# 2017-2018 COMMERCIAL LAW DEVELOPMENTS

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### 1. *General*

- *South Lafourche Bank & Trust Co. v. M/VNOONIE G*, 2017 WL 2634204 (E.D. La. 2017) – Federal law requires that a preferred ship mortgage state "the amount of the direct or contingent obligations." It is sufficient if the mortgage states the maximum amount that may be secured. Because the mortgage indicated that secured a line of credit up to a maximum principle amount of $900,000, the mortgage was effective.
- *In re Climate Control Mechanical Services, Inc.*, 570 B.R. 673 (Bankr. M.D. Fla. 2017) – A secured party with a perfected security interest in the accounts of the debtor, a general contractor, encumbered the debtor's right to the amounts withheld but now due to the debtor under a construction contract. The amounts had not been earmarked for payment of a subcontractor.
- *In re Johnson*, 2017 WL 2399453 (6th Cir. BAP 2017) – A security agreement describing the collateral as "the payment, proceeds, and rights under and related to" the debtor's contract to play hockey failed to comply with California Labor Code § 300(b), governing assignments of wages. The security agreement failed to state that there was no other assignment in connection with the transaction. Accordingly, no security interest attached.
- *Bank of the Pacific v. F/V ZOEA*, 2017 WL 823298 (W.D. Wash. 2017) – The federal Ship Mortgage Act preempts a Washington state law that prohibits the creation of a security interest in commercial shellfish and food fish permits. A preferred ship mortgage granted by the limited liability company covered a Dungeness crab permit appurtenant to a vessel attached to the

* We remember our good friend Jeff Turner.

permit. It did not matter that the owner of the company had the permit titled in his own name and later sold the permit. The owner held title in trust for the limited liability company and the preferred ship mortgage attached and had priority over the rights of the buyer.

2. *Insurance*

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3. *Consignments*

   o *In re TSAWD Holdings, Inc.*, 565 B.R. 292 (Bankr. D. Del. 2017) – Because there was a factual issue about whether a retailer was generally known by its creditors to be substantially engaged in selling the goods of others, summary judgment was not appropriate on whether a transaction by which sporting goods were delivered to a retailer for sale was a "consignment" within the meaning of Article 9, and therefore whether the retailer had the power to grant a security interest in the sporting goods. Although the security agreement provided that it covered only property owned by a retailer, that limited language would not necessarily prevent the security interest from attaching to goods subject to an Article 9 consignment.*

   o *Mellen, Inc. v. Biltmore Loan and Jewelry-Scottsdale, LLC*, 247 F. Supp. 3d 1084 (D. Ariz. 2017), *appeal filed*, (9th Cir. Apr. 4, 2017) – The owner of a 4-carat diamond left the diamond "on memo" with a jeweler. The transaction was not a consignment under Article 9 because the agreement provided that the jeweler held the goods "only for examination and inspection by prospective purchasers," and that the jeweler "acquire[d] no right or authority to sell, pledge, hypothecate or otherwise dispose of" the diamond. Consequently, the pawn broker that bought the diamond from the jeweler did not obtain title under UCC § 9-319. Even if the transaction had been a consignment, the pawn broker purchased the diamond not from the jeweler, but from another person who claimed that the jeweler was his agent.

4. *Real Property*

   - *Bowling v. Appalachian Federal Credit Union*, 2017 WL 461258 (Ky. Ct. App. 2017) – A credit union's mortgages on a married couple's land did not encumber the couple's manufactured home situated on the land because the mortgages did not list the home. The home remained personal property due to the fact that the couple had not filed an affidavit of conversion and surrendered the certificate of title for the home.
   - *Schroeder v. Haberthur*, 401 P.3d 319 (Wash. Ct. App. 2017) – The Washington Deed of Trust Act could be interpreted consistently with Article 9 of the U.C.C., under which timber to be cut is not a "crop." Thus the debtor's forest land was not agricultural property exempt from nonjudicial foreclosure.
   - *In re Gracy*, 689 F. App'x 590 (10th Cir. 2017) – A manufactured home that was anchored to piers and slabs by metal strips and connected to utilities through underground lines was a fixture under the common law even though the certificate of title for the home had not been surrendered. The state statute providing that a manufactured home becomes a fixture if placed on a permanent foundation and the certificate of title is surrendered does not prevent a manufactured home from becoming a fixture in other ways.
   - *In re Smith*, 2017 WL 6372471 (Bankr. W.D. Ky. 2017) – The debtor constructed two pole barns on his property using pole barn nails. The nails have ring shanks making removal impossible. The pole barns were permanent fixtures and thus the mortgagee of the real property had a lien on the insurance proceeds resulting from the destruction of the barns. The barns were not personal property and thus the proceeds were not encumbered by a security interest in the debtor's equipment.*
   - *Lapalco Village Joint Venture v. Pierce*, 223 So. 3d 691 (La. Ct. App. 2017) – A walk-in freezer and a walk-in refrigerator could be immovable property and not a trade fixture.

- *Outsource Services Management, LLC v. Nooksack Business Corp.*, 2017 WL 1315490 (Wash. Ct. App. 2017) – A corporation that operated a casino on tribal land could grant a security interest in revenue of the facility to a secured party that financed without approval of the Secretary of the Interior. Approval is required for agreements that encumber tribal land but the security interest did not encumber the land. The security interest covered non-gaming revenue and all revenue from operation of the facility, even after the casino was closed.
- *In re Lexington Hospitality Group, LLC*, 2017 WL 5035081 (Bankr. E.D. Ky. 2017) – A mortgage on the debtor's hotel did not extend to the rents, which are personal property. The lender's perfected security interest in accounts did not extend to the cash paid by hotel guests because cash is money, for which possession is the only method to perfect unless it is proceeds of other collateral, and guests' payment up front in cash did not create an account. The lender's security interest in credit card receivables generated by hotel guests was not perfected because such receivables are payment intangibles, not accounts, and while the security agreement covered both accounts and general intangibles, the lender's financing statement covered only accounts. Although the financing statement referenced the security agreement, a reference to a document does not describe what is in the document.*
- *In re Carr*, 2017 WL 6016215 (Bankr. D.C. 2017) – A secured party's security interest in a closet system, which became a fixture to the debtor's home, was perfected by the filing of a financing statement.

5. *Personal Property Leasing*

- *In re Jeff Benfield Nursery, Inc.*, 2017 WL 358591 (Bankr. E.D.N.C. 2017) – A wholesaler of nursery stock's delivery of trees to the debtor nursery for planting and cultivation on the debtor's leased property were disguised financing arrangements. The agreements reserved the nursery's title to the trees and gave the nursery the unilateral right to select the type and number of

trees, determine when they would be delivered to the debtor, direct their maintenance and cultivation, and access the debtor's leased property. The court characterized the arrangements as financing transactions because all of the planting and maintenance costs that the nursery advanced to the debtor were to be repaid in the form of credits when the trees were finally harvested and sold to the nursery and the nursery ultimately purchased the trees from the debtor at the lesser of a capped price for the particular variety or the trees' market cost, less all amounts advanced to the debtor as planting and maintenance fees. This formula provided the nursery with the equivalent of interest under a more traditional financing agreement. Additionally, at the end of the agreed term, the debtor was required to repay the nursery all costs advanced for any trees the nursery elects not to purchase. As a result, the nursery would recoup all of its advanced costs, in the form of credits or cash payments, for the trees it elected not purchase, while the debtor bears all the risk of loss and must pay all related insurance costs, fees, and taxes.*

- *Western Surety Company v. FutureNet Group, Inc.*, 2017 WL 227957 (E.D. Mich. 2017) – The factoring of $997,500 in receivables for $750,000 would effectively be a loan at a 24.9% interest rate.
- *In re Kittusamy, LLP*, 2017 WL 957152 (9th Cir. BAP 2017) – A lessee under an equipment lease had the option to purchase the equipment for $1.00 at the end of the lease term. The transaction was a sale with a retained security interest. Consequently, the assignee of the lessor had no administrative expense claim for postpetition rent.
- *In re Price*, 2017 WL 4119031 (Bankr. E.D.N.C. 2017) – A debtor's four trailer leases, each of gave the debtor no right to terminate but an option to buy the trailer at the end of the lease term for $1, were sales and secured transactions.

- *Cozzetti v. Madrid*, 2017 WL 6395736 (Alaska 2017) – A 53-month lease of a mobile home pursuant to which the lessee would become the owner if he made all the payments was a sale and secured transaction. Accordingly, the putative lessor, by representing in a forcible detainer action that the debtor had only a leasehold interest violated the Unfair Trade Practices Act.
- *Lyon Financial Services, Inc. v. Illinois Paper and Copier Co.*, 247 F. Supp. 3d 923 (N.D. 1ll. 2017) – A six-year lease of copier equipment with an option to purchase at the end of the lease term for fair market value was a sale with a security interest, not a true lease, because the value of the equipment at the end of the lease term would be nominal, indicating that the lease term equaled or exceeded the economic life of the goods and that the option price would be nominal consideration. Even if the value of the equipment would not be nominal at the end of the lease term, it would still be less than the cost of relocating the equipment, which the lessee was obligated to pay. Although the lessee, a public entity, had a right to terminate pursuant to a non-appropriation clause, a factor suggestive of a true lease, that right was available only in extremely limited circumstances.
- *In re Lasting Impressions Landscape Contractors, Inc.*, 2017 WL 4127833 (Bankr. D. Md. 2017) – The debtor's five truck leases were sales with a retained security interest because the lease agreements provided that upon expiration of a lease, if either the lessor or the debtor sells the goods, the lessor must receive an "Assumed Residual", with the debtor entitled to any surplus and liable for any deficiency. Although the master lease was unclear, the same provision applied if the debtor terminated the lease early or retained the trucks after expiration of the leases. Consequently, the lessor did not retain a meaningful reversionary interest in the trucks. Moreover, these provisions effectively gave the debtor the right to purchase the trucks at the end of the lease term - at which time they would have a

useful life of 5-10 years - by paying an amount equal to [5.5% month's rent].

- *In re Johnson*, 571 B.R. 167 (Bankr. E.D.N.C. 2017) – A debtor had the right to purchase a leased shed at any time for 65% of the remaining rental payment. Because the debtor had the right to terminate the agreement at any time the transaction failed the bright-line test for a sale and retained security interest under UCC § 1-203(b). Because the debtor provided no evidence about the value of the shed, the court could not conclude that the option price was nominal or that the debtor was building up equity in the shed
- *Stanley v. Pawnee Leasing Corp.*, 2017 WL 2686294 (Ind. Ct. App. 2017) – A finance lease of a screen printer would be treated as a true lease, not a sale and security interest, given that the lessee made no effort to apply UCC § 1-203, such as by arguing that the lease term exceeded the economic life of the goods or that the purchase option was for nominal consideration. Consequently, the lessor was not subject to the stricter notification requirements under Article 9 before selling the printer after the lessee defaulted.
- *In re Jack*, 2017 WL 3225977 (Bankr. M.D. Fla. 2017) – A rental-purchase agreement for home furniture with an initial term of two months and an option to renew was a true lease because the Florida Rental-Purchase Agreement Act expressly states that an agreement of an individual to lease personal property for household use for an initial period of four months or less is a true lease and is exempt from Article 9, even if the lease is automatically renewed with each rental payment.

6. *Sales*

- *Holland v. Sullivan*, 2017 WL 3917142 (Tenn. Ct. App. 2017) – A transaction structured as a sale of an automobile for $30,000 with an option to repurchase, with the putative seller retaining possession and the buyer receiving the certificate of title was

really a loan and a secured transaction with the automobile as collateral.*

- *In re Voboril*, 568 B.R. 797 (Bankr. E.D. Wis. 2017) – The debtor's assignment of his right to receive renewal commissions was not the assignment of a single account in satisfaction of a preexisting indebtedness, excluded from the scope of Article 9 under UCC § 9-109(d)(7). The agreement stated that it provided "collateral security" for the debtor's existing and future debts to the secured party, not an outright sale of the account. Accordingly, filing a financing statement was necessary to perfect and, because the secured party did not file, the security interest was unperfected.
- *Hemmy v. Midland Funding LLC*, 2017 WL 1078632 (D. Haw. 2017) – A consumer debtor had no cause of action under Article 9 against the debt collector that sought to enforce the debt because the assignment to the debt collector was for the purpose of collection only, and thus excluded from Article 9 by UCC § 9-109(d)(5).
- *Patterson v. Rough Road Rescue, Inc.*, 2017 WL 3138002 (Mo. Ct. App. 2017) – An adoption agreement for a dog provided that any noncompliance by the owner "may void this contract" and "could" immediately give the rescue service "the authority to take possession" of the dog. That conditional language rendered the agreement ambiguous as to whether full ownership was transferred to the owner. However because the agreement would be interpreted against the drafter, which was the rescue service, the rescue service retained no interest in the dog.*
- *Classic Harvest LLC v. Freshworks LLC*, 2017 WL 3971192 (N.D. Ga. 2017) – A factor's purchase of the accounts of a produce buyer was a secured loan, not a true sale, because even though the recitals in the purchase agreement stated that the transaction was a sale, the agreement limited the factor's risk of the account debtor's nonpayment. The factor was entitled to

void the purchase of any receivable if, at the time the receivable was created, the produce buyer knew or had received notice of the account debtor's bankruptcy or insolvency. The factor was entitled to adjust the price paid if the produce buyer knew that an account debtor would be unable to timely pay its obligations within ninety days of the invoice date. The produce buyer also retained the risk if the account debtor disputed the quantity, quality or price of the goods sold to it. Accordingly, the factor's purchase did not remove the accounts from the PACA trust. The factor was not a *bona fide* purchaser for value of the accounts after it received notice of the produce buyer's breach of the PACA trust and might not have been at an earlier time, depending on when it should have known of the breach, which was a factual issue not ripe for summary judgment.*

- *Cherokee Funding LLC v. Ruth*, 802 S.E.2d 865 (Ga. Ct. App. 2017) – A litigation financing transaction created no recourse obligation. Thus the financier was a buyer of a portion of the litigation proceeds, not a lender. Thus the transaction was not subject to the Georgia Industrial Loan Act or the Georgia Payday Lending Act.
- *Central Bank v. Hogan*, 891 N.W.2d 197 (Iowa 2017) – A loan participant acquired an interest in the loan and the collateral securing it and not just a receivable from the originating bank. The buyer of a loan participation thus had an interest in the real property that the originator acquired by foreclosing on the collateral. That interest had priority over the interest of a subsequent buyer of the real property that took by quitclaim deed from the originator because a buyer who takes by quitclaim deed takes subject to outstanding equities, about which the buyer is assumed to have notice.*
- *Western Property Holdings, LLC v. Aequitas Capital Management, Inc.*, 392 P.3d 770 (Or. Ct. App. 2017) – Loan participants had no claim against the originator for breach of contract or negligence arising out of the originator's foreclosure on the collateral, which allegedly blocked a more lucrative sale of the collateral

by the debtor. There could be no breach of the implied duty of good faith because the participation agreement expressly granted the originator the authority to exercise its reasonable business judgment regarding what remedies to pursue to enforce the loan. There was also no special relationship between the participants and the originator.

7. *Intellectual Property and Licenses*

   - *Lexmark International, Inc. v. Impression Products, Inc.*, 137 S.Ct. 1523 (2017) – A patent owner's sale of the patented product "exhausts" its rights under patent law and any effort to restrict further sales is not enforceable ("… a patentee's decision to sell a product exhausts all of its patent rights in that item, regardless of any restrictions the patentee purports to impose or the location of the sale.")
   - *Design Data Corporation v. Unigate Enterprise, Inc.*, _ F.3d _ (9th Cir. 2017) – A copyright on a computer program does not extend to program output generated by the program, unless the program does the "lion's share" of the work and the user's contribution is "marginal."*
   - *Star Athletica, LLC v. Varsity Brands, Inc.*, _ U.S. _ (2017) – Designs of clothing and other useful articles may be copyright-protected when a qualifying feature incorporated into the design is conceptually separate from the article.
   - *Elliott v. Google, Inc.*, _ F.3d _ (9th Cir. 2017) – The word "Google" did not lose trademark protection due to generic use where it was not primarily associated with a good or a service. The use of "google" as a verb did not constitute sufficient generic use.
   - *Semcon IP Inc. v. Huawei Device USA Inc.*, 2017 WL 1017424 (E.D. Tex. 2017) – A buyer of patents who granted the seller a security interest in the patents could maintain an action for infringement against a third party without joining the seller-secured party because, even though the buyer could not assign the patents without the seller's permission, the purchase and

sale agreement expressly indicated that the buyer had sole authority to enforce the patents.*

- *Milo & Gabby LLC v. Amazon.com, Inc.*, 693 F. App'x 879 (Fed. Cir. 2017) – A retailer remains the owner of goods sold through Amazon's fulfillment center, pursuant to which the retailer sends its goods to Amazon, which stores the goods and, upon sale to a customer, pulls the goods off the shelf, packages them, and ships them to the customer. Consequently, Amazon is not the seller and cannot be liable - as a seller - for the copyright and trademark violations of the retailers that sold knock-off goods through Amazon. The transactions were not a consignment within the meaning of Article 9 because the retailers did not deliver goods to Amazon "for the purpose of sale," but instead for the purpose of logistics and shipping after a sale had been made through the website.*
- *Williams v. Gaye*, _ F.3d _ (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*

- *In re Gabriel Technologies Corp.*, 2017 WL 6016287 (Bankr. N.D. Cal. 2017) – The lenders that provided financing for the debtor's unsuccessful tort action against a company did not have a security interest in the subsequent proceeds of a settlement of a malpractice claim against the debtor's counsel. A malpractice claim is not assignable under California, Nevada, and New York law. Even though the security agreement purported to cover "any successor claim or any claim related to [the funded tort claim], derived therefrom or arising thereunder," the malpractice claim was not covered by that language and, even if it were, such language does not satisfy the specificity requirement of UCC § 9-108(e).
- *Boling v. Prospect Funding Holdings, LLC*, 2017 WL 1193064 (W.D. Ky. 2017) – The agreement by which an individual

borrowed money at 5% per month, to be repaid out of the proceeds of the individual's pending tort claim, was illegal champerty under Kentucky law. Although the agreements stated that the funds advanced were for "the necessities of life or medical care," they also recognized that the funds were needed so the individual would have "time to seek justice through the courts or negotiations," and the money was explicitly intended to sustain the individual during litigation. The agreements were also usurious.

- *In re Designline Corp.*, 565 B.R. 341 (Bankr. W.D.N.C. 2017) – A transaction by which a bankruptcy trustee sought to obtain financing for three, complex adversary proceedings by selling 25% of the net litigation proceeds - after payment of expenses and attorney's fees - constitutes champerty and would therefore not be approved because: (i) it does not require the financier to make any advances and instead requires the trustee to request advances quarterly; (ii) requires the trustee to seek the financier's input and approval of strategic decisions; and (iii) if the trustee's counsel withdraws, it requires the trustee to consult with the financier regarding substitute counsel.
- *In re Mississippi Phosphates Corp.*, 2017 Bankr. LEXIS 5 (Bankr. S.D. Miss. 2017) – A liquidating trust that purchased all of a bankruptcy debtor's assets, except commercial tort claims, thereby acquired the debtor's pending right to a refund of payments for electric utility service after the state supreme court overturned a rate increase approved by the state utility commission. The right to a refund of an overpayment is a general intangible, not a commercial tort claim. Even if the commission had committed a constitutional tort in approving the rate increase, the state supreme court had ordered repayment before analyzing the constitutional issue.

9. *Government Debtors*

- *Department of Transportation v. United Capital Funding Corp.*, 219 So. 3d 126 (Fla. Dist. Ct. App. 2017) – A non-uniform provision excepted from the scope of Article 9 a transfer by a

governmental entity. It applies when the transfer is such that it would otherwise be within the scope of Article 9 - that is, when the governmental entity would be the debtor in a secured transaction - not when the transfer is a payment *by* a governmental entity that is an account debtor. Accordingly, a state department of transportation that paid the debtor after it received notification that the account owed by the department had been sold and an instruction to pay the factor that had bought the account did not discharge its obligation and remained liable to the factor. Sovereign immunity did not bar the factor's action against the department.

*B. Security Agreement and Attachment of Security Interest*

*1. Security Agreement*

- *Jipping v. First National Bank Alaska*, 2017 WL 927987 (D. Alaska 2017) – A debtor entered into a security agreement in 2009, which included a security interest in a deposit account. The debtor paid off the secured debt in full the 2009 loan. A 2013 loan from and security agreement with the same secured party did not expressly include the deposit accounts in the collateral. The 2013 security agreement's integration clause provided that the agreement, "together with any Related Documents, constitutes the entire understanding and agreement of the parties." The term "Related Documents" did not include existing security agreements.
- *Zuklie Investment Firm, LLC v. JDMN, LLC*, 2017 WL 1484171 (Conn. Super. Ct. 2017) – A limited liability company purchased the assets of a business and authenticated the security agreement. It did not sign the promissory note, only its member signed as an individual. Thus the LLC had no debt to the seller and the security agreement was void.
- *GEOMC Co. v. Calmare Therapeutics, Inc.*, 2017 WL 3585337 (D. Conn. 2012) –A corporation's CEO had both actual and apparent authority to enter into a security agreement on behalf of the corporation, and thus the security agreement was not

*ultra vires*. Although two years later the corporation's board of directors declared that the CEO might have acted contrary to the best interests of the corporation and that the security agreement was retroactively "rendered unauthorized, rejected, and void," that declaration did not affect the validity of the security agreement.*

- *Group One Development, Inc. v. Bank of Lake Mills*, 2017 WL 2937709 (S.D. Tex. 2017) – Although the borrowers claimed to have been fraudulently induced to enter into a loan agreement by oral representations that the loan was unsecured, the borrowers could not, as a matter of law, have reasonably relied on those representations because they were directly contradicted by the terms of the agreement.
- *Cornelius v. Bank of Nova Scotia*, 2017 WL 3412202 (V.I. 2017) – A secured party mistakenly: (i) filed a termination statement; (ii) informed the debtor that the loan was paid off; and, apparently, (iii) had its lien released on the certificate of title for the debtor's car. Nevertheless the debt continued and the security interest survived. Accordingly, the secured party could not be liable in conversion for repossessing the car after the debtor admittedly defaulted.*
- *Concealfab Corp. v. Sabre Industries, Inc.*, 2017 WL 6297672 (D. Colo. 2017) – A prospective borrower against which a financing statement was filed but which never entered into the credit transaction was entitled to an order declaring the security interest invalid even though the prospective secured party had filed a termination statement because there was nothing to prevent the prospective lender from again filing a financing statement.

2. *Value and Obligation Secured*

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3. *Rights in the Collateral*

   - *United States v. Myers*, 2017 WL 412623 (D.S.C. 2017) – A lender attempted to receive and perfect a security interest in specified

farm equipment used on leased land. The equipment was owned by the lessor, who was not the borrower and had not authenticated the security agreement. The evidence was conflicting as to whether the lessor had authorized the borrower to use the equipment as collateral.

- *In re Leonard*, 565 B.R. 137 (8th Cir. BAP 2017) – A bill of sale provided by the seller of cattle to the debtor did not comply with Colorado law because it was not signed by the debtor and it did not list the address for either party. The debtor nevertheless acquired ownership of the cattle because passage of title is governed by the Colorado UCC, and under the UCC that occurred when the cattle were delivered. Consequently, a lender's security interest in the debtor's after-acquired cattle attached to the cattle sold.*
- *United States v. NextGear Capital, Inc.*, 677 F. App'x 366 (9th Cir. 2017) – A secured party had a floating security interest on all of the debtor's after-acquired collateral. The security interest did not attach to a vehicle that someone else purchased using the debtor's license to avoid sales taxes. Although the certificate of title identified the debtor as the owner, the debtor did not purchase the vehicle in the ordinary course of the debtor's business, did not receive delivery of the vehicle, and never held the vehicle on its lot for sale.
- *In re Purdy*, 870 F.3d 436 (6th Cir. 2017) – A cattle lessor failed to demonstrate that the cattle sold by the debtor were leased cattle. The debtor used one bank account to conduct its dairy operations, commingling proceeds of owned cattle with proceeds of leased cattle and proceeds of milking operations, and then using those commingled proceeds to acquire replacements for leased cattle culled from the herd. Moreover, the court did not err in crediting the debtor's testimony that the debtor put the lessor's brand on cattle regardless of whether the cattle were acquired from suppliers paid by the lessor, and thus the brands were not reliable evidence of ownership. A lender's security interest in the debtor's existing and after-acquired

cattle did attach to all the cattle because the debtor used the commingled funds - which were part of the bank's collateral - to acquire the cattle. Consequently, the bank, not the lessor, was entitled to the proceeds of the cattle.*

- *In re McDougall*, 572 B.R. 239 (Bank. D.N.D. 2017) – Although it was unclear whether the individual debtors or the LLC they created owned the cattle that the debtors raised, the weight of the evidence indicated that the LLC owned the collateral that it sold prepetition and the individual debtors owned the collateral remaining when the petition was filed. Accordingly, the agricultural lien of a supplier that provided feed, seed, and supplies to the LLC had priority over the perfected security interest of a bank in the proceeds of the cattle sold by the LLC. The agricultural lien of the lessor of pasture land did not have priority over the bank's security interest because the lessor did not file notice of its lien within 120 days after the lease began.
- *Public Service Commission v. Grand Forks Bean Company, Inc.*, 900 N.W.2d 255 (N.D. 2017) – A secured party with a security interest in the inventory of a grain warehouse did not have priority over eight bean growers that were non-credit-sale receiptholders of beans they had delivered to the warehouse. Delivery of grain to a public warehouse for an unconverted scale ticket or warehouse receipt is a bailment, and the grain in a warehouse is subject to a first priority lien in favor of outstanding receiptholders. That lien has priority over any lien or security interest in favor of a creditor of the warehouseman, regardless of when the creditors lien attached to the grain. The growers engaged in non-credit sales transactions because a credit-sale contract must be signed by both parties and the growers did not sign anything.*
- *Cohen v. Forden*, 2017 WL 370909 (N.J. Super. Ct. 2017) – The managing member of a company who had an unperfected security interest in the company's assets was guilty of fraud and negligent misrepresentation for failing to disclose the

security interest to a lender who would not have made the loan had he known of the security interest.*

- *FDIC v. FBOP Corp.*, 252 F. Supp. 3d 664 (N.D. Ill. 2017) – A tax allocation agreement between a bank holding company and its bank subsidiaries (with which it filed a consolidated return) that provided for how a tax refund would be allocated did not clearly alter ownership of the refunds. Consequently, ownership was to be determined based in the default rule, and the FDIC, as the successor to the banks, was entitled to the portion of the refunds attributable to taxes paid by the banks.

4. *Restrictions on Transfer*

- *Magnolia Financial Group v. Antos*, 2017 WL 4286126 (E.D. La. 2017) – A lender had a security interest in the debtor's right to payment under a settlement agreement even though the settlement agreement had language attempting to prohibit assignment without the consent of the counter-party because UCC § 9-406 invalidates that restriction on assignment.*

- *Estate of Grimmet v. Encompass Indemnity Co.*, 2017 WL 5592897 (E.D. Mich. 2017) – Health care providers that received an assignment from a patient of the patient's rights under a no-fault automobile insurance policy had a cause of action against the insurer in spite of the fact that the policy contained an anti-assignment clause because such clauses violate state public policy and are overridden by UCC § 9-408.*

- *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.

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

- *In re Wharton*, 563 B.R. 289 (9th Cir. BAP 2017) – A promissory note signed by the debtor and stating that "[t]his note is partially

secured by 1965 Corvette automobile," was sufficient to grant the creditor a security interest in the debtor's corvette.*

- *In re Escoto*, 2017 WL 1075046 (9th Cir. BAP 2017) – A promissory note that granted a security interest in a dental practice and further pledged "any and all personal possessions holdings and items of value" and granted the lender "the right to remove any and all possessions . . . and to effect garnishment of any paycheck, settlement monies, or other assets without the need of a court order" covered only tangible assets and provided for self-help remedies with respect only to those tangible assets. The collateral did not include the debtor's rights under a settlement of a lawsuit that the loan was obtained to finance.
- *In re Edwards*, 2017 WL 6754026 (Bankr. E.D.N.C. 2017) – A security agreement that described the collateral as a mobile home and "all accessions, attachments, accessories, replacements and additions, . . . whether added now or later" but which also provided that "Lender is not granted, and does not have, a non-purchase money security interest in household goods," did not encumber the stove, refrigerator, washer, dryer, and air conditioning unit that the debtor purchased separately and installed after delivery of the mobile home.
- *The Mostert Group, LLC v. Mostert*, 2017 WL 4700343 (Ky. Ct. App. 2017) – Although the term "software" might, in other contexts, include source code, the term did not do so in the security agreement that a newly formed limited liability company executed in favor of one of its members. The parties had differentiated "software" from "source code" in a contemporaneously executed agreement under which the individual contributed "software programs and source codes" to the company.
- *Ehrlich v. Commercial Factors of Atlanta*, 567 B.R. 684 (N.D.N.Y. 2017) – A security agreement covering "all . . . obligations of ours to you, however and whenever created, arising or evidenced, . . . now or hereafter existing or due to become due" was sufficient to

cover the debtor's obligations to the secured party resulting from the phony invoices the debtor sold to the secured party.*

- *In re Hard Rock Exploration, Inc.*, 2017 WL 6507836 (Bankr. S.D.W. Va. 2017) – Recorded deeds of trust and financing statements that described the land involved and included in the collateral all "Gas System and all Gas Contracts and accounts resulting therefore" and "now owned or hereafter acquired . . . equipment, general intangibles, accounts, contract rights, inventory, fixtures, as extracted collaterals, instruments, [and] proceeds of collateral" were sufficient to create and perfect a security interest in the debtor's existing and after-acquired contracts relating to the extraction of oil and gas, and the cash proceeds thereof.

*D. Perfection*

*1. Automatic*

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*2. Certificates of Title*

- *In re Wharton*, 563 B.R. 289, 2017 WL 586427 (9th Cir. BAP 2017) – A secured party's possession of the certificate of title and keys for a Corvette did not perfect the security interest under Nevada law. To perfect the security interest in a motor vehicle granted by the end user the security interest needs to be noted on the certificate.*

- *In re Power*, 2017 WL 4158329 (Bankr. D. Idaho 2017) – A secured party that paid off the debtors' existing car loan. An initial title application was incorrectly completed, resulting in the new title certificate failing to indicate the secured party's security interest, was not perfected until, at the earliest, it submitted a second, properly completed application for a new certificate of title. Because that was more than 30 days after the refinancing, the transfer occurred when the security interest was perfected, and thus was an avoidable preference under Bankruptcy Code § 547(b).

- *In re Guiles*, 2017 WL 4838751 (Bankr. W.D. Tex. 2017) – A credit union's security interest in a motor vehicle that was perfected by notation on the certificate of title did not become unperfected when the debtor borrowed additional funds from the credit union and used a portion of the loan to pay off the original note. Although the credit union did not change the lien date on the certificate, because the security agreement covered future advances, it did not matter that the original note was replaced by a new note. At every moment, the debtor's obligation was secured by the motor vehicle.
- *BMW Financial Services, N.A., LLC v. Felice*, 75 N.E.3d 368 (Ill. Ct. App. 2017) – A secured party that had perfected a security interest in a car by having its interest noted on the certificate of title had priority over the buyer that purchased the car after the debtor filed an unauthorized lien release and obtained a duplicate certificate that did not indicate the security interest. Issuance of the duplicate certificate did not cause the car to no longer be covered by the original certificate, within the meaning of UCC § 9-303. Although a buyer who relies on a clean certificate can take free of a perfected security interest under UCC § 9-337, that provision applies only when the new certificate is issued by a different state, which was not what occurred in this case.

3. *Control*

- *In re Delano Retail Partners, LLC*, 2017 WL 3500391 (Bankr. E.D. Cal. 2017) – A secured party did not have a security interest in funds deposited into the trust account of the debtor's lawyer and then transferred to the debtor's bankruptcy trustee because, even if the funds were originally proceeds of inventory, the trustee took free of the security interest under UCC § 9-332(b). Moreover, because the funds had been commingled with non-proceeds in the lawyers' trust account, they were not identifiable proceeds. The secured party did not have a security interest in an account debtor's post-petition payments on a prepetition lease of equipment because even

though the lease itself was chattel paper, the payment stream was not. The payment stream was a payment intangible that was not proceeds of prepetition collateral. Finally, the lender did not have a security interest in the proceeds of the debtor's liquor license because a liquor license is not property of the licensee under California law, and hence no security interest can attach to it.*

- *Vendorpass, Inc. v. Texo Solutions, L.L.C.*, 2017 WL 444303 (N.J. Super. Ct. 2017) – A secured party that received payment from the debtor after the debtor had received funds from a related entity had no liability to a creditor of the related entity. There was no basis for a claim of constructive trust because the secured party was not unjustly enriched by the repayment of a debt. Even if the transfer of funds to the debtor was a constructive or intentionally fraudulent transfer, the secured party was a good faith subsequent transferee that give value, and hence had a valid defense. Moreover, the secured party took free as a transferee of fungible money.*
- *Ericsson Inc. v. Corefirst Bank & Trust*, 2017 WL 3053646 (D. Kan. 2017), *appeal filed* (10th Cir. Aug. 17, 2017) – A secured party with a security interest in a borrower's deposit account and which debited the account after a $217,000 deposit from the debtor's employer, had no liability to the employer for unjust enrichment even though the deposit included an overpayment of $122,000. Although the employer was entitled to restitution from the borrower, the bank took free of the restitution claim because it was a *bona fide* payee: it had no notice of the overpayment. It did not matter that the bank debited the account rather than receiving a voluntary payment from the borrower.*
- *Edwards Family Partnership, LP v. Bancorpsouth Bank*, 236 F. Supp. 3d 964 (S.D. Miss.), *af'd*, 2017 WL 4641274 (5th Cir. 2017) – The assignee of a secured party that had a control agreement with a bank had no claim against the bank for allegedly permitting the debtor to make 13 transfers from the

blocked account to accounts other than the one to which the control agreement permitted transfer. Even if the assignee could enforce the control agreement, the assignee, through its course of conduct, had waived that restriction in the control agreement because the assignee was aware of numerous transfers to other accounts - including some of its own accounts - yet did not complain and instead relied on the debtor to replenish the blocked account.*

- *In re Roselli Moving & Storage Corp.*, 568 B.R. 592 (Bankr. E.D.N.Y. 2017) – A secured party's prepetition security interest did not encumber the trustee's recovery pursuant to a settlement of a fraudulent transfer claim. To the extent that the property transferred by the debtor consisted of funds on deposit, the transferee of those funds took them free of the security interest. Even if the personal property that the debtor had transferred was and remained encumbered by the security interest, that property was not recovered by the trustee.*

4. *Possession*

- *Citizens Bank & Trust v. Piggly Wiggly Alabama Distributing Co.*, 2017 WL 242534 (Ala. Ct. Civ. App. 2017) – A secured party's security interest in the debtor's shares of stock in a corporation was not perfected by the issuing corporation's possession of the stock certificate, which the issuer had obtained to secure its own security interest. Although the issuer had provided a receipt for the certificate to the debtor, who had in turn delivered the receipt to the bank, the issuer never acknowledged that it had possession for the bank's benefit. As a result, the bank's unperfected security interest was subordinate to the judicial lien of a garnishor.*
- *In re Westby*, 2017 WL 1365999 (Bankr. D. Or. 2017) – A creditor's security interest in a promissory note secured by a deed of trust was unperfected because the creditor neither filed a financing statement nor took possession of the note. Although the creditor's security interest attached to the real property that

the debtor received by quitclaim deed after the maker of the note defaulted, that interest too was unperfected.

5. *Authority to File Financing Statement*

   - *United States v. Jordan*, 851 F.3d 393 (5th Cir. 2017) – An inmate who filed a fraudulent UCC financing statement against an assistant U.S. attorney was properly convicted of violating 18 U.S.C. § 1521, which prohibits filing a false lien or encumbrance against the property of a federal official on account of the performance of official duties, even though the $6.54 million contract identified as collateral did not exist.

   - *State of Connecticut v. Brightly*, 2017 WL 1311036 (Conn. Super. Ct. 2017) – The state and a judge were entitled to injunctive relief against a criminal defendant who filed a fraudulent financing statement against the judge that presided over his criminal trial.

   - *Holland v. Sullivan*, 2017 WL 3917142 (Tenn. Ct. App. 2017) – The debtors who had given a lender the certificates of title to their automobiles to secure a debt were liable for both compensatory and punitive damages due to their slander of title and conspiracy to commit slander of title in connection with their actions in obtaining duplicate titles, and then using those duplicates to sell one of the automobiles. It did not matter that the lender's security interest was unperfected.

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

   - *Fishback Nursery, Inc. v. PNC Bank*, 2017 WL 6497802 (Bankr. N.D. Tex. 2017) – The financing statements filed by agricultural lienholders in Michigan and Tennessee were ineffective to perfect agricultural liens in farm products located there because they identified the debtor as "BFN Operations, LLC abn Zelenka Farms" instead of simply as "BFN Operations, LLC," and an official search in each of those states would not have disclosed the filings. Consequently, a secured party's perfected security interest in those farm products had priority. The lien

notice that one agricultural lienor filed in Oregon was also 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. Moreover, the financing statement the lienholder filed in Oregon was not a substitute for a proper lien notice because it lacked some of the required information.*

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

   - *In re Reckart Equipment, Inc.*, 2017 WL 943909 (Bankr. N.D. W.V. 2017) – A secured party sent to the secretary of state two financing statements (each naming a different "debtor") in the same envelope and sent a check in an amount sufficient to cover the fee for *one* of the financing statements. The filing office treated the financing statements as a single filing with respect to *one* of the debtors, applied the fee to the combined financing statement, and indexed it under the name of the debtor that the filing office treated as the "debtor". It turned out that the secured party ended up in a priority dispute with another secured party of the debtor named on the second, "unfiled," financing statement. The secured party would have had priority if that financing statement had been "filed." The court held that because the check's memo line referred to the *unfiled* financing statement the filing office should have treated that one as "filed". Thus the secured party was the "first to file" for the unfiled (and unindexed) financing statement and defeated the later-in-time filer. UCC §§ 9-516 and 9-517. In passing, concerning another financing statement, the court also held that the assignment of a "bare" financing statement to a secured party was effective to give that secured party priority as of the filing date of the assigned financing statement.*

   - *In re Voboril*, 568 B.R. 797 (Bankr. E.D.Wis. 2017) – Insurance commissions are "accounts" under Article 9 and a security interest in them must be perfected by the filing of a financing statement. A financing statement was insufficient where the secured party put the individual debtor's name in the fields for

an organization. A search using the filing office's standard search logic would not disclose the financing statement.*

- *In re Nay*, 563 B.R. 535 (Bankr. S.D. Ind. 2017) – A filed financing statement that misstated the debtor's middle name as it appeared in the debtor's driver's license - "Ronald Mark Nay" instead of "Ronald Markt Nay" - was ineffective to perfect because the middle name is part of the debtor's name and a search under that name using the filing office's standard search logic would not produce the filing. It does not matter that a search could be conducted without using a middle name.
- *SEC v. ISC, Inc.*, 2017 WL 3736796 (W.D. Wis. 2017) – A secured party's financing statement, which erroneously had a space between the "Inc" and the period that follows it, was insufficient to perfect because a search against the debtor's correct name using the filing office's standard search logic did not reveal the filing.
- *In re SemCrude, L.P.* , 864 F.3d 280 (3d Cir. 2017) – The security interests of the debtor's oil suppliers were unperfected because: (i) even though the U.C.C. of the suppliers' states - Texas and Kansas - contained non-uniform language purporting to provide the suppliers with an automatically perfected security interest, the law of the jurisdiction where the debtor was located governs (even pursuant to the choice-of-law rules in the suppliers' jurisdictions); (ii) that law did not provide for automatic perfection, and (iii) the suppliers did not file a financing statement in the state where the debtor is located. The exception from the scope of Article 9 in § 9-109(c)(3) for security interests "created" by the government did not apply because the non-uniform language merely enabled the debtor to create the security interest by buying the oil.
- *Fishback Nursery, Inc. v. PNC Bank*, 2017 WL 6497802 (Bankr. N.D. Tex. 2017) – Under UCC § 9-302 the law of the jurisdiction where farm products are located governs the perfection and priority of an agricultural lien on the farm products. Thus the

law of Michigan, Tennessee, and Oregon governed, respectively, the priority of the agricultural liens of the farm products shipped to those states, even though the debtor's contracts with the agricultural lienholders purported to select only Oregon law.

- *In re Tam of Allegheny LLC*, 575 B.R. 131 (Bankr. W.D. Pa. 2017) – A security interest in a Pennsylvania liquor license - which is a general intangible- was not perfected by the secured party's fixture filing. To be perfected, a financing statement had to be filed with the Secretary of the Commonwealth.*
- *In re: Semcrude LP*, _ F.3d _ (3d Cir. 2017) – A state law provided that an oil producer has an automatically perfect security interest in oil sold by the producer. The automatic security interest was not perfected because questions of perfection were governed by the law of the state of the "location" of the buyer, which did not provide for the automatically perfected security interest.

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

   - *Element Financial Corp. v. Marcinkoski Gradall, Inc.*, 215 So. 3d 1252 (Fla. Dist. Ct. App. 2017), *review granted*, (Fla. Oct. 10, 2017) – A lender that financed a California debtor's acquisition of equipment, and who perfected that security interest by filing in California, remained perfected when the guarantor moved the equipment to Florida and sold it because the lender re-filed in Florida less than one year thereafter. A security interest perfected under the law of the jurisdiction in which the debtor is located remains perfected until four months after the debtor moves to a new jurisdiction or one year after the secured goods are transferred to a person located in a new jurisdiction. In this case, the debtor did not move. Instead, the guarantor moved with the secured property. When the guarantor moved the goods from California to Florida, the guarantor became an owner and therefore a debtor and triggered the one-year grace period in UCC § 9-316(a)(3).*

- *Farmer's and Miner's Bank v. Lee*, 2017 WL 4707457 (E.D. Ky. 2017) – An amended financing statement checked the "collateral change" and "delete" boxes, and then listed one of the three items of equipment specified in the original filed financing statement. It referred to the deleted item, not the remaining items, and thus remained effective with respect to the remaining items of collateral described in the initial financing statement. Although the amendment states "[t]his financing statement covers the following collateral," that language refers to the amendment, not the original financing statement.*
- *First Guaranty Bank v. Republic Bank*, 2017 WL 5564582 (D. Utah 2017) – The initial assignee of a lease of software that had been determined to be a conditional sales agreement had no authority to terminate the financing statement because it had further assigned the lease.
- *In re Wheeler*, 2017 WL 6568758 (Bankr. W.D. Ky. 2017) – A secured party's perfected security interest became unperfected when the bank mistakenly filed a termination statement, even though 10 minutes later the bank attempted to amend the termination by adding itself as the secured party. Although the termination might have been inadvertent, it was authorized because it was filed by a loan processor of the bank that handles financing statements. A result the bank's security interest became subordinate to another perfected security interest, that previously was junior to the bank's security interest.*
- *In re Gold Digger Apples, Inc.*, 2017 WL 508209 (Bankr. E.D. Wash. 2017) – Each of the three entities claiming a PMSI in apples sold to an agricultural cooperative had priority over a secured party that had a perfected security interest in the association's assets because each was a successor in interest to the entity that sold the applies. Although Azzano Farms, Inc. claimed priority even though it was Azzano Orchards, LLC that sold the goods and was named as the secured party in the

financing statement, the same individual owned both entities, the entities conducted the same business, and the claimant was the successor to all of the LLCs' assets and business operations. Although Five Star Orchard asserted a PMSI and was named as the secured party in the financing statement, while R&B Orchard was the seller, both entities were general partnerships with the same general partner and the manager. Moreover, the two partners of Five Star Orchard were two of the three partners in R&B Orchard, the third partner having been bought out by the other two. Although Alvarado Orchards, LLC claimed a PMSI based on goods sold by Miguel Alvarado, who was named as the secured party on the financing statement, the business never changed, merely its name. Although the PMSI claimants did not provide the bank with advance notification of their transactions with the association, the secured party waived that requirement in the parties' intercreditor agreement, which provided a waterfall with respect to the order of payments.*

*E. Priority*

*1. Lien Creditors*

- *Granata v. Broderick*, 2017 WL 5478364 (N.J. 2017) – A lender that obtained a security agreement covering a lawyer's right to a contingent fee in a specified pending case had an Article 9 security interest in the lawyer's account. The lender had priority because that interest was perfected by filing before two judicial liens were created on the right to the fee.
- *In re Hutton*, 2017 WL 3704526 (Bankr. E.D.N.C. 2017) – Although a judgment creditor had the sheriff levy on two vehicles of the debtor, and thereby obtained a judgment lien on the vehicles, that lien was not perfected because it was not noted on the certificates of title for the vehicles.

*2. Statutory Liens; Forfeiture*

- *In re Schley*, 565 B.R. 655, 2017 WL 149944 (Bankr. N.D. Iowa 2017) – A feed supplier's superpriority, statutory lien on the

proceeds of pigs that consumed about half of the feed was not limited to the cost of the feed consumed by the pigs sold. The lien and priority extended to the cost of all the feed supplied to the debtor and consumed by the debtor's pigs, even those not sold.

- *In re Edge Pennsylvania, LLC*, 2017 WL 6498039 (Bankr. M.D. Pa. 2017) – A secured party holding a perfected security interest may not have priority over a landlord's statutory lien under a contractual subordination agreement because the agreement also provided that the secured party had no right to leave the collateral on the leased premises for more than 30 days after the lease terminated. It was unclear whether this provision was a condition to the provision on subordination.
- *Dusenbery v. Hawks*, 895 N.W.2d 640 (Minn. Ct. App. 2017) – A bailee's possessory lien had priority over a perfected security interest because UCC § 9-333 grants the possessory lien priority unless the statute creating the lien expressly provides otherwise, and that statute did not so provide. Although the statute did provide that some liens do not have priority over a purchaser or encumbrancer without notice, that portion of the statute did not apply to a bailee's possessory lien.
- *BMIFederal Credit Union v. Charlton*, 2017 WL 5903444 (Ohio Ct. App. 2017) – An auto mechanic's artisan's lien on a vehicle to secure the cost of repair and storage did not have priority over a security interest in the vehicle previously perfected through compliance with the certificate of title statute because the statute giving priority to artisan's liens does not apply to motor vehicles and the certificate of title statute for vehicles expressly provides that a security interest noted on the certificate of title has priority over other liens.
- *Ally Financial Inc. v. Pira*, 2017 WL 6014258 (Ill. Ct. App. 2017) – An auto mechanic was entitled to an artisan's lien on a car, with priority pursuant to UCC § 9-333 over an earlier perfected

security interest. The lien covered detailing and repair charges of $658 but not storage charges of $27,780.

- *S & H Packing & Sales Co. v. Tanimura Distributing, Inc.*, 850 F.3d 446 (9th Cir. 2017), *rehearing en banc granted*, (9th Cir. June 23, 2017) – A commercially reasonable factoring agreement by a buyer of produce removes accounts receivable from the PACA trust without breaching the trust regardless of whether the factoring transaction is a true sale. Accordingly, the unpaid growers of produce had no claim against the factor that purchased accounts from the produce buyer.
- *Farmer's and Miner's Bank v. Lee*, 2017 WL 4707457 (E.D. Ky. 2017) – A secured party with a perfected secured interest in an item of equipment used by the debtor in its service contract with a mining lessee had priority over a claimed mechanic's lien of the entities that repaired and stored the equipment after the debtor ceased performing on its contract. There was no mechanic's lien because the mechanic's lien statute provides for a lien on the lessee's property, but the debtor was not the lessee. Even if the claimants did have a mechanic's lien, the bank's security interest would have priority because it was perfected long before the mechanic's lien would have arisen.

3. *Buyers and Other Transferees*

- *In re SemCrude, L.P.*, 864 F.3d 280 (3d Cir. 2017) – Downstream buyers of oil and gas from the debtors were buyers for value who took free of an unperfected security interest of the debtors' suppliers under UCC § 9-317(b) because the buyers gave value and did not have knowledge of the security interests. Although the buyers allegedly knew of: (i) the state lien laws that created the security interests, (ii) the identities of some of the suppliers, and (iii) the fact that the suppliers were unpaid, that was insufficient proof of knowledge of the security interests, especially because it is customary for payment not to be made until the month following delivery.*

- *Cyber Solutions International, LLC v. Priva Security Corp.*, 2017 WL 3599578 (W.D. Mich. 2017) – A secured party with a perfected security interest in the debtor's inventory of computer chips, manufactured pursuant to a licensing agreement, had priority over the buyer/licensor, which had prepaid for the chips. Nothing in the agreements between the debtor and the buyer indicated that the buyer owned the chips.*
- *Element Financial Corp. v. Marcinkoski Gradall, Inc.*, 215 So. 3d 1252 (Fla. Dist. Ct. App. 2017), *review granted*, (Fla. Oct. 10, 2017) – Even if the buyers of three Bobcat utility vehicles were buyers in ordinary course of the business, they did not take free of a perfected security interest because the security interest was not created by the buyers' seller.*
- *Focarino v. Travelers Personal Insurance Co.*, 2017 WL 1456967 (N.J. Super. Ct. 2017) – A buyer of a vehicle from a dealer that failed to pay off a lender with a prior perfected security interest in the vehicle took free of the rights of the prior owner's insurer, which had paid off the lender. The dealer acquired voidable title to the vehicle and could, under UCC § 2-403, convey good title to a good faith purchaser for value.*
- *SMS Financial JDC, LP v. Cope*, 685 F. App'x 648 (10th Cir. 2017) – A secured party's security interest in a yacht, which was unperfected due to the secured party's failure to document the yacht with the Coast Guard, nevertheless had priority over the rights of the debtor's wife, who had acquired ownership of the yacht. An unperfected security interest is effective against a buyer having knowledge of it. The debtor initially transferred title to a corporation of which he was president. His knowledge of the security interest was imputed to the corporation. The corporation then transferred the yacht to the debtor's wife, who had "implied actual knowledge."
- *TCP Printing Co. v. Enterprise Bank*, 2017 WL 4357378 (E.D. Mo. 2017), *appeal filed*, (8th Cir. 2017) – A secured party entered into

an agreement with a potential buyer of the debtor's assets, by which the secured party agreed to waive its security interest with respect to any receivables arising during the due diligence period from buyer-funded work. The secured party was not liable to the prospective buyer for breach of contract, unjust enrichment, or conversion for collecting the debtor's accounts because the buyer breached the agreement, which caused the agreement to expire.*

- *Farm Credit of Southern Colorado, ACA v. Mason*, 2017 WL 1279716 (Colo. Ct. App. 2017), *cert. granted* (Colo. Oct. 2, 2017) – Although a secured party with a security interest in the debtor's crops might have acquiesced to the debtor's father cultivating and harvesting the crops, the secured party never waived its rights in the crops because such a waiver must be in writing. Consequently, the father was liable in conversion for selling the crops and retaining the sale proceeds.
- *Exodus Vision, LLC v. Touchmark National Bank*, 2017 WL 951732 (N.D. Ga. 2017) – The owner of equipment that the debtor stored in its warehouse - in a segregated area and specially tagged - stated a claim for conversion against the buyer that purchased it from the debtor's secured party.*

4. *Subordination and Subrogation*

- *Berkley Insurance Co. v. Hawthorn Bank*, 2017 WL 4391774 (W.D. Mo. 2017) – A surety issued a performance bond for a general contractor and later completed the contractor's obligations on the bonded project. The surety did not have priority in the contractor's rights to payment for the project over a creditor with a perfected security interest in the contractor's accounts. Even if the surety was entitled to be equitably subrogated to the contractor's rights - and even if that would give it priority over the bank - the right to equitable subrogation applies only after complete performance, not on the date the bond was issued. The secured party did not receive payment after the date performance was completed. Finally, even if the agreement between the contractor and the surety established a valid trust

for the benefit of the surety, because the creditor was not a party to that agreement and was not made aware of the agreement until after it had exercised setoff, the creditor had no liability to the surety.

- *Prestige Capital Corp. v. United Surety and Indemnity Co.*, 245 F. Supp. 3d 349 (D.P.R. 2017) – A factor's perfected security interest in a contractor's accounts did not have priority in the payment due to the contractor from the owner over the rights of the surety that issued a performance bond and completed the contractor's work. Under Puerto Rico law, a surety is subrogated to the owner's and contractor's rights in contract retainages as a consequence of the surety 's performance of the contractor's obligations. This right is superior to that of an attaching creditor. The fact that the owner had deposited the amount owing in connection with its interpleader action did not make this rule inapplicable.*
- *Ameris Bank v. Lexington Insurance Co.*, 2017 WL 4225629 (S.D. Ga. 2017) – An insurer of equipment paid the owner instead of the secured party, which was named as the loss payee on the casualty insurance policy, and was therefore held liable to the secured party. The insurer did not have a claim against the owner for equitable indemnity, conversion, or unjust enrichment because the insurer made the payment voluntarily.
- *In re Ferguson*, 2017 WL 3783260 (C.D. Ill. 2017), *appeal filed* (7th Cir. Sept. 12, 2017) – A creditor with a junior security interest in the debtor's farming equipment and crop proceeds was not entitled to a marshaling order requiring the senior secured party to look first to its real property collateral because the debtor planned to retain the real property and the delay would prejudice the senior secured party. The junior creditor was not entitled to a marshaling order later, after the real property was sold, because even though the bankruptcy court had, when it first denied marshaling, indicated it would consider revisiting the issue if the real property was sold, at the time of the sale there were no longer two separate sources of funds.

5. *Set Off*
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6. *Competing Security Interests*
    - *First Security Bank v. Campbell*, 2017 WL 219516 (N.D. Ill. 2017) – A creditor with a security interest in a securities account stated various claims against the debtors for causing entities controlled by the debtors to transfer securities out of the securities account and then diverting the proceeds of the transferred securities for his own personal benefit. These claims included a claim against one of the debtors for tortiously interfering with an agreement under which the entities acknowledged the security interest and agreed to be bound by the terms of the security agreement. The creditor also stated claims against both debtors for conspiring with the entities to defraud the creditor and for unjust enrichment. The creditor, however, failed to state a claim for aiding and abetting the entities' fraud because the creditor had not specified what misrepresentations were made, to whom, or when.*
    - *Metabank v. Interstate Commodities, Inc.*, 2017 WL 5633104 (D.S.D. 2017) – A creditor that by letter agreed to release or subordinate its security interest in crop proceeds to a new crop financier upon receipt of a specified amount had a conversion claim against the financier that purchased the debtor's crop because the creditor did not receive the specified amount.
7. *Purchase-Money Security Interests*
    - *In re Jett*, 2017 WL 112525 (Bankr. S.D. Miss. 2017) – The court applied the transformation rule, not the dual-status rule, to a PMSI in consumer goods. Thus a secured party's PMSI in the debtors' vehicle lost purchase-money status when the debtors and bank refinanced the debt and included in it two previously unsecured loans. As a result, the secured party's claim could be modified in the debtor's bankruptcy proceeding.
    - *In re McPhilamy*, 566 B.R. 382, 2017 WL 435802 (Bankr. S.D. Tex. 2017) – Although each of the two loans that a debtor incurred to

acquire two vehicles was secured by a PMSI, five other loans that were cross-collateralized by one or the other of the vehicles were not secured by a PMSI. It did not matter that one of these five loans was contemporaneous with the purchase of the vehicle that secured it and another loan preceded the purchase of the vehicle that secured it because, in each case, the vehicle loan covered the full purchase price and there was no evidence that these other loans were used to acquire either of the vehicles.

- *In re Villarreal*, 566 B.R. 859, 2017 WL 535283 (Bankr. S.D. Tex. 2017) – Four loans secured by a car that the debtor previously purchased were not secured by a PMSI. An additional, earlier loan secured by the car, which loan the debtor used to pay off a non-PMSI, was also not a PMSI.
- *In re Manor*, 569 B.R. 764 (Bankr. W.D. Wis. 2017) – A vehicle lender's PMSI included negative equity in the vehicle that the debtor traded in, as well as the charges for taxes, insurance, and a service contract, because all were value given to enable the debtor to acquire the new vehicle.
- *In re Pettit Oil Co.*, 575 B.R. 905 (9th Cir. BAP 2017) – The consignor of fuel in an Article 9 transaction failed to perfect its interest. Thus it had only an unperfected security interest in the accounts receivable and cash constituting proceeds of the consigned fuel. Although UCC § 9-319 refers only to the consigned goods, not their proceeds, when treating the consignor's interest as a security interest, that silence does not make all of Article 9's rules regarding proceeds inapplicable to consigned goods.*
- *In re Leonard*, 565 B.R. 137 (8th Cir. BAP 2017) – A lender with a perfected security interest in the debtor's existing and after-acquired cattle had priority over the reclamation rights of the seller of the cattle to whom the debtor had provided checks that were dishonored. Although the bill of sale provided by the seller to the debtor did not comply with Colorado law because

it was not signed by the debtor and it did not list the address for either party, industry practices indicated that neither the defects in the bill of sale nor the fact that the lender might not have seen it prevented the lender from acting in good faith.*

- *In re Hhgregg, Inc.*, 2017 WL 6016290 (Bankr. S.D. Ind. 2017) – A supplier that sold goods to the debtor less than 45 days before the petition had no reclamation right because the goods were subject to the perfected security interest of the debtor's inventory lender.

8. *Proceeds*

- *Wells Fargo Financial Leasing, Inc. v. Pope*, 2017 WL 114408 (S.D. Miss. 2017) – Because the debtor's secured lender had a perfected security interest in the products and proceeds of the debtor's poultry houses, compost drum, generator, land, and related equipment of his farming operation, it had a perfected security interest in the proceeds of his poultry flocks. Therefore, the debtor's assignee, who knew of the money owed to the secured party and that the debt was secured by the land, poultry houses, and equipment of the poultry farming operation, was liable in conversion for failing to remit the proceeds of the flock to the secured party.
- *Delaware Trust Co. v. Wilmington Trust NA*, _ B.R. _ (Bankr. D.Del. 2017) – The court reaffirmed its earlier decision, following *Momentive*, that distributions under a plan are not '"proceeds of collateral" when … [the creditor] gets stock in the reorganized entity, unless, that stock was paid by a third-party buyer in return for the debtors' assets comprising the collateral.' Here, no substitute for the Collateral was received by the TCEH First Lien Lenders through Plan Distributions."*
- *In re Edwards*, 2017 WL 6754026 (Bankr. E.D.N.C. 2017) – Although a dealer's compliance with the state certificate of title statute perfected its security interest in a mobile home and all accessions thereto, it did not perfect the security interest in drapes, smoke detectors, ceiling fans, a set of steps, or a 4'-by-4'

porch, each of which was readily detachable and not, therefore, an accession.

- *City of Galveston v. Consolidated Concepts, Inc.*, 2017 WL 1196213 (S.D. Tex. 2017) – The IRS, which had filed a notice of federal tax lien against a contractor, had priority over the claim of a lender with an earlier perfected security interest in the contractor's accounts from a specified project. The lender failed to produce sufficient evidence to raise a factual issue that the funds were proceeds of accounts from that project, and the checks previously issued (but not cashed) were made payable jointly to the contractor and a subcontractor.

*F. Default and Foreclosure*

*1. Default*

- *Credit Acceptance Corp. v. Lowery*, 2017 WL 1191087 (Del. Ct. Common Pl. 2017) – A secured party was entitled to a monetary judgment on the secured obligation even though it had not foreclosed on the collateral.*
- *PACCAR Financial Corp. v. Mostoller*, 2017 WL 1902898 (Pa. Super. Ct. 2017) – A secured party was entitled to the full amount of secured obligations from the debtor and guarantors even though the defendants contended that the secured party had disposed of some or all of the collateral. The secured party would, however, have to credit the secured obligation for the amount of the disposition proceeds.
- *Napoleon v. Strategic Dealer Services, LP*, 2017 WL 894540 (Tex. Ct. App. 2017) – A debtor on a car loan: (i) had made payments to one of two assignees of the loan; (ii) received those payments back when the payee determined that the other assignee had priority; and (iii) never paid the assignee with priority. The debtor had no defense or claim against the assignee with priority, which eventually repossessed and sold the car. Because the debtor conceded that she signed the purchase contract, was obligated to make payments, and that she granted a security interest in the car, she was liable on the assignee's

claim for breach of contract. The fact that the assignee did not possess the original contract was irrelevant because the contract was not a negotiable instrument. Although the debtor claimed that the certificate of title application contained her forged signature, there was no evidence that the assignee had knowledge of this when it repossessed and sold the car.*

- *Companion Property and Casualty Insurance Company v. Wood*, 2017 WL 4168526 (D.S.C. 2017) – A debtor granted a security interest in corporate stock. The security agreement gave the secured party a right to "properties received upon the conversion or exchange thereof pursuant to any merger, consolidation, reorganization, *sale of assets* or other agreements". That language, combined with the duty of good faith and fair dealing, precluded the sale of substantially all assets of the pledged entities without delivering the proceeds or benefits of the sales to the secured party.*

2. *Repossession of Collateral*

   - *Walhof & Co., Mergers and Acquisitions, LLC v. MCB Holdings I, LLC*, 2017 WL 5661589 (Minn. Ct. App. 2017) – A secured party initially had a security interest in the debtor's membership units in an entity and obtained a judgment and entered into a cash management agreement with the debtor that purported to assign to the secured party all rights to membership units. Although the cash management agreement also required the secured party to transfer the membership units back to the debtor upon payment of the debt, the secured party had no obligation to act in a commercially reasonable manner when selling the membership units.

   - *Davis v. Toyota Motor Credit Corp.*, F. Supp. 3d 925 (D. Md. 2017) – A debtor who alleged that a repossession agent battered her in connection with a repossession stated a claim for battery against the repossession company. In the absence of an allegation of agency, the debtor had not stated a claim against the secured party. The debtor's allegations also failed to state a claim for breach of the peace because there is no such tort, and

failed to state a claim for conversion or trespass to chattels because the secured party had a right to repossess the collateral.

- *Commerce Bank & Trust Company v. Property Administrators, Inc.*, F. Supp. 3d 14 (D. Mass. 2017) – A secured party had a security interest in an airplane. The debtor, after default, sold the plane without the secured party's permission. The debtor had had avionics removed. The secured party was entitled to a temporary restraining order prohibiting the debtor and the buyer from transferring or altering the airplane.
- *CNHIndustrial Capital America, LLC v. T & P Farms, LLC*, 2017 WL 4448229 (N.D. Miss. 2017) – The assignee of chattel paper was entitled to replevy the underlying goods securing the account debtor's obligation because the account debtor had agreed not to assert defenses against the assignee and had defaulted by not making payments when due.
- *Hartwell v. Lone Star PCA*, 2017 WL 2664445 (Tex. Ct. App. 2017) – A secured party was entitled to a preliminary injunction against the debtor transferring collateral because the secured party showed that the debtor was in default and had committed conversion by selling some of the collateral and not remitting the proceeds to the secured party.
- *Allied Building Products Corp. v. George Parsons Roofing & Siding, Inc.*, 2017 WL 2964018 (E.D.N.Y. 2017) – A creditor claiming a security interest in the debtor's accounts had not demonstrated irreparable harm so as to entitle it to a preliminary injunction prohibiting the debtor from transferring funds outside the ordinary course of business.
- *In re Sun City Gun Exchange, Inc.*, 2017 WL 1968019 (Tex. Ct. App. 2017) – A secured party with a security interest in a defunct gun dealership's inventory could not enter the residence of the debtor's president for the purpose of inspecting, photographing and videotaping all firearms located on the property. The president was not a party to the security

agreement and had offered to produce for inspection at a neutral location the guns in his possession, which he previously testified once belonged to the debtor.

- *Burns v. State*, 2017 WL 2819116 (Tex. Ct. App. 2017) – The debtor refused to return the collateral - a truck - to the secured party after default and threatened to conceal and damage the truck. The debtor was guilty of willfully damaging the truck by removing many components in order to hinder the secured party. The debtor was sentenced to incarceration for two years.*
- *B.J.'s Auto Wholesale, Inc. v. Automotive Finance Corp.*, 2017 WL 6045223 (Ind. Ct. App. 2017) – A guarantor who owned and operated the debtor was also liable for the debtor's conversion of the collateral because the security agreement provided that proceeds were held in trust for the secured party. There was unrefuted evidence that the guarantor exercised control over the proceeds and was aware of a high probability that such conduct was unauthorized.
- *State v. Carey*, 2017 WL 3412150 (Tenn. Ct. Crim. App. 2017) – A debtor granted a second lien on his vehicle. This was insufficient to convict him of intentionally hindering a secured creditor. There was no indication that the debtor was involved in a fraudulent scheme to prevent the initial secured party from repossessing the collateral or receiving payment on the loan. In fact, payments on the initial secured obligation were being withheld from the debtor's paycheck when the second lien was created.
- *Auto-Site v. Matthews*, 2017 WL 5151204 (Ohio Ct. App. 2017) – A secured party repossessed the collateral due to the debtor's fraud or misrepresentation in the original application. The secured party demonstrated its intention to waive the right to rescind by thereafter restoring possession of the collateral to the debtor. Consequently, when the secured party later repossessed and disposed of the collateral, the debtor remained liable for the deficiency.

- *Dupreez v. GMAC, Inc.*, 2017 WL 6016592 (Md. Ct. App. 2017) – A secured party could charge the debtor for the cost of repossessing the collateral, both under the terms of the security agreement and pursuant to UCC § 9-615(a).
- *Connor v. Reilly*, 2017 WL 213840 (W.D. Wis. 2017) – A buyer of a car did not have a cause of action under § 1983 against the sheriff that seized the car and then released it to the secured party without first providing the buyer with a hearing. The buyer had acquired the car, indirectly, from an individual who had paid for it with a fraudulent cashier's check and who, when reselling it, had provided a fake Notice of Lien Release. The secured party retained a security interest in the car that was superior to the rights of the buyer.

3. *Notice of Foreclosure Sale*
   - *Kinzel v. Bank of America*, 850 F.3d 275 (6th Cir. 2017) – A brokerage house did not breach its agreement with its customers by liquidating, without prior notice, securities in the customers' securities account and using the proceeds to pay down the customers' secured obligation to the brokerage because: (i) UCC § 9-611 requires notification only after default, and in this case the brokerage was exercising its contractual discretion to liquidate the collateral in the absence of a default; and (ii) notification is not required when the collateral is traded on a recognized market, and in this case the securities were traded on the New York Stock Exchange, which is a recognized market. The borrower's agreement with its secured party gave the secured party "ultimate control" and "sole discretion" to liquidate the collateral in the securities account when the stock market crashed, which the secured party did. UCC § 9-611 did not apply because the secured party was not acting upon a "default." The secured party acted in good faith by taking steps within the "range" of risk assumed by the borrower. In the absence of a standard to exercise the secured party's discretion, the secured party had to act in a reasonable manner, which it did. A brokerage house did not breach the implied covenant of

good faith and fair dealing by liquidating, without prior notice or demand, a couple's securities account - which at the time consisted principally of stock in one company - when the value of the securities fell. Although the loan-to-value ratio was under 70%, which had been the brokerage's internal threshold for exercising its contractual discretion to liquidate collateral, nothing about the 70% threshold was actually a part of the parties' agreement. Although the debtors had taken great strides to pay down the secured obligation and the brokerage was aware of their attempt to obtain a home-equity line of credit and move other assets into the securities account, the brokerage liquidated collateral after the Dow Jones Industrial Average was at a twelve-year low and the securities were at their lowest price since 1991.*

- *Hamilton v. Muncy*, 2017 WL 4712410 (Ky. Ct. App. 2017) – A used car dealer with a security interest in a car sold to a consumer and whose notification of disposition did not comply with UCC § 9-614 was not entitled to a deficiency.

4. *Commercial Reasonableness of Foreclosure Sale*

- *Bruce v. Cauthen*, 2017 WL 455578 (Tex. Ct. App. 2017) – A limited partner who had a security interest in another partner's partnership interest wrongfully purchased that interest at a private sale. Although the partnership agreement expressly acknowledged that a public sale might be impossible due to securities laws, and that a private sale would be commercially reasonable even if it produced less than what a public sale would, it did not expressly modify the prohibition in UCC § 9-610(c) on a secured party buying at a private sale.*
- *Volvo Financial Services v. Williamson*, 2017 WL 4708136 (S.D. Miss. 2017) – A secured party did not act in a commercially unreasonable manner in failing to recondition two collateralized trucks and selling them for salvage. The secured party had the trucks inspected by an independent appraisal service and the estimated costs of reconditioning were higher than their reconditioned value. Although the salvage buyer was

now offering the trucks for sale at a significantly higher price, that was only an asking price, not evidence of current value, and there was no evidence of the amount spent on reconditioning. The secured party also acted in a commercially reasonable manner in selling for $69,010 another truck with an estimated wholesale value of $80,850. The fact that the value of the collateral exceeds the disposition price is insufficient to establish that the disposition was commercially unreasonable. Although the sale might have yielded a higher price if the secured party had first reconditioned the truck, the value took its lack of reconditioning into account.*

- *Kosowski v. Alberts*, 2017 WL 6604565 (Ill. Ct. App. 2017) – A secured party could not be liable for failing to conduct a commercially reasonable disposition of the collateral because the assignee to whom the debtor made an assignment for the benefit of creditors, not the secured party, conducted the disposition. Because the disposition was approved by the assignee, it is commercially reasonable under UCC § 9-627(c)(4).
- *Woods v. Hall*, 2017 WL 2645689 (Wash. Ct. App. 2017) – Although a secured party declined to enter the debtor's leased premises to remove the collateral, due to threatened criminal charges, the debtor was liable in conversion for interfering with the secured party's right to reclaim the collateral because the debtor refused to deliver the collateral curbside despite the secured party's demand that the debtor do so.*
- *Jones v. Community Bank of Wichita*, 2017 WL 840249 (Kan. Ct. App. 2017) – A guarantor granted a security interest in a CD jointly owned with her sister to a bank to secure a loan to the sister's business. The guarantor had no cause of action for fraud against the sister's husband for allegedly encouraging the secured party to declare a default and foreclose on the CD because the guarantor did not claim that any of the husband's statements was untrue. In any event, all the statements were made to the secured party, not to the guarantor. Although the

husband might have mistakenly indicated that there were two $100,000 CDs instead of one $200,000 CD, the guarantor failed to show how that was material or how she had detrimentally relied on that misstatement. The guarantor also had no claim for conversion, unjust enrichment, or civil conspiracy.*

- *Wells Fargo Bank, N.A. v. Holdco Asset Management, L.P.*, _ F.Supp.3d _ (S.D.N.Y. 2017) – A secured party held an auction of collateral. Under NY law the court held that the auction was impliedly with reserve and thus the secured party was entitled to reject the highest offer. In addition, because misrepresentation and conversion claims concerning the collateral were duplicative of the contract claims arising from the auction, the tort claims could not be maintained.

5. *Collection*

- *Ara, Inc. v. Waste Management National Services, Inc.*, 2017 WL 4857428 (D. Minn. 2017) – A factor that purchased accounts had no private right of action under UCC § 9-404 or UCC § 9-607 against an account debtor for paying the debtor after receiving instructions to pay the secured party.*
- *Durham Commercial Capital Corp. v. Ocwen Loan Servicing, LLC*, 2017 WL 1196574 (S.D. Fla. 2017) – A factor's letter to a law firm's client that identified the firm's accounts receivable assigned to the factor and instructed the client to pay the factor was effective under UCC § 9-406 even though the notification did not identify the underlying transactions giving rise to the client's obligation to the firm. Even if the law firm violated the rules of professional conduct by giving the factor access to confidential files, and even if that formed the basis for a claim of malpractice against the firm, the factoring agreement was enforceable. However, there were unresolved issues regarding the client's defenses and setoff rights that prohibited summary judgment on the factor's claim against the client.
- *CNHIndustrial Capital America, LLC v. Able Contracting, Inc.*, 2017 WL 4358706 (D.S.C. 2017) – A buyer of several items of

equipment agreed not to assert against the seller's assignee any claim or defense the buyer might have against the seller. The buyer had no defense based on its claim that it "revoked acceptance by returning the equipment" to the assignee. The buyer also could not assert a defense based on fraudulent inducement.

- *Mccarthy Improvement Co. v. Manning & Sons Trucking & Utilities, LLC,* 2018 WL 3009021 (D.S.C. 2018) – An account debtor that claimed to have overpaid the debtor and the secured party due to the debtor's inclusion of unauthorized surcharges in its invoices had no unjust enrichment claim against the secured party because § 9-404(b) expressly denies an account debtor a right to affirmative recovery against a secured party. The secured party should be protected from claims that the account debtor has against the debtor, but should not be protected against claims that the account debtor has directly against the secured party (such as overpayment).

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

   - *Cohen v. Forden*, 2017 WL 370909 (N.J. Super. Ct. 2017) – A managing member of a company who had an unperfected security interest in the company's assets was guilty of fraud and negligent misrepresentation for failing to disclose the security interest to a lender who would not have made the loan had he known of the security interest.*

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

   - *Gay v. Alliant Credit Union*, 2017 WL 35704 (E.D. Mo. 2017) – A debtor failed to state a cause of action against a secured party

for damages caused by the fact that the collateral – a boat – had sunk because the secured party never took possession of the boat. Although the secured party sent the debtor a notice stating that the secured party had repossessed the boat, the debtor knew that was not true. Although the secured party had indicated an intention to repossess the collateral and had received relief from the automatic stay to do so, that did not justify the debtor's decision not to winterize the boat and could not be the basis for a promissory estoppel claim.

- *Kaiser v. Cascade Capital LLC*, 2017 WL 2332856 (D. Or. 2017) – A debt collector's deficiency action on a car purchase loan, brought after the car was repossessed and sold, was subject to the four-year limitations period applicable to an action relating to a sale of goods, not the six-year limitations period applicable to contracts generally (including actions under Article 9). Accordingly, the debt collector could be liable under the Fair Debt Collection Practices Act for initiating the action.
- *Volvo Financial Services v. Williamson*, 2017 WL 4708136 (S.D. Miss. 2017) – The one-year limitations period under Mississippi law for an action for a deficiency did not begin to run when the secured party, who held seven notes, each secured by a vehicle, sold the first vehicles because the notes were cross-collateralized. Instead, the limitations period began after the last item of collateral was sold.
- *In re Ambrose*, 568 B.R. 716 (Bankr. N.D. Ga. 2017) – The Georgia Motor Vehicles Sales Finance Act generally prohibits a secured party that disposes of a motor vehicle from recovering a deficiency unless the secured party notifies the debtor within 10 days after repossession of its intent to pursue a deficiency. The act applies only to sellers and to finance companies that purchase chattel paper from sellers, not to lenders that provide financing directly to car buyers.
- *O.F.I. Imports Inc. v. GECC*, 2017 WL 6734187 (S.D.N.Y. 2017) – A debtor failed to state a claim against a secured party that

failed to file a termination statement or release its interest in the collateral after the debtor paid down to zero its obligation on a revolving line of credit because the security agreement conditioned the secured party's obligation to do so on the debtor's deposit of sufficient cash to cover all contingent obligations and execution of a release, neither of which the debtor had claimed to provide.*

- *In re House*, 2017 WL 2579026 (Bankr. S.D. Miss. 2017) – A secured party was liable for $500 for not returning items allegedly in the debtors' car at the time of repossession despite testimony that the secured party's business practice was to inventory and store items of value.
- *MBI International Holdings Inc. v. Barclays Bank PLC*, 57 N.Y.S.3d 119 (N.Y. Sup. Ct. 2017) – A creditor had a security interest in lease payments due from the Saudi government and allegedly settled by releasing the Saudi government from the lease in exchange for a banking license in Saudi Arabia. The debtor's claim against the secured party was barred by the statute of limitations, which requires that the action be brought within six years or within two years of when it should have been discovered. The conduct alleged occurred in 2006, the debtor was aware of the settlement by 2008, and the banking license became public knowledge in 2009.
- *Cece & Co. Ltd. v. U.S. Bank*, 60 N.Y.S.3d 5 (N.Y. App. Div. 2017) *NMC Residual Ownership LLC v. U.S. Bank*, 60 N.Y.S.3d 110 (N.Y. App. Div. 2017) – A holder of residual interests in a REMIC trust stated a claim for breach of contract against the trustee for selling trust assets to itself at a price below market. Although an indenture trustee does not owe a fiduciary duty to the trust beneficiaries and its obligations are defined by the terms of the indenture agreement, it does owe a duty to avoid conflicts of interest. The court stated there would be no claim if the indenture agreement had expressly given the trustee the right to purchase trust assets at a price below market, but it did not. The indenture stated that the trustee may terminate the trust by

purchasing the remaining trust assets. The agreement obligated the trustee to deposit a specified amount in an account for the beneficiaries, but did not state that this amount is the purchase price.*

7. *Successor Liability*

   - *US Herbs, Inc. v. Riverside Partners, LLC*, 2017 WL 238446 (N.D. Ohio 2017) – An entity purchased assets of the debtor from the debtor and its secured creditors – in lieu of a private foreclosure sale. The buyer was not liable to an existing creditor of the debtor because: (i) the buyer expressly disclaimed liability in the purchase agreement; (ii) there was no *de facto* merger because the debtor did not immediately or rapidly dissolve; and (iii) and the buyer was not a "mere continuation" of the debtor because there was no continuity of ownership.*
   - *Wass v. County of Nassau*, 60 N.Y.S.3d 339 (N.Y. Sup. Ct. 2017) – An individual injured by an allegedly defective ladder had no product liability claim against the corporation that bought the assets of the manufacturer from the SBA, after the SBA had foreclosed its security interest in those assets. The "mere continuation" doctrine of successor liability did not apply because, even though the corporation employed some of the people who had worked for the manufacturer, there was no sale between manufacturer and the corporation, no continuity of ownership or control, and no corporate reorganization.*
   - *In re Comprehensive Power, Inc.*, 2017 WL 6327192 (Bankr. D. Mass. 2017) – A bankruptcy trustee stated a claim for successor liability under both the *de facto* merger and *alter ego* theories against the secured party that purchased the debtor's assets at a public disposition pursuant to a "loan to own" strategy and then hired many of the debtor's employees to engage in the same business, even though there was no continuity of ownership.*
   - *Columbia State Bank v. Invicta Law Group PLLC*, 402 P.3d 330 (Wash. Ct. App. 2017) – A lawyer's sole proprietorship was the

successor - under the "mere continuation" theory of successor liability - of the professional limited liability company of which he was the sole member and manager and which ceased paying its debts when the lawyer filed for personal bankruptcy protection. The lawyer continued his individual law practice under the sole proprietorship using the same name, location, website, signage, telephone number, employees, and equipment as the PLLC, and represented the same clients. The sole proprietorship also held itself out to the landlord and malpractice insurer as the PLLC or its successor. Because the lawyer, as a sole proprietor, had successor liability for the obligations of the PLCC, the lawyer was also bound by the attorney's-fees clause in the PLCC's loan agreement with a bank.

- *La Bella Dona Skin Care, Inc. v. Belle Femme Enterprises, LLC*, 805 S.E.2d 399 (Va. 2017) – Unlike successor liability based on fraud, which must be proven by clear and convincing evidence, successor liability based on "mere continuation" need be proven only by a preponderance of the evidence.

*G. Retention of collateral*

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- *Black Sky Capital v. Cobb*, _ Cal.App.4th _ (2017) – A "sold-out junior" that held both the senior and the junior term debt each secured by a deed of trust on the same property could bring an action on the note (now unsecured) that had been secured by a junior deed of trust. The court declined to follow *Simon* where the court held that the holder of both the first and the second could not use the "sold-out junior" rule. The court concluded that either *Simon* was wrong or that because the two loans in *Simon v. Superior Court*, 4 Cal.App.4th 63 (1992) were made at the same time, the lender was trying to "circumvent" the anti-deficiency laws. In this case, the loans were made two years apart, so there was not a "circumvention" issue.

- *AgStar Financial Services, ACA v. Northwest Sand & Gravel, Inc.*, 391 P.3d 1271 (Idaho 2017) – A mortgagee that purchased the mortgaged real property at a foreclosure with a credit bid of less than the full debt, but which was denied a deficiency judgment because the value of the property exceeded the debt, could not thereafter foreclose on the personal property collateral. The debt was extinguished by the foreclosure sale.

- *Chatham Square Owners Corp. v. Roth*, 52 N.Y.S.3d 245 (N.Y. Dist. Ct. 2017) – The buyer of a condominium at an Article 9 foreclosure sale could not use summary proceedings to evict the debtor. The debtor was not a licensee but instead a tenant under the proprietary lease, even if that lease had been terminated by the sale.

- *Arsr Solutions, LLC v. 304 East 52nd Street Housing Corp.*, 48 N.Y.S.3d 510 (N.Y. Sup. Ct. 2017) – Because the lender that had a security interest in shares of stock associated with three cooperative apartment units purchased the shares at an Article 9 disposition, the lender's successor was entitled to an order requiring the cooperative housing corporation to recognize the successor as the owner of the stock, to deliver to the successor a

new stock certificate naming the successor as the owner, and to issue to the successor proprietary leases for the apartment units associated with those shares.

- *3432 West Henderson Building, LLC v. Gizynski*, 81 N.E.3d 94 (Ill. Ct. App. 2017) – A mortgagee was entitled to default interest on amounts paid for attorney's fees incurred in connection with the mortgage because the mortgage expressly provided that such expenses "shall become a part of the Indebtedness payable on demand and shall bear interest at the Note rate from the date of the expenditure until repaid."

## III. GUARANTIES

- *Western Surety Company v. FutureNet Group, Inc.*, 2017 WL 227957 (E.D. Mich. 2017) – The defendant in an action on an indemnification agreement, which the court had preliminarily enjoined from transferring of any of the collateral for its obligations outside the ordinary course of business, would not be permitted to factor $997,500 in receivables for $750,000. Such a transaction would effectively be a loan at a 24.9% interest rate, would not be in the ordinary course of business, and was not shown to be necessary.
- *Firestone Financial, LLC v. Meyer*, 2017 WL 714110 (N.D. Ill. 2017), *appeal filed*, (7th Cir. 2017) – The lender that provided loans to finance the acquisition of equipment was entitled to summary judgment against the guarantor of those loans even if, as the guarantor alleged, the lender failed to fulfill an oral promise to make additional loans and that failure led to the demise of the borrower's business. The alleged oral promise was too vague to be enforceable because it did not indicate the interest rate or the repayment period. Moreover, it was not reasonable for the guarantor, a former businessman and disbarred attorney, to rely on the alleged promise because it entailed funding new equipment purchases without further question, the signing of documents, or any further review of the guarantor's finances, all of which the lender had done prior to making the earlier loans.
- *Regions Bank v. Thomas*, 2017 WL 4585612 (Tenn. 2017) – A secured party that failed to provide the guarantors with notification of its planned disposition of the collateral did rebut the resulting presumption that no deficiency was owning by submitting evidence that disposition proceeds exceeded the fair market value of the collateral at the time of the disposition. However, because the secured party still has the burden of proof on what deficiency is owing, the guarantors could submit evidence that, with notification, they would have satisfied the secured obligation. The

guarantors lacked standing to seek recovery of a surplus, even if a proper disposition would have yielded a surplus.

- *Walker v. Probandt*, 902 N.W.2d 468 (Neb. Ct. App. 2017) – An individual who signed a promissory note as an accommodation party was liable for the unpaid portion of the note to the entity to whom the note was assigned when another accommodation party entered into a settlement with the payee. The claim was not an action for contribution, but an action on the note by the assignee.
- *Vaneiser, LLC v. Nebraska Bank of Commerce*, 2017 WL 1229931 (Neb. Ct. App. 2017) – The bank with a security interest in the assets of an LLC and which, pursuant to a settlement agreement, conducted a public sale of the assets, was entitled to apply some of the sale proceeds to pay the LLC's obligation, under a guaranty, for the deficiency remaining on the debt of a sister entity following foreclosure of a deed of trust. The settlement agreement did not release the LLC of its liability on the guaranty. The bank could not, however, use any of the sale proceeds to pay a $12,500 auction fee that the bank charged, even though the settlement agreement provided for the LLC to pay "costs associated with . . . the auction."
- *Sterling Savings Bank v. Thornburgh Resort Co.*, 694 F. App'x 568 (9th Cir. 2017) – Although the owner of real property that gave a bank a deed of trust on the property to secure a third party's debt thereby acquired suretyship status, the owner did not perform its secondary obligation until the bank foreclosed. Consequently, even if the bank impaired the owner's suretyship status by releasing cash collateral, that occurred before, not after, the owner performed. Because performance was with knowledge of the impairment, the owner had no defense based on the impairment.*
- *Ford Motor Credit Co. v. Orton-Bruce*, 2017 WL 1093906 (S.D.N.Y. 2017) – The continuing guaranties that the owner of a car dealership and his wife provided to an automobile manufacturer, and which provided for termination with respect to future indebtedness by providing notification sent by registered mail,

remained in effect after the owner sold the dealership to his son. Neither guarantor sent notification of termination. It did not matter that the manufacturer had approved the sale.*

- *York v. RES-GA LJY, LLC*, 799 S.E.2d 235 (Ga. 2017) – A mortgagee that judicially foreclosed on several items of real property but was denied judicial confirmation of the sales because it failed to prove that it had obtained the fair market value of the properties sold was nevertheless entitled to judgment against the guarantors of the debt. The guarantors, by expressly waiving in the guaranty agreements "all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of . . . 'anti-deficiency' law" had effectively waived the protection of the state confirmation statute, which is a defense based on suretyship and based on an "anti-deficiency" law.
- *G & W Warren's, Inc. v. Dabney*, 218 Cal. Rptr. 3d 75 (Cal. Ct. App. 2017) – A written guaranty executed in connection with the sale of a motorcycle dealership and which covered the obligations under the promissory note and lease did not cover the buyer's obligations under a noncompete agreement or two consulting agreements. Although the guaranteed "Purchase Price" was expressly stated to be in exchange for, in part, goodwill, there was nothing in the transaction documents to support the seller's contention that goodwill included the compensation allocated to the noncompete and consulting agreements.*
- *The Coastal Bank v. Martin*, 2017 WL 5564525 (11th Cir. 2017) – A bank was entitled to obtain a deficiency judgment against the guarantors of a mortgage loan even though the bank had purchased the property at the foreclosure sale and had not obtained a court order confirming that the foreclosure sale price constituted the fair market value of the property because even thought a debtor cannot waive the confirmation requirement, guarantors can under Georgia law and they did in this case.

- *Gensco, Inc. v. Johnson*, 2017 WL 3589251 (Wash. Ct. App. 2017) – The individual who signed a continuing guaranty of the obligations of a corporation and later rescinded the guaranty remained liable for the obligations incurred prior to rescission. The guaranty was not limited either to debts incurred at only one of the debtor's locations or to the amount of the desired credit limit in the initial application because the guaranty covered "all existing and future indebtedness." The creditor's allocation of a portion of payments received after rescission to the newly incurred debts was effective because the credit agreement expressly stated that the creditor" may apply payments at its own discretion," unless contrary instructions were provided by the debtor.

- *Vendorpass, Inc. v. Texo Solutions, L.L.C.*, 2017 WL 444303 (N.J. Super. Ct. 2017) – A secured party that received payment from the debtor after the debtor had received funds from a related entity had no liability to a creditor of the related entity. There was no basis for a claim of constructive trust because the secured party was not unjustly enriched by the repayment of a debt. Even if the transfer of funds to the debtor was a constructive or intentionally fraudulent transfer, the secured party was a good faith subsequent transferee that gave value, and hence had a valid defense. Moreover, the secured party took free as a transferee of money.
- *United States Small Business Administration v. Bensal*, _ F.3d _ (9th Cir. 2017) – The Federal Debt Collection Procedures Act has a fraudulent transfer provision. That provision authorizes the federal government to void a "fraudulent transfer" by a debtor owing a debt to the United States. The Act preempts a state law that allows a debtor to disclaim an inheritance and thereby place the property to be inherited beyond the reach of the government.
- *Nautilus, Inc. v. Yang*, _ Cal.App.4th _ (2017) – The Uniform Fraudulent Transfer Act (the predecessor to the Uniform Voidable Transactions Act) allows a transferee to avoid liability if it can establish that it acted in good faith. The court held that the good faith defense is not available if the transferee had fraudulent intent, colluded with a person who was engaged in the fraudulent conveyance, actively participated in the fraudulent conveyance, or had actual knowledge of facts showing its knowledge of the transferor's fraudulent intent. The court emphasized that the transferee was not subject to inquiry notice of facts that would have given it knowledge of the fraudulent intent. The court also held that the transferee has the burden of proof in establishing its good faith.
- *McDonald v. Nixon Energy Solutions*, 2017 WL 1836937 (D.S.C. 2017) – The supplier of a generator to a biogas facility had no fraudulent conveyance claim against the owner's secured party for

receiving payment of a federal grant to the owner, even though the secured party perfected its security interest after the supplier filed a notice of its mechanic's lien and the secured party never complied with the Federal Assignment of Claims Act. The secured party did have a security interest in the owner's general intangibles, which included the right to payment of the federal grant, and there was no evidence that the owner was insolvent when the security interest was transferred. The supplier also had no claim for tortious interference with contract against the secured party because the secured party was justified in receiving the payment.

- *Janice M. Hinrichsen, Inc. v. Messersmith Ventures, L.L.C.*, 895 N.W.2d 683 (Neb. 2017) – The trial court did not err in concluding that the transaction by which an insurance agency with a $98,000 judgment against it sold for $250 to an entity newly formed by the agency's owner the agency's customer list was a fraudulent transfer for less than reasonably equivalent value. However, the trial court did err in awarding judgment for only $250. Although the plaintiff did not prove the value of the customer list, the proper remedy for a fraudulent transfer is to avoid the transfer, so the plaintiff should have been permitted to levy on the asset transferred or its proceeds.*
- *Georgia Commercial Stores, Inc. v. Forsman*, 803 S.E.2d 805 (Ga. Ct. App. 2017) – An unsecured creditor of an insolvent LLC stated claims for breach of fiduciary duty and intentionally fraudulent transfer against the LLC's president for causing the LLC to repay a $239,000 debt to the president. Just as the officers and directors of an insolvent corporation owe a fiduciary duty to the corporation's creditors, so too do the managing members of an insolvent LLC. Although the LLC's assets were fully encumbered and the payment was made with the secured creditor's approval, those facts alone did not demonstrate that the unsecured creditor was uninjured by the transfer; the claim of a creditor that diligently pursues collection are not reduced or defeated by the hypothetical claims of other creditors who have slept on their rights.

- *Duncan v. Asset Recovery Specialists, Inc.*, 2017 WL 2870520 (W.D. Wis. 2017), *appeal filed*, (7th Cir. Aug. 8, 2017) – Although the debtor did not have a claim under the Fair Debt Collection Practices Act against either the secured party or the repossession agent based on her mistaken belief that the repossession agent sought to charge her $100 to return property within the repossessed car, the debtor might have a conversion claim.
- *Impala Platinum Holdings Limited v. A-1 Specialized Services and Supplies, Inc.*, 2017 WL 2840352 (E.D. Pa. 2017) – Pursuant to the Uniform Contribution Among Tortfeasors Act, the defendant who the jury determined was 59% responsible for the $16 million verdict in a fraudulent transfer action was not entitled to any reduction for the amount paid by the defendants who settled during the trial because the settlement agreement provided that any judgment against other tortfeasors would be reduced by the *pro rata* share of liability the jury apportioned to the settling defendants. Thus, the defendant remained liable for 59% of $16 million, even though that amount plus the settlement amount exceeded $20 million.
- *Stoltenberg v. Sheppard, Mullin, Richter, & Hampton, LLP*, 2017 WL 2644646 (Cal. Ct. App. 2017) – A law firm that acquired a security interest in a client's artwork and cooperative apartments to secure the payment of the firm's fees did not thereby receive a fraudulent transfer. Although the security interest attached after an $8.5 million judgment was entered against its client, it initially appeared that the client had sufficient assets to pay the firm's fees and at least a portion of the judgment and the judgment creditor's counsel had agreed that the client could use the art to pay attorney fees. The transfer was not constructively fraudulent because even if the collateral was worth substantially more than the amount of the fees, the firm's lien was limited to the amount of the fees.*
- *Wells Fargo Equipment Finance, Inc. v. Bacjet, LLC*, 221 So. 3d 671 (Fla. Ct. App. 2017) – A secured party located in Oklahoma and that did not lend to Florida residents was nevertheless subject to personal jurisdiction in Florida with respect to a judgment

creditor's fraudulent transfer action against the secured party with respect to the transaction by which the secured party acquired a security interest in the judgment debtor's accounts, stock certificates, and Florida homestead.

- *Mizrahi v. Checkolite International, Inc.*, 2017 WL 111919 (D.N.J. 2017) – An unsecured creditor of a corporation stated a cause of action for violation of the New Jersey Uniform Fraudulent Transfer Act against the corporation's secured lender and the buyer of the corporation's assets at a disposition by the secured lender. The unsecured creditor alleged that the buyer, which employed the debtor's principal owner, and the secured lender conspired to prevent payment to the unsecured creditor.
- *Meoli v. Huntington National Bank*, 848 F.3d 716 (6th Cir. 2017) – Because a bank's investigator discovered the fraudulent past of the operator of a Ponzi scheme, whose company was a depositor and borrower of the bank, but failed to share that discovery with the bank's manager who oversaw the company's account, the bank failed to demonstrate that it acted in good faith with respect to loan payments it received after that date. With respect to earlier indirect transfers, the bank did not necessarily have knowledge of the voidability of those transfers merely because it had acquired inquiry notice of the fraud; it depends on what a reasonable investigation would have disclosed. Moreover, the bank was not a "transferee" with respect to deposits received into the depositor's account from a related entity that participated in the scheme because the bank has no dominion or control over ordinary deposits that the customer could withdraw, even though the bank had a security interest in the deposits.
- *In re Cornerstone Homes, Inc.*, 567 B.R. 37 (Bankr. S.D.N.Y. 2017) – The debtor's bankruptcy trustee stated a cause of action for actual and constructive fraudulent transfers against the banks for making loans that enabled the debtor to operate a Ponzi scheme. The complaint adequately pled fraudulent intent of the transferor by alleging that the loans were used to create the illusion of profitability, to pay off individual investor loans, to solicit

individuals to make unsecured investments, and to perpetuate the alleged Ponzi scheme. The complaint adequately pled fraudulent intent of the banks by alleging that, at the time the loans were made, the banks knew or should have known that the debtor was insolvent based on the debtor's audited financial statements and tax returns, which the banks had. The trustee also adequately pled claims for constructive fraud by alleging that the banks lacked good faith for the same reasons.

- *In re International Management Associates, LLC*, 563 B.R. 393 (Bankr. N.D. Ga. 2017) – Although all transfers in furtherance of a Ponzi scheme are presumed to have been made with fraudulent intent, to be "in furtherance of" the scheme and subject to the presumption, a transfer must be one that directly and materially induces future investors. Therefore, the debtor's transfer of funds to a brokerage to open an account was not in furtherance of the debtor's Ponzi scheme. The transfer was for contemporaneous and equivalent value to a third party who was neither an investor nor participant in the scheme. Even if the presumption did apply, the brokerage acted in good faith. While an insider might be subject to an objective standard of good faith - and therefore properly be charged with knowledge of the facts that an inquiry in response to red flags would have disclosed - an unaffiliated third party in an arm's-length transaction is subject only to a subjective standard of good faith, and lacks good faith only if it has actual knowledge of the insolvency of the debtor or the existence of a Ponzi scheme. The fact that the account was opened in the name of the debtor entity and funded with the entity's assets, rather than in the name of the entity's owner does not suggest bad faith, even if that somehow violated regulatory requirements or the brokerage's internal policies. The fact that two of the debtor's checks to the brokerage were dishonored and funds were then sent by wire might indicate financial difficulties, inadequate capital or liquidity, or insolvency, but does not give rise to an inference of dishonesty of lack of integrity. Finally, the fact that the debtor traded on margins, incurred substantial losses, and the brokerage did not investigate further, as industry standards might require,

would be relevant only if good faith were an objective test; it does not suggest that the brokerage lacked honesty or remained willfully ignorant of facts that would give rise to a belief that the debtor was operating a Ponzi scheme.

- *In re Comprehensive Power, Inc.*, 2017 WL 6327192 (Bankr. D. Mass. 2017) – The trustee stated a claim that the secured party's purchase of the debtor's assets at a public disposition was intentionally fraudulent by alleging that the secured party engaged in a "loan to own" strategy and because it assumed effective control of the debtor prior to the sale, its intent could be imputed to the debtor. The trustee also stated a claim that the transfer was constructively fraudulent by claiming that the value of the assets was substantially greater than the amount the secured party's credit bid, which was the only bid.
- *Ehrlich v. Commercial Factors of Atlanta*, 567 B.R. 684 (N.D.N.Y. 2017) – The allegations of the debtor's bankruptcy trustee that the debtor provided false invoices to its factor to obtain new loans, and used those funds to pay down the debt to the factor, did not state a claim against the factor for avoidance of a fraudulent transfer. The factor had a perfected security interest in all of the debtor's assets, and thus the transfers could not have harmed other creditors.
- *In re Caribbean Fuels America, Inc.*, 688 F. App'x 890 (11th Cir. 2017) – In ascertaining the value of what the debtor received in exchange for an allegedly constructively fraudulent transfer, the objective value of the property is what matters, not whether the debtor benefitted from it. Accordingly, because the trustee did not challenge the objective value of the leasehold that the debtor received in return for the rent paid for a house used as a residence and office by the debtor's principals, the payments were not avoidable.
- *Development Specialists, Inc. v. Kaplan*, 574 B.R. 1 (D. Me. 2017), *appeal filed*, (1st Cir. May 17, 2017) – The bankruptcy court did not err in concluding that reasonably equivalent value was received

by corporations that signed promissory notes and granted a security interest in their assets to secure a loan used to pay the corporations' shareholders for their stock, which was transferred to the corporations' new parent. The shareholder gave reasonably equivalent value and although the bankruptcy court failed to focus on what each of the corporations received, the court did find synergy and indirect benefits in the transaction.

- *In re Fah Liquidating Corp.*, 572 B.R. 117 (Bankr. D. Del. 2017) – The debtor's prepetition transfers of $31.5 million to a German company could not be avoided as constructive fraudulent transfers under § 548(a)(1)(B) because, even though the transfers originated in the United States from a Delaware corporation, they were made pursuant to contracts that included milestones to be achieved at production facilities in Germany, required disputes to be resolved in Munich, chose German law to govern, and required payment in Euros, and thus the transfers were made extraterritorially.
- *In re East Coast Foods, Inc.*, 2017 WL 3701211 (Bankr. C.D. Cal. 2017) – The recipient of an avoidable fraudulent transfer has no claim for the consideration provided if the recipient did not act in good faith.
- *In re Trinity 83 Development, LLC*, 574 B.R. 136 (Bankr. N.D. Ill. 2017) – The re-recording thirteen months before the petition of a mortgage for which a satisfaction had erroneously been recorded did not result in a new "transfer" that could be avoided under § 548.
- *PGA West Residential Association, Inc. v. Hulven International, Inc.*, _ Cal.App.4th _ (2017) – An individual sought to shield his real property from the claims of his creditors by creating a sham corporation and then giving the sham corporation a sham note and sham deed of trust. The plan was for the sham entity to foreclose on the real property. A creditor of the individual brought an action to invalidate the deed of trust. In a reversal of roles, the creditor argued that a "transfer" — and therefore a fraudulent

transfer") had not taken place because everything was a sham and the "transferee" argued that a fraudulent transfer had taken place. The reason for this reversal is that the applicable statute of repose had lapsed and with it the substantive claim had been "extinguished." Although the complaint did not allege a fraudulent transfer in those words, the court ruled that the "gravamen" of the claim was a fraudulent transfer and ruled for the "transferee."

- *Slone v. Commissioner of Internal Revenue*, _ F.3d _ (9th Cir. 2018) – Shareholder of transferor received a fraudulent transfer in a tax avoidance transaction.

## V. CREDITOR AND BORROWER LIABILITY

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

- *Roy Allan Slurry Seal v. American Asphalt South,* _ Cal.5th _ (2017) – For a plaintiff to state a cause of action for intentional interference with prospective economic advantage, the plaintiff must allege that it had a preexisting economic relationship with a third party with probable future benefit that preceded or existed separately from defendant's interference. In the particular case of a public works contract, where the governmental entity has very broad discretion to reject bids, an "existing" relationship does not exist sufficient to support the claim because the prospective economic benefit is too "speculative" and "attenuated."
- *Honeycutt v. United States,* _ U.S. _ (2017) – The members of a criminal conspiracy do not have "joint and several liability" for forfeiture among the members of the criminal conspiracy, unless the individual conspirator "acquired" or "personally benefit[ed]" from the forfeitable property.
- *Ascentium Capital LLC v. Adams Tank & Lift Inc.*, 2017 WL 4102741 (M.D. Ga. 2017) – The lender expecting to obtain a PMSI in equipment and which advanced funds directly to the debtor's seller had a cause of action against the seller for money had and received - but not for unjust enrichment - for not returning the portion of the funds allocated to equipment that the debtor never purchased, and instead forwarding those funds to the debtor.
- *Transit Funding Associates, LLC v. Capital One Equipment Finance Corp.*, 48 N.Y.S.3d 110 (N.Y. App. Div. 2017) – Because a loan agreement expressly provided that the lender could deny any funding request "in its sole and absolute discretion," the borrower had no claim against the lender for breach of contract or breach of the duty of good faith arising from the lender's refusal to make requested advances, even though the refusal might have put the

borrower out of business and might have been motivated by the lender's relationship with a competitor of the borrower.*

- *Bank of America v. JB Hanna, LLC*, 866 F.3d 929 (8th Cir. 2017) – A sophisticated borrower which had experience with loan agreements and interest-rate swaps could not have reasonably relied on the lender's allegedly fraudulent representation that a new five-year loan agreement coupled with an interest-rate swap of mismatched duration was in the borrower's best interest.
- *Rebel Auction Co., Inc. v. Citizens Bank*, 805 S.E.2d 913 (Ga. Ct. App. 2017) – A bank claiming a security interest in equipment was not entitled to summary judgment on its claim for conversion against the auctioneer that admitted (apparently mistakenly) to selling the equipment because the bank's filed financing statement identified the debtor as "Big Metal Construction Inc. Payroll Account" instead of "Big Metal Construction Inc.," and neither party had submitted evidence about whether the financing statement would have been disclosed in response to a search under the debtor's correct name. Hence a material fact remained in dispute about whether the equipment was encumbered by the financing statement.
- *DS-Concept Trade Invest, LLC v. Morgan-Todt, Inc.*, 2017 WL 2180982 (N.D. Cal. 2017) – The factor that purchased the accounts of a cheese supplier might have a negligence claim against the storage company that improperly stored the cheese in a freezer, rather than a refrigerator, rendering the cheese unfit for consumption. The factor claimed to have a security interest in the cheese and the storage company might have had a duty to the factor because the factor alleged that pursuant to practice within the global industry pertaining to trade debt and factoring agreements, the storage company should have understood that the cheese and its proceeds were subject to third-party interests "in favor of those who had provided financing in connection with the acquisition and intended sale of the cheese."

- *Commercial Credit Group, Inc. v. Process, Inc.*, 2017 WL 4214085 (E.D. Ark. 2017) – A buyer of collateralized equipment was estopped from alleging that the security interest was unperfected or that the buyer took free as a buyer in ordinary course of business by statements made in the buyer's pleadings. The buyer also failed to show that no portion of the secured obligation remained outstanding after the secured party purchased the proceeds of the equipment using a credit bid.
- *Wilhelm Management, LLC v. MB Financial Bank*, 2017 WL 1333599 (Ill. Ct. App. 2017) – The trial court did not err in granting a judgment notwithstanding the verdict after a jury found a bank liable for inducing an assignee for the benefit of creditors to breach his fiduciary duties. The bank had a perfected security interest in all of the assignor's assets, did nothing wrong in conferring with the assignor, and was within its rights in refusing to consent to an offer to buy the assets conditioned on a release of the guarantors. Moreover, the assignor did not breach his fiduciary duties because he advertised the assets for sale and he received no offers for an amount in excess of what was owed to the bank.*

*B. Obligations Under Corporate and Securities Laws*

- *Marblegate Asset Management, LLC v. Education Management Finance Corp.*, _ F.3d _ (2d Cir. 2017) – Trust Indenture Act of 1939 § 316(b) prohibits only non-consensual amendments to an indenture's core payment terms. In addition, the court indicated that successor liability and fraudulent transfer theories could apply to a UCC foreclosure sale.
- *Frechter v. Zier*, 2017 WL _ (Del. Ch. 2017) – A bylaw provision that allowed the removal of directors of a Delaware corporation only by a two-thirds vote was "inconsistent" with Delaware GCL § 141(k), which provides that a director "may" be removed by a majority vote.
- *Western Surety Company v. La Cumbre Office Partners, LLC*, _ Cal.App.4th _ (2017) – A natural person was the managing member of a limited liability company. That LLC was the sole

manager of a second limited liability company. The individual signed an agreement on behalf of the second LLC, but misstated his position as the managing member of the second LLC. He should have indicated that he was signing for the first LLC in the first LLC's capacity as the manager of the second LLC. Although the individual did not have actual authority to execute the agreement on behalf of the second LLC, the second LLC was bound because he did have authority to sign for the first LLC and the first LLC had authority to bind the second LLC. The analysis was based on the California LLC Act (former Corporations Code Sec. 17157(d), continued as § 17703.01(d)), which provides that a manager has the power to bind an LLC even in the absence of actual authority (unless the other party to the agreement knows of the lack of authority). Here the first LLC, as the manager of the second LLC, had the authority to bind the second LLC and the individual, as the manager of the first LLC had authority to bind it. The misstatement of the individual's title did not change the result.

- *Marblegate Asset Management, LLC v. Education Management Finance Corp.*, 846 F.3d 1 (2d Cir. 2017) – A restructuring of a company's debt accomplished through a sale of assets by secured creditors and a release of guarantees of unsecured notes did not violate § 316(b) of the Trust Indenture Act because the terms of the indentures were not amended. The legal rights of the non-consenting noteholders were unaffected even though they would, as a practical matter, never receive payment because the transaction left the note issuer as nothing more than an empty shell.
- *Southpaw Credit Opportunity Master Fund, L.P. v. Roma Restaurant Holdings, Inc.*, 2018 WL 658734 (Del. Ch. Feb. 1, 2018) – Shares issued in violation of a stockholders agreement were "void" because the shareholders agreement was a "governing document" under Delaware corporate law.
- *Menaldi v. Och-Ziff Capital Management Group LLC*, 277 F. Supp. 3d 500, 2017 WL 4386902 (S.D.N.Y. Sept. 29, 2017) – Failure to disclose

potential liability for FCPA violations following receipt of subpoenas indicating governmental investigations was noncompliance with ASC 540-20 governing loss contingencies.

- *Yu v. GSM Nation, LLC*, 2017 WL _ (Del. Ch. 2017) – A creditor of an owner of an entity, to bring an *alter ego* claim, must show "complete domination" of the entity by the owner.
- *Curci Investments, LLC v. Baldwin*, _ Cal.App.4th _ (2017) – A creditor of a member of an LLC used reverse veil piercing to reach the assets of the LLC. The court held that was OK where there are no "innocent" members who would be adversely affected and where adding another creditor to the liabilities of the entity would not harm other creditors of the entity. The court noted that reverse veil piercing may be more appropriate for LLCs than it is for corporations because a creditor of a shareholder that exercises remedies against the stock typically may exercise all of the shareholder's rights, while a creditor of a member of an LLC may be precluded from exercising those rights under LLC law.
- *The Cirillo Family Trust v. Moezinia,* C.A. No. 10116-CB (Del. Ch. July 11, 2018) – Merger could be invalid because of insufficient documentation.

*C. Borrower Liability*

- *In re Licursi*, 573 B.R. 786 (Bankr. C.D. Cal. 2017) – The obligations of a husband and wife who guaranteed a secured loan to a corporation that they owned and operated and that sold collateral to a newly formed entity that the couple also owned, and who not only failed to inform the secured lender of the sale but continued to misrepresent the corporation's financial condition, were nondischargeable under § 523(a)(2). Although the misrepresentations occurred after the secured lender had extended credit, they caused the secured lender to delay exercising its rights. Because the corporation was insolvent at the time of the sale, and thus the husband as an officer owed a fiduciary duty to the corporation's creditors, the husband's liability was also nondischargeable under § 523(a)(4). The couple's dissipation of

proceeds of the collateral was also grounds for making their obligation nondischargeable under § 523(a)(6).

*D. Disputes Among Creditors and Intercreditor Issues*

- *U.S. Bank v. T.D. Bank*, 2017 WL 436508 (S.D.N.Y. 2017) – Because the Rule of Explicitness is part of the non-bankruptcy law of New York and applies in disputes outside of bankruptcy court, if a lender is to be entitled to postpetition interest before the principal owed to a different lender may be paid, the intercreditor agreement must so state clearly. Nevertheless, by providing that the lenders were "entitled to receive post-petition interest . . . to the fullest extent permitted by law," the intercreditor agreement in this case was sufficiently explicit that both the senior and junior lenders were entitled to postpetition interest before the principal of either the senior or junior debt may be paid. It did not matter that post-petition interest would not have been available in the bankruptcy proceeding because this was not a bankruptcy case and, in any event, the agreement defined "Obligations" to include "interest and fees that accrue after the commencement . . . of any Insolvency or Liquidation Proceeding . . . regardless of whether such interest and fees are allowed claims in such proceeding."*
- *Crystal Bay Lending Partners, LLC v. JMA Boulder Bay Holdings, LLC*, 2017 WL 3222271 (Nev. 2017) – The entity that bought a senior lender's "right, title and interest in, to and under the Loan Documents" could enforce the intercreditor agreement that the senior lender had entered into when the loan was made. Even though the intercreditor agreement was not expressly listed as one of the Loan Documents, that term was defined with broad language that necessarily included the intercreditor agreement.*
- *Bowling Green Sports Center, Inc. v. G.A.G. LLC*, 77 N.E.3d 728 (Ill. Ct. App. 2017) – Although the senior lender violated its intercreditor agreement with the junior lender by failing to obtain the junior's consent to an increase in the senior loan, the junior was injured thereby only to the extent of the small increase in the loan. Consequently, the senior lender's lien would be subordinated only to the extent of the increase in the debt and the

junior creditor remained bound by the intercreditor agreement and could not seek to collect from the debtor until the original amount debt to the senior lender was paid.*

- *Marblegate Asset Management, LLC v. Education Management Finance Corp.*, 846 F.3d 1 (2d Cir. 2017) – A restructuring of a company's debt accomplished through a sale of assets by secured creditors and a release of guarantees of unsecured notes did not violate § 316(b) of the Trust Indenture Act because the terms of the indentures were not amended. The legal rights of the non-consenting noteholders were unaffected even though they would, as a practical matter, never receive payment because the transaction left the note issuer as nothing more than an empty shell.
- *In re MPM Silicones, LLC*, 874 F.3d 787 (2d Cir. 2017) – An intercreditor agreement that excepted from its debt subordination clause "any Indebtedness . . . that by its terms is subordinate or junior in any respect to any other Indebtedness" was ambiguous as to whether it referred to lien subordination or debt subordination, in part because each meaning rendered other language in the agreement superfluous. Extrinsic evidence indicates that the language did not except notes with a springing lien that was subject to lien subordination because the parties understood that those notes were not subordinated and a contrary ruling would have led to an absurd result that the notes were senior when issued but then subordinated when their springing lien sprung.*
- *Peterson v. Imhof*, 2017 WL 1837856 (D.N.J. 2017) – Even though an intercreditor agreement required the consent of all lenders to a release of the guarantors, because the original loan documents authorized the lenders' agent to release the guarantors with the consent of lenders holding a majority interest in the loan, the agent's release of the guarantors pursuant to a settlement agreement was effective, despite fact that a lender with a 43.53% interest did not consent, and thus that lender had no claim against the guarantors as long as the guarantors materially performed

their obligations under the settlement agreement. However, that lender did have a claim against the agent for the breach of intercreditor agreement.*

- *In re Energy Future Holdings Corp.*, 566 B.R. 669 (Bankr. D. Del. 2017) – The holders of the highest tranche of first-lien debt - the whole of which was undersecured -were not entitled to post-petition interest out of the adequate protection payments and plan distributions on the debt allocated to the lower tranches because the waterfall in the intercreditor agreement dealt only with payments out of the proceeds of collateral pursuant to the exercise of remedies. Neither the adequate protection payments nor the plan distributions constituted "proceeds" of collateral. Moreover, neither of these amounts resulted from the exercise of remedies under the loan documents. As a result, the intercreditor agreement did not speak to the allocation of payments and the payments were to be allocated pursuant to the Bankruptcy Code.*

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

### *A. Scope*

#### *1. General*

- *In re Escalera Resources Co.*, 563 B.R. 336 (Bankr. D. Colo. 2017) – Because metered electrical energy is a "good" within the meaning of the UCC and Bankruptcy Code § 503(b)(9), the utility that provided electricity to the debtor during the 20 days preceding bankruptcy was entitled to administrative expense priority for the price of the electricity.*
- *Mellen, Inc. v. Biltmore Loan and Jewelry-Scottsdale, LLC*, 247 F. Supp. 3d 1084 (D. Ariz. 2017), *appeal filed* (9th Cir. Apr. 27, 2017) – The pawn broker that purchased a diamond that the rightful owner had entrusted to a jeweler did not acquire good title to the diamond under § 2-403(2) because: (i) the pawn broker purchased the diamond not from the jeweler, but from another person who claimed that the jeweler was his agent, and the owner had not entrusted the diamond to the seller; (ii) the seller was not a person who deals in goods of that kind; and (iii) the pawn broker was not a buyer in ordinary course of business because it acquired the diamond in partial satisfaction of an earlier loan. The pawn broker did not get good title under § 2-403(1) because neither the jeweler nor the seller acquired the diamond through a transaction of purchase, and thus neither had voidable title and the power to transfer good title to a good faith purchaser for value.
- *Export Development Canada v. E.S.E. Electronics*, 2017 WL 3868795 (C.D. Cal. 2017) – The terms in invoices sent by a seller of goods providing for interest on past due accounts and recovery of attorney's fees incurred to collect were not material additions to the parties' agreement. Because the buyer neither objected to the terms nor expressly limited acceptance to the terms of the purchase orders, the terms became part of the parties' contract.

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*

   - *Fresh Direct, Inc. v. Harvin Foods, Inc.*, 2017 WL 1197674 (D. Del. 2017) – Regardless of whether the invoices sent by sellers of produce to a buyer were acceptances or confirmations of an oral agreement reached on the phone, the additional terms in the invoices had to be analyzed under § 2-207. Those terms - which consisted of interest on overdue invoices and attorney's fees incurred in collecting - were not material, and because the agreements were between merchants and the buyer never objected to the terms, the terms became part of the contract.
   - *Blackwell Motors, Inc. v. DeShields*, 2017 WL 4127459 (Mo. Ct. App. 2017) – The buyer of automobiles from an individual who acquired the automobiles at a dealers-only auction after submitting forged documents showing he was entitled to buy on behalf of a dealer had no claim against the seller that repossessed the automobiles after the bogus checks for the purchase price were dishonored. The individual was a thief who acquired no title to the automobiles and thus could pass no title to the buyer. Although a person who acquires goods by fraud has voidable title and can pass good title to a good faith purchaser for value, the individual was not a party to the sales contract at the dealers-only auction. The dealer he allegedly represented was.

C. *Warranties and Products Liability*

   - *Connor v. Reilly*, 2017 WL 213840 (W.D. Wis. 2017) – The buyer of a car did not have a cause of action under § 1983 against the sheriff that seized the car and then released it to the secured party without first providing the buyer with a hearing. The buyer had acquired the car, indirectly, from an individual who had paid for it with a fraudulent cashier's check and who, when reselling it, had provided a fake Notice of Lien Release. The secured party retained

a security interest in the car that was superior to the rights of the buyer.

- *Martin v. Smith*, _ NW _ _ (Wash.Ct.App. 2017) – A party to a contract, not subject to Article 2 of the UCC, breached a warranty in the agreement. The court held that the breach made the contract void, even if the breach was not material.

*D. Limitation of Liability*

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*E. 'Economic Loss' Doctrine*

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*F. Performance, Breach and Damages*

- *In re TSAWD Holdings, Inc.*, 574 B.R. 482 (Bankr. D. Del. 2017) – Although the seller of goods had the right to stop shipment while the goods were in transit after discovering that the buyer was insolvent, and the seller sent proper notice to shop shipment by sending it to the freight forwarder, which was the agent of the carrier, the carrier was not obliged to follow the seller's instruction because neither the seller nor the freight forwarder was listed as the consignee on the nonnegotiable document of title. Accordingly, the buyer became the owner of the goods upon receipt and the goods thereafter became property of the estate when the debtor filed for bankruptcy protection.
- *Koviack Irrigation and Farm Services, Inc. v. Maple Row Farms, LLC*, 2017 WL 4182409 (Mich. Ct. App. 2017) – A buyer of equipment for an irrigation system was entitled to reject nonconforming goods that were delivered late in the harvest season and which the buyer waited until spring to install and test.

*G. Personal Property Leasing*

- *Blue Ridge Bank v. City of Fairmont*, 2017 WL 555986 (W. Va. 2017) – A city that leased equipment under a finance lease with a hell-or-high-water clause had a defense to payment against the bank that received an assignment of the lease from the lessor. Because, after the lessor failed to pay the supplier for the equipment, the city

paid the supplier directly, the city had a defense arising from the lease transaction, and thus it did not matter whether that defense accrued before or after the assignment to the bank. Although both the hell-or-high-water clause and § 2A-407 cut off most of a finance lessee's defenses to payment, that rule applies only after the finance lessee accepts the goods. In this case, the city accepted the goods not under the lease, but under its own purchase contract with the supplier.

- *State Bank & Trust Co. v. Philly Wholesale, LLC*, 2017 WL 3279023 (E.D. Pa. 2017) – A liquidated damages clause in an equipment lease that provided for payment of both the entire unpaid amount under the lease and the present value of all future rent reduced by three percent was an unenforceable penalty. The sum was essentially a double recovery and was not a reasonable estimate of the lessor's damages, which might be the future income stream under the lease (i.e., rent) plus the diminished value of the property upon repossession and the cost in time, effort, and expense in dealing with default. Moreover, while a late fee can be charged on past due amounts, the lessor could not get both a late fee and default interest with respect to the same missed payment because that would be a double recovery for the same injury. Because the court awarded default interest, there would be no award of the claimed late fees.

## VII. NOTES AND ELECTRONIC FUNDS TRANSFERS

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

- *Colonial Funding Network, Inc. v. Epazz, Inc.*, 16 Civ. 5948, _ F.Supp. 4th (S.D.N.Y 2017) – Under New York law, there cannot be usury if there is no "loan or forbearance." For there to be a loan or forbearance, the amount must be "repayable absolutely." An obligation arising as the payment of the price in a "purchase" is not a loan or forbearance. If the obligor does not have a usury defense, neither does a guarantor. Any reliance by a seller on pre-contractual statements by a buyer is not justifiable when "an express provision is a written contract contradicts a prior alleged oral representation in a meaningful fashion."*
- *Turner v. Wells Fargo Bank*, _ F.3d _ (9th Cir. 2017) – The transfer of a note and deed of trust not in compliance with a pooling and servicing agreement made the transfer voidable, but not void. As a result the trustor did not have standing to complain.
- *2023 BR Holdings, LLC v. Williams*, 2017 WL 5009261 (D. Md. 2017) – Even though the holder of a guaranteed note had executed an allonge by which it "collaterally assigned" the note to a lender pursuant to a "Security Agreement," the holder had standing to enforce the note and guaranty. The assignment was only a partial assignment, and thus the holder retained sufficient rights to be a real party in interest.
- *Ag Resource Management, LLC v. Southern Bank*, 2017 WL 2927477 (E.D. Ark. 2017) – A secured party with a security interest in the debtor's crops, and which was listed as a co-payee on thirteen checks issued by a buyer of the crops, had a cause of action for conversion against the bank that allowed the debtor to deposit the checks into an account at the bank without the endorsement of the secured party. Although checks written to alternative payees may be endorsed by any one of them, and any ambiguity about whether payees are joint payees or alternative payees will be resolved in favor of the latter, the secured party was a joint payee

even though its name was indicated on a lower line because its name and the debtor's name were connected by the conjunction "and."

- *Wall v. Altium Group, LLC*, 2017 WL 123779 (W.D. Pa. 2017) – A couple who purchased payments under a structured settlement from an intermediate buyer but who received no payments when a court vacated the order approving an earlier sale had no cause of action against the intermediate buyer for breach of transfer warranties because the initial assignment of the annuity was not a negotiable instrument and the couple was not a party to it. However, the couple did state a cause of action against the intermediate buyer for breach of contract.
- *Dobson Bay Club II DD, LLC v. La Sonrisa De Siena, LLC*, 393 P.3d 449 (Ariz. 2017) – A lender sought to enforce a five percent late-fee provision in a promissory note, which obligated a commercial borrower to pay nearly $1.4 million when it was late in submitting a balloon payment on the note.The court held that the late fee was an unenforceable penalty. Because ". . . the late fee neither reasonably forecasted anticipated damages for the losses identified in the late fee provision nor reasonably approximated the actual losses". The court observed that "the difficulty of proving [the lender's] loss as identified in the late fee provision was slight."
- *Zelby Holdings, Inc. v. Videogenix, Inc.*, 92 Mass. App. Ct. 86, 2017 WL 3574199 (2017) – Common law partial payment rule for purposes of tolling the statute of limitations applies under UCC Article 3.

*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*

- *JPMorgan Chase Bank, N.A. v. Herman*, _ A._ _ (Conn.App. 2017) – Under UCC § 8-112 a judgment creditor of a holder of a security entitlement properly levied against the securities intermediary where the securities account was maintained. The court rejected the judgment debtor's argument that the judgment creditor should have levied on DTC, where the physical certificate was located.

*C. Documents of Title*

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# IX. CONTRACTS

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

- *Norcia v. Samsung Telecommunications America, LLC*, _ F.3d _ (9th Cir. 2017) – The court concluded (applying California law) that a customer had not "agreed" to an arbitration provision with a cell phone manufacturer included in an in-the-box brochure. The court first considered whether it was analogous to a shrinkwrap agreement. The court concluded that California probably would enforce a shrinkwrap agreement, but that the requirements for enforcement here were not met due to inadequate notice. The court then considered the *Hill* in-the-box decision and concluded that California had not accepted (or rejected) this rule and that, in any event, the provision in the brochure did not become part of a contract, again due to notice insufficiencies. Finally, the manufacturer was not a party to or third party beneficiary of a contract with the service provider.
- *Jacobs v. Locatelli*, _ Cal.App.4th _ (2017) – California law requires that an agreement for the payment of a commission for the sale of real estate must be in writing. An allegation that one of the co-owners – who signed a commission agreement – was acting for other owners who had allegedly formed a joint venture was sufficient to allow parol evidence on that issue.
- *Noble v. Samsung Electronics America, Inc.*, _ F.3d _ (3d Cir. 2017) (not precedential) – An arbitration *proviso* "tucked" away on page 97 of a warranty brochure included inside the box for the purchased product (a smart watch) did not give the buyer reasonable notice of the provision and was not enforceable.
- *Hickcox-Huffman v. US Airways, Inc.*, _ F.3d _ (9th Cir. 2017) – An airline's terms of transportation were a "routine offer of a unilateral contract subject to being accepted by flying on" the airline. The passenger flew, but the baggage was not available when the passenger arrived and the passenger sought the return of her fee. The court interpreted the airline's "commitment" that

for the $15 baggage fee it would "timely" deliver the baggage to mean delivery upon arrival. The terms of transportation provide that "[t]ravel on [the airline] shall be deemed acceptance by the customer of [the airline's] terms of transportation." The court rejected the airline's argument that the passenger did not have a remedy because the contract did not specify a remedy. The court stated that a "contract may be enforceable even if it does not specify a remedy for a breach." The court also rejected the argument that a contractual limit on consequential damages also limited the availability of other damages. The court held that a return of the fee was an appropriate remedy, stating "Though restitution may be sought as an equitable remedy where there is no enforceable contract, it is also an available remedy where there is an enforceable contract that has been breached by non-performance."*

- *James v. Global TelLink Corp.*, 852 F.3d 262 (3d Cir. 2017) – The provider of a phone system to prisoners argued that an audio statement during the telephone account set-up process referring to online terms of use were assented to by the prisoners. The court held that the terms were not reasonably conspicuous and that the terms were not reasonably accessible. Thus they did not become part of the agreement.
- *In re Crystal Waterfalls, LLC*, 2017 WL 4736707 (C.D. Cal. 2017) – The assignee of a secured loan was bound by the original lender's waiver of the right to collect interest at the default rate. Although the loan agreement provided that the original lender "shall not be deemed to have waived any rights . . . unless such waiver is given in writing and signed [by the original lender]," such a non-waiver clause can itself be waived if enforcing it would be inappropriate or unconscionable. In this case, the original lender had provided the debtor with an estimated payoff amount that was based on the non-default interest rate, the Purchase and Sale Agreement between the original lender and the assignee, in stating the amount owing, reflected interest calculated at the non-default rate, and the original lender continued to accept monthly interest

payments from the debtor at the non-default rate until the loan was transferred.*

- *Shields Limited Partnership v. Bradberry*, 526 S.W.3d 471 (Tex. 2017) – Although a no-implied-waiver clause can normally be waived, a term in a commercial lease providing that the landlord's "acceptance of late installments of Rent shall not be a waiver and shall not estop Landlord from enforcing that provision or any other provision of this Lease in the future" was specific enough to prevent the landlord's acceptance of late payments from being a waiver of default. Because the tenant was in default, the tenant had not properly exercised its contractual right to extend the lease term.
- *Kanno v. Marwit Capital Partners II, L.P.*, 2017 WL 6547078 (Cal Ct. App. 2017) – Evidence of an oral agreement by the buyer of a business to redeem preferred stock provided to the seller in connection with the sale was not barred by the parol evidence rule. Although each of the three documents executed in connection with the sale - a Contribution and Purchase Agreement; a Stock Subscription Agreement; and a Stockholder Agreement -contained an integration clause, such clauses are merely rebuttable evidence that the agreements were fully integrated. The fact there were three agreements intended to be part of the same transaction in fact demonstrated that the parties did not intend for any one agreement to be a complete integration. Moreover, the alleged existence of the oral stock redemption agreement was not inconsistent with the terms of any of the three written agreements.*
- *First Bank and Trust v. Fitness Ventures, L.L.C.*, 2017 WL 6031783 (La. Ct. App. 2017) – The trial court has sufficient evidence to support its finding that a term sheet executed by a secured party and a defaulting debtor, which provided for the secured party to take control of the debtor, run the debtor's business, credit income earned therefrom to the secured obligation, and during such time refrain from pursuing the obligors, was merely an agreement to agree, pending completion of the secured party's due diligence.

Thus, the secured party could pursue the obligors after the debtor lost its lease and ceased operations.

- *Kolchins v Evolution Markets, Inc.*, 28 N.Y.3d 1177 (NY 2018) – Does "mazel" mean "luck" or "congratulations" sufficient to indicate assent to enter into a contract?
- *Enterprise Products Partners LP v. Energy Transfer Partners LP Court of Appeals of The State of Texas.*, _ SW _ _ (Texas Court Appeals 2017) – A document did not create a binding agreement where it provided "Neither this letter nor the JV Term Sheet create any binding or enforceable obligations between the Parties and . . . no binding or enforceable obligations shall exist between the Parties with respect to the Transaction unless and until the Parties have received their respective board approvals and definitive agreements memorializing the terms and conditions of the Transaction have been negotiated, executed and delivered by both of the Parties. Unless and until such definitive agreements are executed and delivered by both of the Parties, either [Enterprise] or ETP, for any reason, may depart from or terminate the negotiations with respect to the Transaction at any time without any liability or obligation to the other, whether arising in contract, tort, strict liability or otherwise."
- *Meyer v. Uber Technologies, Inc.*, _ F.3d _ (2d Cir. 2017) – A contested provision of an online agreement was enforceable where notice of the provision was "reasonably conspicuous" and where the manifestation of assent was "unambiguous". After a detailed analysis of the screens involved, the court found both on the facts before it.
- *CSH Theatres, L.L.C. v. Nederlander of San Francisco Associates*, _ WL _ (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_*, _ F.3d _ )(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) – Buyer who clicked "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*

- *Umbach v. Carrington Investment Partners (US) LP*, _ F.3d _ (2d Cir. 2017) – A limited partner sought to withdraw its capital from the limited partnership. At the time that the limited partner made its request, it was entitled to do so. The LP agreement provided that it could be amended by a two-thirds vote of the limited partners and the vote of the GP. A separate provision provided that the GP could not take any action in "contravention" of the LP agreement. The requisite number of limited partners and the GP approved an amendment to the LP agreement delaying the withdrawal rights. The court held that the GP's approval of the amendment was in "contravention" of the LP agreement and thus ineffective. The

court conceded that all amendments "changed" the LP agreement, but that this amendment was "inconsistent" with the LP agreement and therefor in "contravention" of the LP agreement. The court summarized its conclusion: "Thus, giving these terms their ordinary meanings, all amendments to an agreement are changes; but not all changes are contraventions."

- *O'Connor v. Oakhurst Dairy*, _ F.3d _ (1st Cir. 2017) – The absence of the Oxford comma in a list of items in a statute was interpreted to mean that the last two words should be read as a unit. Similarly the fact that all words in the list, except the last two, were gerunds gave rise to a similar interpretation. The court wryly began its opinion with "For want of a comma, we have this case."
- *Spirit Broadband, LLC v. Armes*, 2017 WL 384248 (Tenn. Ct. App. 2017) – Because the bill of sale for a small cable company covered "any and all assets owned by Sellers and utilized in the operation of the cable television system[ ] ... including, but not limited to . . . those certain Operating Contracts listed on Schedule III attached hereto," the seller's contract with DirectTV was included in the sale even though the Schedule contained only the word "none." The bill of sale conveyed "any and all assets" and the introductory phrase, "including, but not limited to," used in reference to operating contracts served a descriptive, not a restrictive, function.
- *Lyon Financial Services, Inc. v. Illinois Paper and Copier Co.*, 247 F. Supp. 3d 923 (N.D. Ill. 2017) – A term in a "Partnership Agreement," under which one party purchased copiers from the other for the purpose of leasing them to a town, by which the supplier warranted to the purchaser that all "lease transactions" are "valid and fully enforceable," applied to the transaction with the town even though that transaction was really a sale and secured transaction, rather than a lease. The agreement had to be interpreted consistently with the parties' intent and, given that there were only two transactions, the term had to refer to the lease transaction with the town.

- *United Leasing, Inc. v. Balboa Capital Corp.*, 2017 WL 3674926 (S.D. Ind. 2017) – Because the phrase "to Seller's knowledge:" preceded a list of representations and warranties in an agreement for the sale of leases, it modified all of them, even though it arguably made no sense with respect to some of them. Because the buyer's complaint did not allege that the seller knew of the defects in some lease documents, the complaint had to be dismissed.
- *LSVC Holdings, LLC v. Vestcom Parent Holdings, Inc.*, 2017 Del. Ch. LEXIS 865 (Del. Ch. 2017) – Court may consider extrinsic evidence when contract's plain meaning, in the context of the overall structure of the contract, is susceptible of more than one reasonable interpretation.
- *Plaze v. Callas* (Del.Ch. March 29, 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."
- *Kanno v. Marwit Capital Partners II, L.P.*, 18 Cal.App.5th 987 (2017) – Under California and Delaware law, integration clause creates only a presumption of integration and, under facts of the matter, parol evidence allowed.

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

- *Poublon v. C.H. Robinson Company*, _ F.3d _ (9th Cir. 2017) – The court applied the usual "sliding scale" analysis to determine if an arbitration provision in an employment agreement was unconscionable. That test requires that there exist both procedural and substantive unconscionability, where if one element is low, the other must be high. Here the only element of procedural unconscionability was the existence of an adhesion agreement. The court held that in the circumstances, the adhesive nature of the contract , without other "oppressive" facts, created a low level of procedural unconscionability, thus requiring a "high" level of substantive unconscionability (a term being "unreasonably favorable" to the other party. The court found substantive unconscionability as to some terms of the arbitration provision

and did not find it as to others. The court severed those terms with a high level of substantive unconscionability and enforced the others.

- *The Williams Companies, Inc. v. Energy Transfer Equity, L.P.*, 2017 WL 1090912 (Del. Sup. Ct. March 23, 2017) – Non-delivery of opinion that was a condition to closing was not a breach where the law firm acted in good faith. An agreement in an agreement to use "commercially reasonable efforts" to cause the agreement to close required, as appropriate, the use of affirmative action and would not be satisfied by avoiding taking action that did not interfere with the transaction.
- *Hardwick v. Wilcox*, _ Cal.App.4th _ (2017) – A lender and borrower entered into usurious notes. They then settled a dispute concerning the notes by entering into a forbearance agreement that included a release of "unknown" claims. The court held that the forbearance agreement itself was usurious (because it extended the usurious obligation) and thus it would violate public policy to allow it to release the existing usury claims. The court also held that the release of "unknown" claims did not encompass the usury claim because the borrower did not know that it had a usury claim. Applying California's usury laws, the court reduced the principal of the loans by the full amount of interest paid.
- *Brinckerhoff v. Enbridge Energy Company, Inc.*, _ A.3d _ (Del. 2017) – A limited partnership agreement replaced traditional fiduciary duties with a contractual duty of good faith. The court held that the LPA's general good faith standard did not displace the contractual agreements.
- *Family Security Credit Union v. Etheredge*, 2017 WL 2200364 (Ala. 2017) – Even if the trial court correctly concluded that the arbitration provision in vehicle financing contracts was substantively unconscionable because the financier reserved the right to avail itself of the courts while forcing the borrowers to arbitrate every conceivable claim, the provision was nevertheless enforceable because there was no evidence of procedural

unconscionability. By referring to "[a]ny controversy or claim arising out of or relating to this Agreement," the arbitration provision covered the borrowers' claims that the financier negligently failed to ensure that they obtained good title to the purchased vehicles.

*D. Risk Allocation*

- *BNSF Railway Co. v. Tyrrell*, _ U.S. _ (2017) – A corporation was not "at home" in a state where it was not incorporated or headquartered. Nor was the employment of 2,000 persons in that state enough to make the corporation "essentially" "at home", taking into account "an appraisal of a corporation's activities in their entirety." Thus the courts of the state did not have general personal jurisdiction over the corporation. There might have been specific personal jurisdiction had the claims "related" to activity in the state.
- *In re Simplexity, LLC*, 2017 WL 65069 (Bankr. D. Del. 2017) – The Chapter 7 trustee for a limited liability company stated a cause of action against the company's principals for breach of their fiduciary duties - despite the exculpatory clauses in the debtor's operating agreement - for their failure to file bankruptcy until after the company's secured creditor swept the company's deposit accounts and left the company with no funds to pay the WARN Act claims of its employees.
- *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 2017 WL 6327110 (N.Y. 2017) – Although the seller of mortgage loans breached representations and warranties relating to some loans, the seller could not be liable for general contract damages because the sales agreement provided for cure or repurchase as the sole remedies for breach of loan-specific representations and warranties. While the seller also represented and warranted generally that the "documents . . . do not contain any untrue statement of material fact," and the agreement did not purport to limit the remedy for breach of this provision, the alleged defects were on loan-specific and thus the provision limiting remedies applied.

- *Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC*, _ Cal.App.4th _ (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.

*E. Personal Jurisdiction*

- *Bristol-Myers Squibb Co. v. Superior Court of California*, _ U.S. _ (2017) – A state does not have specific jurisdiction over a person unless the claim arises out of activity in the forum. Here the defendant did not develop or manufacture the allegedly defective drug in the forum state.

*F. Choice of Law and Forum*

- *Rincon EV Realty LLC v. CP III Rincon Towers, Inc.*, 2017 WL 429267 (Cal. Ct. App. 2017) – Even though a loan agreement selected New York law as the governing law, and a contractual clause waiving the right to the jury is enforceable in New York, the agreement's jury waiver clause was unenforceable in California litigation because it violates fundamental policy of the state and California has a materially greater interest in the matter than does New York even though California did not have an interest in the parties or the transaction.*
- *Madden v. Midland Funding, LLC*, _ F.Supp.3d _ (S.D.N.Y. 2017) – A note provided for the application of Delaware law, which has no interest rate limit. The borrower asserted that the note was usurious under NY law. The court applied *Restatement (Second) of Conflict of Laws* § 187 and held that the application of Delaware law would violate a "fundamental" policy of New York. The court did not discuss whether New York had a "materially greater" interest in applying its law than Delaware did in applying its law.
- *In re Sterba*, _ F.3d _ (9th Cir. 2017) – A promissory note provided generally that Ohio law would apply. The court applied federal common law choice-of-law rules, which generally follow the *Restatement (Second), Conflict of Laws.* The court applied § 142 (1988 version) and first concluded that a contractual choice-of-law provision did not apply to determine the applicable statute of

limitations, unless it did so expressly. This particular provision did not. The court then concluded that the default rule was to apply the statute of limitations of the forum.

- *Bautista Cayman Asset Co. v. Desarrollos Bucana, S.E.*, 2017 WL 3610497 (D.P.R. 2017) – Language in three promissory notes, which were incorporated into a loan agreement, by which the borrowers "submit ourselves expressly to the competency of the state courts of the City of San Juan, Puerto Rico," was a mandatory forum selection clause that bound both parties to litigate in the named courts.
- *Throckmorton v. Soria*, 2017 WL 5793819 (Cal. Ct. App. 2017) – The seller of Mexican real property was bound by the choice-of-forum clause in the purchase and sale agreement, which selected the courts of the city of Tijuana as the exclusive forum, even though her action was based solely on the promissory note issued in connection the sale, the note was not contemporaneous with the purchase and sale agreement, and the note lacked a choice-of-forum clause.
- *First Home Bank v. Raut, LLC*, 2017 WL 6729178 (M.D. Fla. 2017) – A creditor's federal action in Florida on a promissory note and the associated guaranty were not subject to the Florida choice-of-forum clause in the security agreement. Consequently, there was no personal jurisdiction over the defendants, and the case would be transferred to federal court in Kentucky, where the defendants were located.
- *Ha Thi Le v. Lease Finance Group, LLC*, 2017 WL 2915488 (E.D. La. 2017) – Even if a lease of equipment located in Louisiana would be treated as a sale with a security interest under the law of New York, a clause in the lease agreement selecting New York as the forum for all litigation was not enforceable because it violated fundamental policy of Louisiana, as expressed in the state's Lease of Movables Act, that invalidates a consent to jurisdiction in another state or a fixing of venue.

- *Madden v. Midland Funding, LLC*, 237 F. Supp. 3d 130 (S.D.N.Y. 2017) – Application of Delaware law pursuant to a choice-of-law clause in the parties' credit card agreement would violate a fundamental public policy of New York because Delaware does not cap the interest rate that parties may agree to whereas New York has a criminal usury statute.
- *Shanghai Commercial Bank v. Kung Da Chang*, 404 P.3d 62 (Wash. 2017) – A bank that had a Hong Kong judgment against a borrower could enforce the judgment against the borrower's community property in Washington because the loan agreement chose Hong Kong law – which does not recognize community property – to govern enforcement, application of Hong Kong law does not offend Washington policy, and Hong Kong Law would have otherwise applied in the absence of a chosen law because Hong Kong had the most significant relationship to the transaction.
- *Orgone Capital III, LLC v. Daubenspecksw*, 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."
- *Petrucci v. Esdaile*, 2017 WL 3080555 (Mass. Super. Ct. 2017) – Contractual choice-of-law provision determines which state's statute of limitations applies only if it does so expressly; citing decisions in many other jurisdictions to the same effect).
- *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.App. 2018) – Inbound, mandatory choice-of-forum provision based on statute still subject to forum non conveniens analysis.
- *In re Howmedica Osteonics Corp.*, _ F.3d _ (3d Cir. 2017) – Under *Atlantic Marine* a court generally must enforce valid forum selection clauses. When not all parties have signed a forum selection agreement, there is not personal jurisdiction over all parties, and other similar issues, the court should apply a series of factors.

*G. Damages and Remedies*

- *Stella v. Asset Management Consultants, Inc.*, _ Cal.App.4th _ (2017) – An investor could not avoid the running of the statute of limitations by invoking the delayed discovery rule. A private placement memorandum gave the investor actual knowledge that the investors would bear the cost of a commission paid by the issuer to acquire property (which related to the alleged misrepresentation). The investor had notice that it should have made additional inquiry.
- *Wall v. Altium Group, LLC*, 2017 WL 123779 (W.D. Pa. 2017) – A couple who purchased payments under a structured settlement from an intermediate buyer but who received no payments when a court vacated the order approving an earlier sale had no cause of action against the intermediate buyer for breach of transfer warranties because the initial assignment of the annuity was not a negotiable instrument and the couple was not a party to it. However, the couple did state a cause of action against the intermediate buyer for breach of contract.
- *Magnusson v. Ocwen Loan Servicing, LLC*, 2017 WL 6261482 (D. Utah 2017) – Although credit documents provided for the borrower to pay the lender's attorney's fees "in enforcing the note," in litigation that "that might significantly affect Lender's interest in the property," or incurred "for the purpose of protecting Lender's interest in the Property," the lender was not

entitled to attorney's fees incurred in successfully defending against the borrower's action for violation of the Home Affordable Modification Program. The litigation did not involve an effort to enforce the note and did not relate to the lender's lien on the collateral.

- *Coastal Investment Partners, LLC v. DSG Global, Inc.*, 2017 WL 3605502 (S.D.N.Y. 2017) – A corporation that provided a $72,500 promissory note with 8% interest in return for a $10,000 loan, the agreement for which provided that $62,5000 of the debt could be "redeemed" for $1 and which gave the holder a right to convert the note to equity, raised a plausible defense that the note was criminally usurious.*
- *In re 8110 Aero Drive Holdings, LLC*, 2017 WL 2712961 (Cal. Ct. App. 2017) – An increase in a loan's interest rate from 5.977% to 10.977% after default was an invalid penalty rather than an enforceable liquidated damages clause. The higher rate was not an alternative performance but applied only after breach. The agreement had numerous other provisions to protect the lender from the added perils and overhead costs in the event of default, including funding reserve accounts, late charges, and a broad indemnity clause, and thus the increase in the interest rate was not a reasonable measure of the lender's damages.
- *Susaraba v. Bates*, 2017 WL 3723366 (Tex. Ct. App. 2017) – A man who, following his divorce, remained liable for half of the debt represented by a promissory note to his former mother-in-law, was not released therefrom when his ex-wife provided to her mother a security interest in business property "in lieu of judgment." There was no accord and satisfaction with the ex-husband because he did not sign the document. There was no release because nothing in the document unambiguously indicated that either the ex-husband or the ex-wife was released of personal liability.
- *White Winston Select Assets Funds, LLC v. Intercloud System, Inc.*, – 2017 WL 4390104 (D.N.J. 2017), appeal filed, (3d Cir. Nov. 6,

2017) – A prospective borrower that signed a term sheet for a $5 million loan from a private investment company before obtaining alternative funding from another lender was liable for the $500,000 breakup fee provided for in the term sheet. The investment company was excused from satisfying the conditions to close because the prospective borrower had made those conditions impossible to fulfill. The breakup fee was not a penalty because it was not grossly disproportionate to the $600,000 maximum return that the investment company might have obtained from making the loan.*

- *In re Ultra Petroleum Corp.*, 575 B.R. 361 (Bankr. S.D. Tex. 2017) – The make-whole premium that noteholders were entitled to upon prepayment was not an unenforceable penalty under New York law, even though the amount was enormous, but was instead an enforceable liquidated damages clause. The damages resulting from prepayment were not readily ascertainable at the time the parties entered into the Note Agreement but instead would have been all future interest under the notes minus the proceeds from reinvestment in an alternative investment. It is extremely difficult to ascertain what an appropriate alternative investment would be and it was reasonable for the parties to choose, as they did in the Note Agreement, 0.5% in excess of the yield on U.S. Treasury securities having a maturity equal to the remaining term on the notes.
- *Vitatech International, Inc. v. Sporn*, 2017 WL 4876175 (Cal. Ct. App. 2017) – An agreement to settle a contract dispute that required the defendant to pay $75,000 and which provided that, if payment was not made by a specified date, the plaintiff could file a stipulated judgment for the $166,000 amount claimed plus prejudgment interest and attorney's fees, created an unenforceable penalty because the defendant never admitted to liability on the underlying claim and the increase in liability for not timely paying the settlement amount was disproportionate to the harm caused.*
- *Russell City Energy Company v. City of Hayward*, _ Cal.App.4th _ (2017) – A contract between a municipality and a private person

prohibited the municipality from imposing taxes on the private person's development and operation of a power plant. That provision violated a provision of the California Constitution that prohibited the municipality from "surrender[ing]" its taxing power. Because the clause was *malum prohibitum* (and not *malum in se*), the private party was allowed to recover money it had paid on the contract under a theory of unjust enrichment.

*H. Arbitration*

- *Kindred Nursing Centers Limited Partnership v. Clark*, _ U.S. _ (2017) – A person holding a power of attorney entered into an arbitration agreement on behalf of a person in a nursing home. The Kentucky Supreme Court held that under Kentucky law a power of attorney did not authorize the holder to waive the principal's right to go to court unless it did so specifically. The specificity requirement did not apply to most other powers granted under the power of attorney. The Supreme Court held that the specificity requirement did not put arbitration agreements on an "equal footing" with other contracts and thus the Kentucky rule was invalid under *Concepcion.*
- *Santander Consumer USA, Inc. v. Mata*, 2017 WL 1208767 (Tex. Ct. App. 2017) – A secured party sued by the debtor for actions relating to a repossession, and which moved to compel arbitration pursuant to a clause in the security agreement, could not compel the repossession agent it hired or the agent's subcontractors to arbitrate the secured party's claims against them for indemnification and contribution. There was no arbitration clause in the secured party's agreement with the repossession agent, nor did that agreement incorporate by reference the terms of the security agreement.
- *Sanders v. JGWPT Holdings, LLC*, 2017 WL 4281123 (N.D. Ill. 2017) – The individuals who sold to a factor some of their rights to payment under structured settlements were bound by the arbitration clause in their agreements.

- *Burcham v. Ford Motor Credit Company, LLC*, 2017 WL 2773697 (S.D. Ill. 2017) – Although it was not clear whether the debtor's class action against the secured party for failing, pursuant to a state statute, to timely release its security interest on purchased vehicles was subject to the arbitration clause in the parties' agreement - which excepted actions to "enforce the security interest" - the issue of arbitrability was for the arbitrator because the agreement contained a "delegation provision" indicating that the arbitrator was to decide "the arbitrability of any issue."
- *Sargon Enterprises, Inc. v. Browne George Ross LLP*, 223 Cal. Rptr. 3d 588 (Cal. Ct. App. 2017) – Although a court may not normally review an arbitrator's ruling for legal error, it may review an award for exceeding that arbitrator's authority by violating one of the parties' nonwaivable statutory rights. Accordingly, the trial court should not have confirmed an arbitrator's award that held a party liable for breach of contract for filing a complaint despite have agreed to arbitrate. Parties have a statutory right - even if they have entered into an arbitration agreement - to bring an action in court and let the court decide whether the dispute is arbitrable.*
- *Harshad & Nasir Corporation v. Global Sign Systems*, _ Cal.App.4th _ (2017) – A court may review an arbitrator's decision for errors of fact or law if the parties agree to that. The court found such an agreement where the parties agreed that the arbitrator should follow the law and that any award was subject to judicial "review". The relevant contract did not include some services mentioned during discussions because any "offer" concerning those services was not sufficiently definite. The arbitration agreement did not cover a claim for lost profits because it gave the arbitrator only power to reach a decision for amounts owed for services "performed."
- *Benaroya v. Willis*, _ Cal.App.4th _ (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*, _ U.S. _ (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*

- *In re Simplexity, LLC*, 2017 WL 65069 (Bankr. D. Del. 2017) – The Chapter 7 trustee for a limited liability company stated a cause of action against the company's principals for breach of their fiduciary duties – despite the exculpatory clauses in the debtor's operating agreement – for their failure to file bankruptcy until after the company's secured creditor swept the company's deposit accounts and left the company with no funds to pay the WARN Act claims of its employees.
- *In re Town Center Flats, LLC*, 855 F.3d 721 (6th Cir. 2017) – An assignment of rents is, under Michigan law, an absolute assignment if the assignment has been recorded and a default has occurred. Therefore, rents arising from the debtor's residential complex were not property of the estate.

#### *2. Automatic Stay*

- *In re Cowen*, 849 F.3d 943 (10th Cir. 2017) – Retaining possession of property is not, by itself, exercising control over that property, and thus a secured party does not violate § 363(a)(3) merely by retaining possession of collateral after the debtor files a bankruptcy petition. The secured party in this case might, however, be liable for forging documents in an effort to show that it had disposed of the collateral before the petition was filed.
- *In re Denby-Peterson*, 2017 WL 4776965 (Bankr. D.N.J. 2017) – Although a secured party does not violate the stay simply by retaining possession of a vehicle repossessed prepetition, the debtor is entitled an order requiring the secured party to turn over the vehicle.
- *In re Avila*, 566 B.R. 558 (Bankr. N.D. Ill. 2017) – A city that had impounded the debtor's vehicle for nonpayment of tickets did

not violate the automatic stay by refusing to release the vehicle after the petition was filed because possession was necessary to maintain perfection of the city's statutory lien and the trustee's rights and avoidance powers are subject to such a perfected lien.

- *In re House*, 2017 WL 2579026 (Bankr. S.D. Miss. 2017) – A secured party that had repossessed the debtors' car prepetition violated the automatic stay after the petition was filed by refusing to return the car after the debtors had provided proof of insurance.
- *In re Holloway*, 565 B.R. 435 (Bankr. M.D. Ala. 2017) – The order vacating dismissal of a Chapter 13 case reinstated the stay as of the date of the order, not retroactively to the date of dismissal. Therefore, a secured party that repossessed a vehicle after the dismissal but before the dismissal order was vacated did not violate the stay.
- *In re Gilford*, 567 B.R. 412 (Bankr. D. Mass. 2017) – The debtor's ex-husband and his counsel willfully violated the automatic stay by proceeding with a state-court hearing that held the debtor in contempt for failing to comply with an order requiring the debtor to refinance a car lease or turn the car over to the ex-husband. Even though the car lease was in the ex-husband's name, the car was in the debtor's possession and thus protected by the automatic stay.
- *In re Gray*, 567 B.R. 841 (Bankr. W.D. Wash. 2017) – A judgment creditor and its law firm violated the automatic stay by failing to take steps to quash a bench warrant for the debtor's arrest which they had obtained for failing to appear at supplemental proceedings. Those proceedings, which related to collecting a judgment debt, did not come within the police or regulatory power exception to automatic stay.
- *In re HardRock HDD, Inc.*, 569 B.R. 443 (Bankr. E.D. Mich. 2017) – In determining whether collateral is needed for a successful reorganization, the court must consider which

debtor entity in a jointly administered but not substantively consolidated case owns the collateral, and whether that owner has a realistic chance of successfully reorganizing.

3. *Substantive Consolidation and True Sale*

   - *Curci Investments, LLC v. Baldwin*, _ Cal.App.4th _ (2017) – Creditor of 99% member of LLC could state claim for "reverse veil piercing."
   - *Rapid Capital Finance, LLC v. Natures Market Corp.*, 2017 WL 4764559 (N.Y. Sup. Ct. 2017) – A transaction structured as a sale of future receivables with a face amount of $38,100, in exchange for $30,000, with the seller obligated to turn over future receivables through daily debits of $152 was a true sale, not a secured borrowing, because the agreement contained a reconciliation provision that allowed for changes in the daily debits based on the amount of receivables generated. As a result, the transaction could not be usurious.
   - *In re Rocky Aspen, LLC*, 2017 WL 977813 (D. Colo. 2017) – Although a lender to a limited liability company had, pursuant to its security agreement with the members, the right to vote their membership interests after default, because the company was managed by managers, the managers retained the authority to file a bankruptcy petition on behalf of the company.*
   - *In re Tara Retail Group*, 2017 WL 1788428 (Bankr. N.D.W. Va. 2017) – Although the debtor's organizational documents required the approval of an independent director for the filing of a bankruptcy petition, the debtor's managing member, through its independent director, ratified the petition by remaining silent, despite having complete information and an opportunity to be heard on the matter.
   - *In re Kimball*, 2017 WL 2110777 (Bankr. D. Kan. 2017) – The debtor's prepetition collateral assignment of a life insurance policy to the SBA was merely as security for a loan, not outright, and therefore the policy became property of the estate.

Because the debtor's confirmed Chapter 11 plan did not expressly provide otherwise and the SBA had a meaningful opportunity to participate in the case, the SBA did not retain its lien.

4. *Secured Parties, Set Off, Leases*

   - *In re Semcrude LP*, _ F.3rd _ (3rd Cir. 2017) – Court concluded that downstream parties who had negotiated for setoff rights and other remedies should not lose out to upstream parties who did not protect themselves. In the court's view, parties who take precautions against insolvency do not act as insurers to those who take none.
   - *In re World Imports, Ltd.*, 862 F.3d 338 (3d Cir. 2017) – A furniture seller's claim was entitled to priority under § 503(b)(9) because the goods sold were "received" by the debtor within 20 days prior to bankruptcy, even though the goods were shipped FOB and the risk of loss passed to the debtor prior to that time.
   - *In re SRC Liquidation, LLC*, 573 B.R. 537 (Bankr. D. Del. 2017) – A supplier's claim for goods that a supplier drop-shipped to the debtor's customers was not entitled to priority under § 503(b)(9) because the goods were not "received" be the debtor.
   - *In re ADI Liquidation, Inc.*, 572 B.R. 543 (Bankr. D. Del. 2017) – Goods that a seller delivered directly to the members of the bankrupt debtor - a cooperative food distributor - were not "received" by the debtor and might not even have been sold to the debtor, and thus the claim for the price was not entitled to priority under § 503(b)(9).
   - *In re Windmill Run Associates, Ltd.*, 566 B.R. 396 (Bankr. S.D. Tex. 2017) – An oversecured creditor was entitled to post-petition interest at the pre-default rate, not at the default rate. Even though the debtor's Chapter 11 plan provided for full payment of all unsecured claims, so that other creditors would not be hurt by awarding interest at the default rate, and even though the spread between the rates was only 4% and thus not

unreasonable, because the creditor was at all times oversecured and engaged in obstructionist tactics, both before and during bankruptcy, the court would exercise its equitable powers to deny default-rate interest.

- *In re Montiel*, 572 B.R. 758 (Bankr. W.D. Wash. 2017) – The date to value collateral for the purposes of determining whether lien stripping will be permissible in a Chapter 13 case is the petition date, not the date on which the motion was made or heard, even though the debtor waited three years to bring the motion.
- *Valley National Bank v. Ford Motor Co.*, 2017 WL 1084524 (D.N.J. 2017) – A lender with a prepetition security interest in the debtor's accounts was not entitled to collect from an account debtor on accounts generated postpetition from the provision of services. Nothing in the cash collateral order expressly granted the lender a security interest in postpetition accounts and, absent such a term in the order, the lender's security interest was cut off by § 552.

5. *Avoidance Actions*

- *In re Tenderloin Health*, 849 F.3d 1231 (9th Cir. 2017) – In determining whether a prepetition payment to a creditor from a deposit account in which the creditor had setoff rights satisfied § 547(b)(5), by enabling the creditor to receive more than it would have had the transfer not been made and the debtor liquidated in Chapter 7, it was appropriate to consider whether the deposit of funds into the deposit account would itself have been an avoidable preferential transfer.
- *In re Asheford*, 2017 WL 6550424 (Bankr. N.D. Ohio 2017) – A security interest in a motor vehicle that was perfected 32 days after the debtor signed the purchase agreement and took possession was avoidable as a preference even though the agreement was conditional on financing and the approval for the financing came through less than 30 days before the security interest was perfected. Even if the transfer of the security interest did not occur the date when financing was

approved, the transfer would still be on account of an antecedent debt because the debtor made his promise to pay when he signed the purchase agreement. The transfer of the security interest was not a substantially contemporaneous exchange because it was outside the 30-day period.

- *In re CVAH, Inc.*, 570 B.R. 816 (Bankr. D. Idaho 2017) – A trustee's power under § 544(b) to exercise the rights of unsecured creditors to avoid prepetition transfers includes the power of the IRS to avoid transfers under state law as far back as ten years, without regard to any state statute of limitations. It also includes the power to use the Federal Debt Collection Procedures Act to avoid transfers made up to six years earlier.

6. *Executory Contract*

   - *In re Spanish Peaks Holdings II, LLC*, 862 F.3d 1148 (9th Cir. 2017) – A sale of the debtor's real property free and clear effectively terminated prepetition leases that the trustee had not rejected prior to the sale. Although § 365 includes protections for lessees of the debtor's property upon rejection, there was no conflict between § 363 and § 365 because the leases had not been rejected.

7. *Claims*

   - *U.S. Bank v. T.D. Bank*, 569 B.R. 12 (S.D.N.Y. 2017) – Because the Rule of Explicitness is part of the non-bankruptcy law of New York and applies in disputes outside of bankruptcy court. If a lender is to be entitled to be paid postpetition interest before the principal owed to a different lender, the intercreditor agreement must so state clearly. Nevertheless, by providing that the lenders were "entitled to receive post-petition interest . . . to the fullest extent permitted by law," the intercreditor agreement in this case was sufficiently explicit that both the senior and junior lenders were entitled to postpetition interest before the principal of either the senior or junior debt could be paid. It did not matter that post-petition interest would not have been available in the bankruptcy proceeding because this

was not a bankruptcy case and, in any event, the agreement defined "Obligations" to include "interest and fees that accrue after the commencement . . . of any Insolvency or Liquidation Proceeding . . . regardless of whether such interest and fees are allowed claims in such proceeding."*

- *In re Salamon*, 854 F.3d 632 (9th Cir. 2017) – A creditor whose claim was secured by a junior deed of trust on real property could not make the § 1111(b) election after the property was sold at a nonjudicial foreclosure sale. After that time, the claim was no longer secured by a lien on property of the estate.
- *In re Licursi*, 573 B.R. 786 (Bankr. C.D. Cal. 2017) – The obligations of a husband and wife who guaranteed a secured loan to a corporation that they owned and operated and that sold collateral to a newly formed entity that the couple also owned, and who not only failed to inform the secured lender of the sale but continued to misrepresent the corporation's financial condition, were nondischargeable under § 523(a)(2). Although the misrepresentations occurred after the secured lender had extended credit, they caused the secured lender to delay exercising its rights. Because the corporation was insolvent at the time of the sale, and thus the husband as an officer owed a fiduciary duty to the corporation's creditors, the husband's liability was also nondischargeable under § 523(a)(4). The couple's dissipation of proceeds of the collateral was also grounds for making their obligation nondischargeable under § 523(a)(6).
- *Midland Funding LLC v. Johnson,* 137 S.Ct. 1407 (2017) – A "claim" exists in bankruptcy even though statute of limitations has run, unless the running of the statute extinguishes the claim.

*8. Plan*

- *Czyzewski v. Jevic Holding Corp.*, _ U.S. _ (2017) – A structured settlement of a bankruptcy case must follow the "basic priority rules" of the Bankruptcy Code.

- *In re Sunnyslope Housing L.P.*, 859 F.3d 637 (9th Cir. 2017) – Replacement value, not foreclosure value had to be used in valuing for the purposes of cramdown collateral that the debtor proposed to retain and use, even though in this rare case foreclosure value would be higher because it would vitiate covenants requiring that the collateral be used for low-income housing
- *In re Alliance Well Service, LLC*, 2017 WL 4877228 (Bankr. D.N.M. 2017) – An insurance premium financier that had a security interest in the debtor's unearned premium and which, pursuant to a confirmed plan of reorganization, had the right to cancel the policy, collect any unearned premium from the insurer, and to apply it to the loan balance, was not entitled to retain the amount that the insurer refunded as an overpayment of the premium. The financier's secured claim was paid in full by periodic payments pursuant to the plan; the plan provided that amounts remaining due were unsecured.
- *In re ARSN Liquidating Corp.*, 2017 WL 279472 (Bankr. D.N.H. 2017) – A sale of assets under § 363(f) free and clear of all claims and interests, including claims under a successor liability theory, meant that buyer acquired the debtor's assets free of the debtor's experience rating and contribution rate to the state's unemployment compensation fund.

*9. Other*

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## B. *Consumer Law*

- *Mashiri v. Epsten Grinnell & Howell*, _ F.3d _ (9th Cir. 2017) – A debtor stated a claim under Fair Debt Collection Practices Act. The court applied the "least sophisticated debtor" standard. A collection letter used language that "overshadowed" information that indicated the individual's right to validate the debt.
- *Expressions Hair Design v. Schneiderman*, _ U.S. _ (2017) – The Second Circuit had upheld a NY statute prohibiting posting a credit card surcharge as Constitutional under the First

Amendment because the Second Circuit concluded that the regulation of pricing information was not "speech" for purposes of the First Amendment. The Supreme Court held that the New York statute regulating how prices were communicated involved "speech" subject to the First Amendment. The Supreme Court did not determine whether the New York statute's regulation of protected "speech" violated the First Amendment and sent the case back to the Second Circuit to consider that issue.

- *Midland Funding LLC v. Johnson*, _ U.S. _ (2017) – A debt collector's knowing filing of a time-barred proof of claim in the debtor's bankruptcy was not a "false, deceptive or misleading" act under the Fair Debt Collection Practices Act.
- *Henson v. Santander Consumer USA Inc.*, _ U.S. _ (2017) – Fair Debt Collections Act does not apply to a creditor that acquires a debt and collects it for its own account.
- *Soberanis v. City Title Loan, LLC*, 2017 WL 1232437 (D.S.C. 2017) – A debtor stated causes of action against a secured party for conversion, breach of the peace, violation of the Fair Debt Collection Practices Act, and unconscionable debt collection for repossessing the debtor's car over her objections and without first sending a notice of cure required by South Carolina law. The debtor also stated a claim for unfair trade practices by alleging that the secured party included a mandatory arbitration clause in the agreement, refusing to waive it, but also refusing to participate in arbitration, all for the purpose of delaying adjudication of the debtor's claims.*
- *Duncan v. Asset Recovery Specialists, Inc.*, 2017 WL 2870520 (W.D. Wis. 2017), *appeal filed*, (7th Cir. Aug. 8, 2017) – Although the debtor did not have a claim under the Fair Debt Collection Practices Act against either the secured party or the repossession agent based on her mistaken belief that the repossession agent sought to charge her $100 to return property within the repossessed car, the debtor might have a conversion claim.

- *Complete Cash Holdings, LLC v. Powell*, 2017 WL 1422476 (Ala. 2017) – A jury award of compensatory and punitive damages against a secured party for repossessing a vehicle based on a forged title pawn agreement had to be reversed because the secured party was creditor - not a debt collector within the meaning of the Fair Debt Collection Practices Act - and therefore the jury's general verdict could have been based in its erroneous conclusion that the secured party had liability under the FDCPA.
- *Afewerki v. Anaya Law Group*, _ F.3d _ (9th Cir. 2017) – A debt collector violated the Federal Fair Debt Collection Act when its complaint alleged more than was owed and overstated the interest rate. The misstatement was "material" for purposes of a claim under that Act because the misstatements could disadvantage the "least sophisticated debtor" in the debtor's "charting a course of action."

C. *Professional Liability*

- *In re Designline Corp.*, 2017 WL 279488 (Bankr. W.D.N.C. 2017) – A transaction by which a bankruptcy trustee sought to obtain financing for three, complex adversary proceedings by selling 25% of the net litigation proceeds – after payment of expenses and attorney's fees – constituted champerty and would therefore not be approved because: (i) it did not require the financier to make any advances and instead required the trustee to request advances quarterly; (ii) it required the trustee to seek the financier's input and approval of strategic decisions; and (iii) if the trustee's counsel withdrew, it required the trustee required to consult with the financier regarding substitute counsel.
- *Oakland Police & Fire Retirement System v. Mayer Brown, LLP*, 861 F.3d 644 (7th Cir. 2017) – The law firm representing the debtor and which provided transaction documents to counsel for the creditors' agent, resulting in the filing of termination statements for a $1.5 billion term loan that was not paid off, had no liability to the creditors because the firm owed no duty to the creditors. It did not matter that the firm represented the agent in unrelated matters or that it had prepared the documents.

- *GemCap Lending, LLC v. Quarles & Brady, LLP*, 269 F.Supp. 3d 1007, 2017 WL 4081884 (C.D. Cal. 2017), *appeal filed*, (9th Cir. Oct. 6, 2017) – A secured party did not have a cause of action against the debtor's counsel for professional malpractice in connection with an opinion letter counsel issued because, even though the opinion stated that the Loan Agreement created a valid security interest in favor of the secured party in the debtor's rights in the "collateral," and some of the intended collateral was in fact owned by a related entity, the opinion letter defined "collateral" to be the debtor's property and thus was not incorrect.
- *J.W. Hall, Inc. v. Nalli*, 2017 WL 626715 (Pa. Super. Ct. 2017) – The seller of a business had no cause of action for malpractice against the attorney who documented the transaction for both the buyer and the seller and who failed to provide for a security interest in the assets sold to secure the buyer's obligation to pay the balance of the purchase price because the seller could not prove to have suffered damages. The seller repurchased the property in the buyer's bankruptcy proceeding, the seller therefore had the property back, and the payments the seller did receive from the debtor offset the expenses incurred in repurchasing the property.
- *Hattem v. Smith*, 52 N.Y.S.3d 172 (N.Y. App. Div. 2016) – The malpractice claim of an individual who sold a business against his lawyer who failed to perfect a security interest in the buyer's assets was properly reduced by the individual's comparative fault and failure to mitigate. The individual failed to inform the lawyer of changes in the closing process until after a bank perfected its security interest in the buyer's assets and the individual failed to foreclose on some of the assets, permitting them to be seized and sold by another creditor.
- *DLA Piper LLP (US) v. Linegar*, 2017 WL 6559658 (Tex. Ct. App. 2017) – The law firm that represented the surviving company in a merger, in connection with which the company received a bridge loan from an entity controlled by one of the company's principal owners, was liable for malpractice for failing to perfect the security interest that secured the loan. Even though the firm did not

represent the secured party or the principal owner, a member of the firm told the principal owner that the security interest was not at risk and that "everything would be taken care of," and failed to make clear who the firm represented.*

- *Macquarie Capital (USA) Inc. v. Morrison & Foerster LLP*, 2018 WL 326391 (N.Y. Sup. Ct. App. Div. January 9, 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.