WL 832894 (Bankr. W.D. Va. 2018) – Lawyers who knew of and participated in a scheme to have their fees paid by a third party that towed a car that the debtor was prepared to surrender to the secured lender to a state with a laws that allowed a statutory lien for towing and storage charges to prime a perfected security interest, and which charged excessive towing and storage fees for services that were completely unnecessary, would have to disgorge the fees received and would be suspended from practicing before the court. See also In re White, 2018 WL 1902491 (Bankr. N.D. Ala. 2018) (involving similar sanctions against others involved in the scheme).

9. *Other*

- *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.

B. Consumer Law

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C. Professional Liability

- *Macquarie Capital (USA), Inc. v. Morrison & Foerster LLP,* 2018 WL 326391 (N.Y. Sup. Ct. App. Div. 2018) – Litigation by underwriter against its counsel alleging that counsel should have brought certain information to underwriter's attention in connection with an offering; court holds that trial court should have determined whether the information, while admittedly in the underwriter's possession, put the underwriter on sufficient notice without counsel's interpretation of the information.[2]

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